VENABLE LLP

575 7th Street, NW
Washington, DC 20004-1601

Telephone 202-344-4000
Facsimile 202-344-8300

www.venable.com

Ian D. Volner 202-344-4814 idvolner@venable.com

August 9, 2004

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

Re: Notice of *Ex Parte* Presentation: CG Docket No. 02-278

Dear Ms. Dortch:

Attached is a copy of a letter that we sent to Allen Hile at the Federal Trade Commission today regarding DialAmerica Marketing, Inc.'s ("DialAmerica") Sponsor Program and the National Do Not Call Registry. We sent a copy of this letter via electronic delivery to Erica McMahon at the FCC today. Pursuant to the Commission's rules, this letter is being submitted electronically for inclusion in the above-referenced docket.

Respectfully submitted,

/s/
Ian D. Volner

VENABLE LLP
575 7th Street, NW
Washington, DC 20004-1601
Telephone 202-344-4000
Facsimile 202-344-8300
www.venable.com

Ian D. Volner **(202) 344-4814** **idvolner@venable.com**

August 9, 2004

Via Hand Delivery
Mr. Allen Hile
Federal Trade Commission
Bureau of Consumer Protection
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Charitable Fundraising by DialAmerica Marketing, Inc.

Dear Mr. Hile:

I understand that our client, DialAmerica Marketing Inc. ("DialAmerica") met with you in June, 2003 to discuss the issue of whether the Commission's National Do Not Call Registry rule applies to a program that DialAmerica runs on behalf of a select group of nationally-known charitable organization which is known as the "Sponsor Program." Since that meeting DialAmerica has continued to pursue this issue principally with the Federal Communications Commission ("FCC"); we believe that the subject is now ripe for a further substantive meeting with you and your staff.

The purpose of this letter is thus two-fold. First because the FCC and the Federal Trade Commission have concurrent jurisdiction over matters involving the National Do Not Call Registry, we wanted to apprise you of the steps we have taken with the FCC to try to bring this matter to a satisfactory resolution. Second, the issue involving the Sponsor Program arises because of an ambiguity in both the Commission's Telemarketing Sales Rule ("TSR") and the FCC's Telephone Consumers Protection Act ("TCPA") Rules. We hope to explain why resolution of the legal ambiguities in both sets of rules should be resolved as a matter of public policy in a way that permits the Sponsor Program – which has been of inestimable benefit to the charitable organizations that DialAmerica serves – to continue.

In brief, all that we seek is clarification that the National Do Not Call Registry requirements of the TSR and the TCPA rules do not apply to calls made in connection with the Sponsor Program. Toward this end, Art Conway, President & CEO of DialAmerica; Noreen Kaminski, its Vice-President for Government Affairs and Regulatory Compliance; and I would like to meet with you to discuss the matter at your earliest convenience.

A. THE PROGRAM

A copy of the Supplemental Petition for Clarification or Reconsideration filed by DialAmerica with the FCC is enclosed as Attachment A.[1] In brief, the Sponsor Program involves calls placed by DialAmerica on behalf of specific charitable organizations such as Mothers Against Drunk Driving ("MADD") and the Leukemia and Lymphoma Society. The basic purposes of these calls is two-fold. First, the calls are intended to acquaint the consumer with the mission and purposes of the charitable organization; and second, to invite the consumer to make a purchase of a magazine of their choice; the charity for which the call was placed receives twelve percent (12%) of the subscription price.

Examples of the scripts used in the Sponsor Program are set forth as Exhibit 8 of the Supplemental Petition. The scripts leave no room for doubt that these calls are being made on behalf of the specific charitable organization. The caller begins the call by stating that he or she is calling from DialAmerica on behalf of the specific charity. The caller then explains what the charity is and how it helps people. For example, when placing calls for MADD, the caller explains the dangers of drunk driving and the many services that MADD provides to victims of the crime. If the individual expresses an interest in the charity, the caller offers a subscription to a magazine. The caller explains that 12½ percent of the purchase price will go to the charity. If the individual is interested in a magazine, he or she can choose from over 400 different titles; DialAmerica offers magazines from competing publishers and receives no compensation from the publisher. If the individual indicates that he or she would rather send a contribution directly to the charity, the caller provides the telephone number and address of the charity.

Once the individual orders a magazine, DialAmerica sends a thank you letter from the charity to the consumer, invoices the consumer, and informs the magazine publisher of the order so that it can be fulfilled and remits the agreed-upon purchase price to the publisher. DialAmerica then collects the payment from the consumer and sends 12½ percent to the charity. Once an individual subscribes to a magazine through the Program, he or she has an established business relationship with the charity and not with DialAmerica generally or with the magazine publisher.

