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**Before the
Federal Communications Commission
Washington DC 20544**

In the matter of	CG Docket No. 02-278
Direct Marketing Association's Petition for Forbearance	Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
	DA 13-2119 November 1, 2013

**Gerald Roylance's Comments re Direct Marketing
Association's Petition**

I. Introduction

In DA 13-2119,¹ the FCC seeks comment about the Direct Marketing Association's (DMA) October 17, 2013 petition.² Generally, DMA wants the FCC to reverse the rules requiring disclosure that were codified in the February 2012 *Report and Order*³ and became effective on October 16, 2013. The *Petition* is one day after the effective date of those rules.

The petition should be denied: the TCPA, FTC rules, and FCC rules require prior express written consent. Prior express written consent requires disclosure, and without disclosure, the consent should not be acquired for implied activities. The FTC has long held that consent cannot be a condition of service; the FCC followed suit. The DMA

¹ FCC, 1 November 2013, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Forbearance from the Direct Marketing Association*, <http://apps.fcc.gov/ecfs/document/view?id=7520955229>,

² Direct Marketing Association, *Petition for Forbearance by the Direct Marketing Association*, October 17, 2013, <http://apps.fcc.gov/ecfs/document/view?id=7520946817>

³ FCC, *Report and Order*, FCC 12-21, <http://apps.fcc.gov/ecfs/document/view?id=7021898593> and <http://apps.fcc.gov/ecfs/document/view?id=7021898594>

wants to negate that provision and keep consent as a condition of service by keeping consumers ignorant. Consumers must be given the opportunity to make an informed opt-in. Industry should not be able to use ignorance to strip that consumer right.

The 2012 *Report and Order* delayed the effective date of the written express consent requirement precisely to give DMA members and others time to upgrade their systems and acquire prior express written consents for disclosed activities. The FCC recognized that it should give the industry time to collect that consent, so there was an implementation period that was effectively 18 months, February 2012 to October 2013. The FCC allowed industry to collect that prior express written consent in several different forms. The clock has now run out, and those who slept now want the rules to change.

In a footnote, the FCC points out that the DMA's Petition is not a satisfactory forbearance request. The FCC also seeks comment on what sort of relief may be granted. No relief should be offered; the FCC's intent and explanation were clear. The DMA's members had 18 months to provide disclosure and acquire prior express written consent.

II. DMA's argument

The DMA agrees with the FCC that there should be signed prior express written consent: "marketers need to establish a record that consent has been obtained."⁴ The DMA agrees that paragraph 33 of the 2012 *Report and Order* is consistent with the FTC regulations that require consent is not a condition of service.⁵ The DMA believes the FCC regulations go too far when then they require the marketer to actually disclose that consent is not required.

The DMA claims that "requiring a disclosure stating that the consumer is not being coerced does not enhance that protection."⁶ I disagree. The disclosure provision adds significant consumer protection because it informs the consumer of her rights.

The DMA's position is one that wants to support consumer ignorance. The hope is that an ignorant consumer, when presented with a consent document, will just sign it. That would effectively nullify the informed consent aspect of the rule. I've been involved in many home solicitation contracts, and the home solicitation statutes seek to protect consumers from high pressure sales tactics by both creating a right to cancel the contract and a requirement to inform the consumer of that right. Those statutes require prominent disclosure of cancellation rights. I am aware of some of those laws, and I am continually amazed at the artful dodges used by salesmen to suppress that protection. I've had home solicitation contracts mailed to me with the required statutory notice, but the cancellation date was already filled in based on the date of the solicitation rather than the date of contract delivery (by the time I received the contract, the bogus cancellation date had already passed). The cancellation notice is supposed to be prominent on page one of the contract, but I've received such contracts in a pretty folder that had advertising

⁴ *Petition*, page 3.

⁵ *Petition*, page 4.

⁶ *Petition*, page 5.

fliers covering the notice. In another scheme, the contract was delivered on the specified date, but a second meeting would set some terms of the contract; the second meeting was then scheduled to be after the cancellation date.

