

May 4, 2006

Via Electronic Submission
Marlene Dortch
Secretary Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

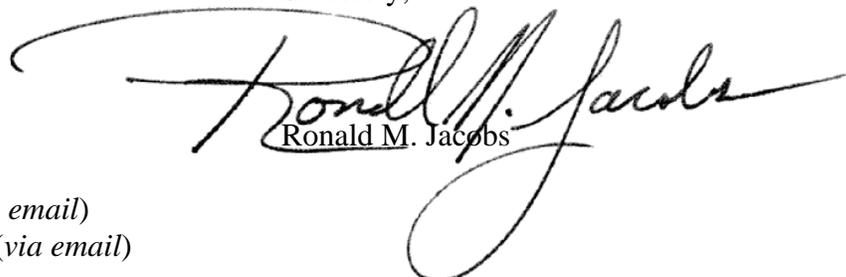
On May 4, 2006, Jerry Cerasale of the Direct Marketing Association (“DMA”) together with Ian D. Volner, Heather L. McDowell, and Ronald M. Jacobs, of Venable LLP, met with Ian Dillner of Chairman Martin’s Office to discuss issues surrounding preemption and telemarketing. At the meeting, DMA discussed its prior submissions regarding preemption and reiterated its view that the Commission should act to preempt certain state telemarketing laws as they are applied to interstate telephone calls.

In addition, the DMA shared with Mr. Dillner an email exchange that one of DMA’s members had with the attorney general’s office of the State of North Dakota regarding concerns the office has with the federally-mandated recorded message used on abandoned calls. A redacted copy of this email is attached for inclusion in the record in this proceeding.

Finally, Mr. Volner discussed a recent North Dakota Supreme Court decision holding that the Telephone Consumer Protection Act does not preempt North Dakota’s attempt to regulate political speech conducted by interstate telephone call. Mr. Volner explained that the party to that case, Free Eats, will be filing a petition for writ of certiorari with the United States Supreme Court.

In accordance with the Commission’s rules, a copy of this letter is being filed electronically for inclusion in the public record of this proceeding.

Sincerely,



Ronald M. Jacobs

cc: Ian Dillner (via email)
Jerry Cerasale (via email)

From: "Thomas, James P." <jpthomas@state.nd.us>
To: "Jannicelli, Rob" <RJannicelli@dialamerica.com>
Date: 2/9/06 11:08AM
Subject: RE: Do Not Call Complaint

Mr. Jannicelli -

Thank you for the additional information; however, we are not seeking to enforce the FTC regulations; rather, our concern is with North Dakota law. As a matter of policy we generally do not give advisory opinions or legal advice with respect to compliance matters. I will say that this Office does not intend to take further action on this complaint.

Office of Attorney General

JPT

From: Jannicelli, Rob [mailto:RJannicelli@dialamerica.com]
Sent: Wednesday, February 08, 2006 9:57 AM
To: Thomas, James P.
Cc: Hetzler, Tonya J.
Subject: RE: Do Not Call Complaint

Dear Mr. Thomas,

My apologies if I did not clearly explain in my initial response the purpose of the recorded message in question. Again, please be assured that DialAmerica is committed to complying with all state and federal laws regulating our industry.

DialAmerica does not send prerecorded sales messages as part of our sales campaigns. Our intent was to connect the call in question to a live representative. DialAmerica was utilizing a predictive dialer for this calling and on February 1, 2006 we were unable to connect the customer to a live representative within two (2) seconds of their completed greeting. As a result the call was "abandoned". As per federal guidelines (see below) we played a recorded message.

It has been our understanding that compliance with the federal guidelines and the abandoned call message is not a violation of any state law. If this is not the case, then please let me know as this would be a concern and conflict for anyone doing telemarketing into the state of North Dakota.
FCC - TCPA (Federal Communications Commission - Telephone Consumer Protection Act)

§ 64.1200 Delivery Instructions

(a) No person or entity may:

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed,

and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a) (6) of this section.

FTC-TSR (Federal Trade Commission - Telemarketing Sales Rule)

§ 310.4 Abusive telemarketing acts or practices.

(b) (4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed and;

(iv) the seller or telemarketer, in accordance with 310.5(b)-(d), retains records establishing compliance with 310.4(b)(4)(i)-(iii).

If you have any additional feedback or concerns, please feel free to contact myself.

Sincerely,

Rob Jannicelli
Asst. Director, Govt. Affairs & Legislative Compliance
DialAmerica Marketing, Inc.

Phone: (201) 327-0200 ext. 2862
Fax: (201) 236-9287
E-mail: rjannicelli@dialamerica.com

-----Original Message-----

From: Thomas, James P. [<mailto:jpthomas@state.nd.us>]
Sent: Tuesday, February 07, 2006 5:39 PM
To: Jannicelli, Rob
Cc: Hetzler, Tonya J.
Subject: RE: Do Not Call Complaint

Mr. Jannicelli -

Thank you for your recent response. It would appear your prerecorded message in this case was in violation of North Dakota law found at N.D.C.C. sec. 51-28-02.