---

[1] We are also attaching the *ex parte* statements submitted by DialAmerica in connection with its meetings with FCC Commissioners and staff as Attachments B-E. These will, hopefully, shed additional light on the nature of the Sponsor Program, and the public policy justifications for our proposed solution. We note that we have submitted a redacted version of Exhibit 1 to Attachment B and Exhibit 2 to Attachment C (as was submitted for the public record with the FCC) because these exhibits show total revenue of DialAmerica. We can provide you with an un-redacted copy if you would like.

The Sponsor Program offers a number of benefits to the charities that cannot be matched by other fund raising programs. First, there are no out-of-pocket expenses for the charities. If DialAmerica does not sell any magazine subscriptions, it absorbs the loss. In point of fact, the prospect portion of the Sponsor Program – the only part of the program at issue here – is not now and never has been profitable to DialAmerica. Indeed, as our submissions to the FCC show, the Sponsor Program has yielded far more revenues to the Sponsors than total profits realized by DialAmerica from all of its business activities including the Sponsor Program itself. Although 12½ percent may not seem like a high yield for the charity, it is important to remember that all of this money goes to the charities' exempt purposes and not to fundraising costs. If the charities were to conduct their own magazine sales – as they certainly can do without being subject to the Do Not Call Registry – much of the sale price would go to overhead for the calls and not to the charitable purpose.

Second, the Sponsor Program involves not only fundraising but also outreach. Members of the public who would not otherwise be aware of a specific organization learn of its mission and the services it offers; not infrequently, the called party or a family member or friend has need for the support services the organization provides. MADD reports that many people contact its victims' support services as a result of DialAmerica's calls. The charities would have to pay a company such as DialAmerica to conduct either a solicitation campaign or an outreach campaign. Through the Sponsor Program, however, the charities are able to increase their awareness and raise money without expending funds.

Unfortunately, since the National Do-Not-Call Registry was created, the Sponsor Program has seen a dramatic decline in its success. Not only are there fewer individuals to call, but also given the demographics of those individuals who are on the Registry, those most likely to support the charities no longer receive calls for the Sponsor Program. Both the outreach and fund raising benefits of the Sponsor Program have suffered.

As the foregoing makes clear, the Sponsor Program is not a commercial solicitation with a charitable donation "tacked on" to circumvent the do-not-call rules. Rather, it is a call made to explain the charitable organization and to raise funds in a way, that is of value to the organization and the contributors.

B. THE LEGAL FRAMEWORK

The DialAmerica Sponsor Program presents a narrow but fundamental public policy and legal question: Should this unique program be subjected to the Do Not Call Registry requirements of the TSR and TCPA Rules? It bears emphasis that DialAmerica is not seeking a waiver or exception from any of the other requirements imposed on outbound telephone solicitations by either or both of the agencies. It has long supported the implementation of caller-ID requirements, has for decades maintained organization-specific do not call lists for each of the sponsoring organizations, and has promoted and encouraged the implementation of call abandonment limitations.

While the issue thus presented is extremely narrow, it is nonetheless vital because compliance with the Do Not Call Registry threatens the viability of the Sponsor Program, and, therefore, poses a basic issue of public policy. The Sponsor Program presents a unique legal problem in that the TCPA and the TSR treat charitable calls in two very different ways. The TCPA categorically exempts all calls placed by or on behalf of tax-exempt nonprofit organizations. As we describe below, the FCC's ambiguous discussion of the scope of that exemption has forced DialAmerica to conclude that it is not prudent to treat the calls as exempt from the TCPA at this time. Although the FTC's Rules proceed from a different statutory – and therefore analytic – framework, they are also unfortunately ambiguous as to the central legal question we have posed. As a result, what we seek on behalf of DialAmerica and its charitable organizations is, fundamentally, clarification that the Sponsor Program does not preeminently or "predominantly" involve the "sale of goods" and, therefore, is not subject to the Do Not Call Registry requirements of both agencies' regulations.

1. The FTC's Framework

It is clear the FTC does not have jurisdiction over nonprofit entities, such as the charities involved in the Sponsor Program, based on the entity's status. *See Nat'l Federation of the Blind v. FTC*, 303 F. Supp. 2d 707, 714-15 (D. Md. 2004). At the same time, the Commission does have jurisdiction over for-profit entities placing calls on behalf of charitable organizations. *Id.* at 715. The TSR, however, exempts from the National Do-Not-Call Registry calls made for the purpose of inducing a "charitable solicitation." Thus, if the charities were to hire DialAmerica to conduct a solicitation campaign, the calls would not be subject to the Do-Not-Call Registry. Similarly, if MADD were to conduct its own magazine campaign, its calls would be beyond the reach of the FTC. Thus, it is only when a charity hires DialAmerica to place calls on its behalf that involve the potential sale of a magazine that the calls are subject to the Do-Not-Call Registry.

