

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of) **CG Docket No. 02-278**
)
The Direct Marketing Association)
)
Letter – Inconsistent State)
)
Telemarketing Laws)

**COMMENTS OF JOE SHIELDS IN REGARDS TO THE LETTER FROM THE
DIRECT MARKETING ASSOCIATION – INCONSISTENT STATE
TELEMARKETING LAWS**

I respectfully submit these comments to the Commission in reply to the letter from the Direct Marketing Association to the Commission on inconsistent state telemarketing laws submitted to the Commission on January 10th, 2005.

The Direct Marketing Association (hereinafter “DMA”) has long made material misrepresentations to the Commission and the public. The letter in question is a prime example – inconsistency is not a constitutional principle on which to base preemption. Congress specifically did not preempt the field with the Telephone Consumer Protection Act (hereinafter “TCPA”). Neither is there any reason for conflict preemption as not only can telemarketers easily comply with both state and federal laws, but they must do so if they do not wish to find themselves subject to state long-arm civil and/or criminal actions

As an example of the material misrepresentations made by the DMA to the Commission and the public, I am attaching a news article wherein the former DMA President H. Robert Wientzen publicly states that cell phone numbers cannot be added to the national do-not-call list. (See highlighted portion of the attachment) Obviously, cell numbers can be added to the national do-not-call list.

Another example of the DMA material misrepresentation to the Commission and the public are the DMA statements in the letter to the Commission. One is “... *and the consumers they serve will also be needlessly harmed.*” It is ludicrous to claim that a consumer will be “needlessly harmed” by telemarketers complying with state telemarketing laws. Furthermore, the DMA does not and has never represented consumers. A more incredulous statement in the same letter is “*If the call is made without the use of an automatic dialing system... ..then there are no applicable rules.*” Obviously, the TCPA applies to all telemarketing calls regardless of how the call is initiated.

The DMA is fully aware of all state laws that deal with telemarketing yet only provides those to the Commission that the DMA wants the Commission to preempt. It is obvious to this commentor that the DMA is attempting to use the Commission to create loopholes in those state telemarketing laws which have more restrictive requirements on existing business relationships¹, state do-not-call lists, prerecorded calls, calling hours and charitable calls.

The TCPA does not contain a requirement for a dialing device that delivers prerecorded messages to be registered with a state or federal agency – a Texas telemarketing statute does:

Texas Utilities Code, Subchapter F, Automatic Dial Announcing Devices

§ 55.121. DEFINITION. In this subchapter, "automated dial announcing device" means automated equipment used for telephone solicitation or collection that can:
(2) convey, alone or in conjunction with other equipment, a prerecorded or synthesized voice message to the number called without the use of a live operator.

§ 55.130. PERMIT.

(a) A person may not use an automated dial announcing device without a permit issued by the commission.

§ 55.138. CRIMINAL PENALTY.

- (a) A person commits an offense if the person owns or operates an automated dial announcing device that the person knows is operating in violation of this subchapter.
- (b) An offense under this section is a Class A misdemeanor.

If the Commission were to preempt all state telemarketing laws, as the DMA is suggesting, then those DMA members² will claim that the Commission has ruled that the TCPA preempts the above Texas statute as well as all other state statutes containing criminal penalties for the initiation of prerecorded telephone solicitations.

Consequently, I respectfully request that the Commission refrain from ruling that the TCPA preempts all state telemarketing laws. I respectfully request that the Commission rule as Congress intended – more restrictive state laws are in addition to the TCPA and the Commissions rules.

¹ A recent survey by the DMA in England provided empirical data that 80% of consumers did not welcome telemarketing calls even when an existing business relationship existed with the entity represented by the call.

² Voice Mail Broadcasting Corporation, a DMA member and commentor in this proceeding is not in compliance with the referenced Texas statute

Respectfully submitted,

_____/s/_____

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Wientzen Blasts Hartford Courant Story as Unethical

By Ray Schultz

Direct Newsline - a daily marketing newsletter, Oct 1 2003

The do-not-call flap took a bizarre new turn yesterday when the Hartford Courant reported that 11 Direct Marketing Association employees, including senior vice president Jerry Cerasale, had signed up for the Federal Trade Commission's national do-not-call registry.

But the story was denounced by DMA president H. Robert Wientzen.

"I question the ethics of violating the privacy of people who took whatever action they might have taken for whatever reason," Wientzen said in an interview. "It's not ethical reporting."

Wientzen also said that some DMA employees, including Cerasale, did not sign up for the list themselves, but were put on it by "people who oppose our point of view." And this proves the flaws in the FTC's online sign-up system, he continued.

The Courant said it searched telephone directories and other public records for the home numbers of telemarketing executives, then verified the numbers by entering them on a page the FTC's Web site.

But Wientzen argued that Internet signups are unreliable because anyone can punch a phone number in, and that this is contributing to "significant hygiene problems."

Wientzen added: "Lots of folks are on it who don't know they're on it, or shouldn't be there. [Some numbers] are not even appropriate phone numbers -- there are business numbers and cell numbers."

He also questioned the ability of outsiders to go onto the FTC site and verify the numbers. This raises "a very significant question," he said.

Wientzen conceded that some DMA staffers and industry members may have signed up for the do-not-call list. But other DMA employees signed up to measure the registry's effectiveness at blocking calls, he added.

"It's a common practice to seed lists," he said.

In addition to Cerasale, the Courant named Jasvant D. Mahadevia, a senior vice president of the DMA. The paper quoted Mahadevia as saying, "There are so many calls I don't want. They are disturbing my routine."

The Courant said it also found the names of Thomas B. Barker, CEO of West Corp.; and Steven G. Rolls, chief financial officer for Convergys.

The Courant story reported that "the DMA executives, some of whom admit they signed up to protect their own privacy, did so even as their organization waged a legal campaign to prevent federal regulators from blocking telemarketers' calls to millions of other Americans."

According to the story, Cerasale said, "Somebody is obviously trying to embarrass me."

Wientzen criticized the Courant's "negative" tone given that some DMA staffers' names were entered by opponents.

The DMA's position is that any consumer who wants to get off of telephone lists should be able to do so. However, Wientzen argued that the best mechanism for doing that is the DMA's own Telephone Preference Service.

"We're trying to demonstrate that we have been doing it better and cheaper for 18 years," he said.

He added that the FTC list is "an example of the federal government getting into something they don't understand and frankly being in over their heads."

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