The FCC's disclosure requirement is good for consumers, and it should be maintained.

The DMA's comment that "The disclosure that the marketer will use an "autodialer" has no counterpart in the FTC rule and similarly serves no practical purpose: if an autodialer is not used, neither the rule nor the statute applies" does not make sense. The term "autodialer" has a reasonable meaning as the TCPA's statutory automatic telephone dialing system (ATDS),⁷ and they are used in predictive dialers and voice broadcasting. The point of getting prior express consent is to avoid the prohibitions in 47 U.S.C. § 227(b).

The DMA claims that amending existing written agreements to provide disclose and get informed/uncoerced consent would be prohibitive.⁸ However, the DMA does not explain why it would be prohibitive or give any estimate of the costs. The claim is unsupported.

Getting informed consent would have been easy prior to 16 October 16 2013 because text messages could have been used to do it. My guess is that industry did not want to do that because many customers would not consent, and that could have financial consequences to the companies. The companies would rather operate on the assumption that they still have consent rather than learn that they don't. If a customer actually knew that he might be hounded every day by dunning tests, I doubt he would consent to that imposition. A customer may have signed up for a service, but he may not be interested in it anymore. If customers knew all the options, then they would make more discerning choices.

In fact, I wonder if the DMA already knows that re-opt-in campaigns are getting dismal results. I'd expect that some DMA members have at least mounted trial campaigns to obtain prior express written consent. If those campaigns saw poor returns, then it would make sense that the DMA would now attack the disclosure aspect of the new rules. The "confusion" that the DMA claims exists⁹ might just be consumers understanding the benefit and deciding not to opt-in. That "cost", the loss of opt-ins, might be prohibitive, but that would be consumers expressing their will.

The DMA claims that those who are currently receiving text message advertising may easily opt out but do not, therefore we should continue to infer their consent. That is not the whole story. If messages are currently being sent and enjoyed, then it should be easy to get an informed continued consent. The mere receipt of text message does not

⁷ 47 C.F.R. § 64.1200(f)(2) makes "autodialer" and ATDS synonyms.

⁸ *Petition*, page 5.

⁹ *Petition*, page 4.

mean that someone continues to want them. It's a lot easier to ignore or delete a text message rather than open it up, read it, and reply STOP.

Advertisers (and their marketing associations) congenitally believe consumers want to receive their advertising. I've had once per month emails become once per week and then every other day. When I went to the trouble of actually opting-out of one advertiser's spam, they offered to make the emails less frequent. I got the sense that I was a guinea pig: the advertisers crank up the frequency until consumers start complaining, and then the advertisers take it down a notch.

When I started doing business with one company, I opted out of receiving advertisements, but I said OK to a monthly newsletter. I expected the newsletter might have some reasonable information. Apparently, a lot of customers opted out of advertisements, so the company created a new category, "special offers", and since the category didn't exist when I originally signed up, the company defaulted me to receiving those special offers. I don't see how special offers differ from advertisements. I guess that didn't work so well, either, so the company newsletter is now just advertising.

Many of the supposed written consents for automated telemarketing imposed upon me are not currently being used. Neither Wells Fargo Bank nor PayPal (see below) are making automated calls to me. If they aren't making the calls now, then losing the right to make them for lack of clear disclosure is no big loss.

My grocery store has my telephone number, but it has not hit me with any prerecorded calls. Maybe it knows that I have to eat, so I will show up in the store.

My local drugstore has my telephone number and does do automated calls. It already has my landline number, but now it wants my email address (it will give me 20% off my purchase if I give that to them) and my cellphone number. It wants to text me when my prescription has been filled, but I can wait the 20 minutes or come back a few hours after I drop the prescription off (the doctor usually faxes the prescription so I don't need to wait). By the way, I'm annoyed with the drugstore. I got a prerecorded message that a prescription was ready, but the message did not indicate which prescription. I went to pick it up, but it was a disused prescription that the drugstore had placed on an automatic fill schedule without my consent. I told the drugstore that the prescription was no longer used, so they should delete it. A month later I received another prerecorded call for a filled prescription, so, stupidly, I dropped by to pick it up – it was the same disused prescription. I spoke with the store manager and watched while he made sure the problem was fixed.