The Commission recognized that there is some ambiguity in the TSR for calls made to the Sponsor Program. Unfortunately, the Statement of Basis and Purpose does not alleviate the ambiguity:

> NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves "'percent of purchase' situations, where

> contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause" These commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule. The Commission believes that when the transaction predominantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.[2]

Although the disclosure rules are virtually identical in both situations described above, the do-not-call rules are fundamentally different: one is subject to the Do-Not-Call Registry and one is not. Thus, the Commission's discussion does not exactly reach the Sponsor Program. The call is very clearly a call to inform the public about the charity and to obtain financial support. However, the item the consumer receives is probably not an "incentive or nominal value." Nonetheless, a significant portion of the proceeds do go to the charity. Plainly, the call is not "predominantly to induce the purchase of goods or services;" it is to inform the individual about the charity and its mission *and* to raise funds.

2. <u>The FCC's Framework</u>

The FCC's TCPA rules clearly exempt calls made by or on behalf of a tax-exempt nonprofit entity and the Sponsor Program calls plainly meet this test. However, in the Report and Order amending the TCPA, the FCC raised some ambiguity about calls that are superficially similar to the Sponsor Program. The FCC stated in its Report and Order that it would "not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly 'non-commercial' content into that message."[3] The FCC offered an example of a call subject to the TCPA a call by "a seller that

---

[2] 68 Fed. Reg. 4580, 4590 (Jan. 29, 2003) (footnotes omitted).
[3] 18 FCC Rcd. 14014 ¶ 128 (July 3, 2003).

calls to advertise a product and states that a portion of the proceeds will go to a charitable cause." DialAmerica does not insert non-commercial content in an otherwise commercial message, but the application of the FCC's policy remains unclear. Therefore, DialAmerica has been working with the FCC to better explain the Sponsor Program and to resolve the ambiguity in a way that permits calls on behalf of sponsor organizations to be made to consumers on the National Registry. There are several ways that this can be accomplished in the context of the FCC's action on reconsideration of its June 2003 TCPA Order. We have explored various alternatives with the Commissioners and staff during our meetings at that agency, and they are outlined in the attachments to this letter.

Fundamentally, despite the differences and approaches and Rules, the basic conclusion that we ask each of the agencies to reach is this: the structure and the purpose and content of calls made by DialAmerica in the Sponsor Program simply do not constitute calls that are predominantly designed or intended to induce the purchase of goods or services.

C. THE PUBLIC POLICY CONSIDERATION

The Commission recognized that calls made for charitable purposes are fundamentally different than those made by for-profit entities:

> The Commission is persuaded by the arguments of Hudson Bay that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-call" requirements a greater measure of success with respect to preventing a pattern of abusive calls from a fundraiser to a consumer than it was able to produce in the context of commercial fundraising:
>
>> When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.
>>
>> * * *
>>
>> In a non-commercial call the recipient is more than a potential source of income. Rather he or she is also a voter, a constituent, a consumer, a

> source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale; there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the recipient of the call against the cause not just against the caller or their organization.[4]

In formulating its rules, the FCC was equally sensitive to the First Amendment values of speech on behalf of charitable organizations and to the fact that these calls are of incalculable benefit to charitable organizations for both outreach as well as financial reasons.

We submit and have pressed upon the FCC the conclusion that the DialAmerica Sponsor Program falls squarely within these basic policy considerations. It does so because these calls are not primarily sales solicitations. Indeed, we have submitted to the FCC empirical evidence supporting the conclusion that calls made in the Sponsor Program are not objectionable to consumers: the incidence of "do not call requests" made in conjunction with these calls is measurably lower than that experienced by DialAmerica in connection with its commercial business clients. Therefore, application of the Do Not Call Registry requirements on the Sponsor Program, in the FTC's own words, sweeps "too broadly" because it not only could prompt – but actually has prompted – some consumers to "accept the blocking of charitable solicitation calls that they would not mind receiving."

Thank you very much for your time and consideration of this matter. I will call you next week to see when it would be productive for us to schedule a time to meet.

Sincerely,

Ian D. Volner

Enclosures (5)

cc: Arthur Conway (w/out enclosures)
Noreen Kaminski

[4] 68 Fed. Reg. at 4637.