Nothing in this communication is intended to waive any rights or remedies available to North Dakota or any consumer.

Office of Attorney General

James Patrick Thomas
Assistant Attorney General

From: Jannicelli, Rob [mailto:RJannicelli@dialamerica.com]
Sent: Friday, February 03, 2006 4:14 PM
To: Hetzler, Tonya J.
Subject: RE: Do Not Call Complaint

Dear Ms. Hetzler,

Please be assured that DialAmerica is committed to conducting business in compliance with all state and federal laws regulating our industry.

After conducting preliminary research into our call records, I see that we were attempting phone number 701-663-██████ on behalf of our client (██████████) to offer a renewal to ██████████. The call records show that we made a total of 9 attempts between December 23, 2005 and February 1, 2006 (note: this does not include any attempts possibly made today 2/3/06).

The call record for February 1st does show that we did not have a live representative available within 2 seconds of the consumer answering the phone. As discussed, a recorded message is only played in this situation as per Federal guidelines (FTC-TSR and FCC-TCPA). This message is not a sales message.

As also discussed over the phone, DialAmerica does scrub against all required do-not-call lists including the National DNC Registry for which our client does not have an established business relationship.

As a result of receiving this complaint, we are adding the above phone number to our company specific do-not-call file to ensure there are no future solicitations by our company on behalf of any client.

Should you have any additional questions or concerns, please feel free to contact myself.

Sincerely,

Rob Jannicelli
Asst. Director, Govt. Affairs & Legislative Compliance
DialAmerica Marketing, Inc.

Phone: (201) 327-0200 ext. 2862
Fax: (201) 236-9287
E-mail: rjannicelli@dialamerica.com

-----Original Message-----

From: Hetzler, Tonya J. [mailto:thetzler@state.nd.us]
Sent: Friday, February 03, 2006 2:53 PM
To: Jannicelli, Rob
Subject: Do Not Call Complaint

Mr. Jannicelli,

Thank you for taking the time to speak with me today. I've attached a copy of the Do Not Call complaint that we received. The number called was 701-663-██████.

We look forward to receiving your response.

<<SCAN1019_000.pdf>>

Sincerely,

Tonya Hetzler, Do Not Call Coordinator
Consumer Protection & Antitrust Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054

Phone: 701-328-5570

Fax: 701-328-5568

thetzler@state.nd.us

CONFIDENTIALITY NOTE:

This e-mail message may contain confidential information that is intended only for the named recipient(s) above. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this e-mail or its attachments is strictly prohibited. If you received this e-mail in error, please immediately notify the sender by replying to this e-mail and deleting the message and any attachments from your system.

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**DO NOT CALL COMPLAINT FORM
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION**

SFN #53893 (Rev. 11/2003)

Phone Number Telemarketer Called: (701) 663-██████████			
Complainant Name: ██████████			
Address: ██████████	City: Mandan	State: ND	Zip Code: 58554
Day Time Phone Number: (701) 663-██████████			
** Company name or telephone number are required to process a complaint. **			
Name of Company Selling Product or Service: Direct Marketing (i Think)			
Telephone Number of Company: (706) 286-██████████			
Address of Company (if known):			
Name of Person who contacted you (if known): Pre-recorded Message			
Date of Alleged Violation: 2/1/2006			
Time of Alleged Violation: 8:38 PM			
Did the caller state the caller's name, telephone number, city and state, and name of business at the beginning of the call? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Was the call a prerecorded message? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
Brief description of product or service offered in the solicitation: I received the call on February 2 at 8:38 PM. When I answered, the message began immediately. I was not sure if it was a prerecorded message or if it was the answering machine. I did not catch the whole name of the business but think it may have been Direct Marketing. The recording stated the name of the company, the telephone number and a message stating			
** COMPLAINT MUST BE SIGNED ON THE REVERSE SIDE **			

060785

Please include any additional information about the call here:

"This is a telemarketing call - we will attempt to contact you later."

The information contained in this complaint is true and correct to the best of my knowledge. I wish to file a complaint. I hereby authorize the Attorney General to use my name and any information contained in this complaint for the investigation of my complaint, and I consent to disclosure of any information in this complaint to others at the discretion of the Attorney General. I consent to releasing to the Attorney General any document or information relevant to the investigation of this complaint.


Signature

2-2-06
Date

Mail Completed Form To:
Consumer Protection Division
Office of Attorney General
4205 State Street
PO Box 1054
Bismarck, ND 58502-1054
701-328-3404 Telephone
800-472-2600 Toll Free
701-328-5568 Facsimile

Office of Attorney General

RECEIVED

FEB 2 2006

Consumer Protection
Bismarck North Dakota