The DMA wants to create two classes of customers: "old" and "new".¹⁰ The "new customers" have better rights and more protections than the "old customers". The two classes defy fairness. The Civil War did not free only those "new slaves" acquired after 1865 and keep the "old slaves" working the fields for their masters.

¹⁰ *Petition*, page 8.

III. Examples of post Report and Order non-compliant consent

DMA wants existing non-compliant consent from existing customers to satisfy the FCC regulations. Industry hasn't been diligent about getting reasonable consent in my case even when it knew about the new regulations. Below are two absurd attempts by well-known companies to acquire written consent for automated calls that do not follow the spirit of the new rules for prior express written consent.

The DMA also claimed that “there was no evidence before either the FCC or FTC that consent was coerced, and if such evidence is presented, that customer’s consent would be invalidated, not because of the FCC Rule, but because the coercion itself may be unlawful under FTC regulations and state consumer protection statutes.”¹¹ The DMA seems to use a sinister / unlawful notion of “coerced” – essentially that someone held a gun to the consumer’s head. The real object was to prevent consent being a condition of service, and the FCC and FTC presumably had evidence for that occurring.

A. Wells Fargo Bank

In an August 2013 statement, Wells Fargo Bank told me it was amending our agreement. The effective date of the amendment, interestingly enough, was October 14, 2013. The date is clearly to meet the new FCC regulations that become effective on that date. The amendment stated:

1. The second paragraph of the section titled “Telephone Calls and Text Messages” is amended and restated to read as follows:

The ways the Bank may call you include using prerecorded/artificial voice message and/or through the use of an automatic telephone dialing system. The ways the Bank may send text messages to you include through the use of an automatic telephone dialing system. The Bank may call you and send text messages to you at your telephone number, including mobile/cellular telephone numbers that could result in charges to you.

The agreement makes such automated contact a condition of service. There is no opt-in provision here and no disclosure that consent is not a requirement of service. Wells Fargo believes it has obtained written consent to place prerecorded calls by virtue of its written (and one-way amendable) agreement. However, that written consent should not be construed to satisfy the FCC or FTC requirements. It is not an opt-in but rather a condition of service.

The agreement does not limit “your telephone number” to numbers that I disclosed to them; it leaves open the possibility of the bank data mining consumer telephone numbers and using them.

¹¹ *Petition*, page 5.

B. PayPal

Around October 2012, I received an email from PayPal telling me it had amended our account agreement. PayPal focused on an agreement to arbitrate. I could opt-out of the agreement to arbitrate, but only if I sent an actual letter to PayPal's Litigation Department. In that letter, in order to opt out, I was required to disclose my name, address, and telephone number.

But there was another twist to the PayPal agreement.¹² Section 1.10 gave PayPal the right to send prerecorded messages to any of my telephone numbers whether they were cellular or landline.

1.10 Calls to You; Mobile Telephone Numbers. By providing PayPal a telephone number (including a mobile telephone number), you agree to receive autodialed and prerecorded message calls at that number. The ways in which you provide us a telephone number include, but are not limited to, providing a telephone number at Account opening, adding a telephone number to your Account at a later time, providing it to one of our employees, or by contacting us from that phone number. If a telephone number provided to us is a mobile telephone number, you consent to receive SMS or text messages at that number. We won't share your phone number with non-affiliated third parties for their purposes without your consent, but may share your phone numbers with our Family of Companies or with our service providers, such as billing or collections companies, who may contact you using autodialed or prerecorded message calls or text messages. Standard telephone minute and text charges may apply if we contact you.

The terms of this agreement make prerecorded calls and texts a condition of service. Consequently, PayPal's User Agreement should not suffice for making automated calls.

In addition, PayPal's User Agreement allows PayPal to capture telephone number with ANI and then transmit prerecorded messages to those numbers. Such a capture has never been part of the FCC's conscious release of number requirement. Obtaining numbers with ANI capture was addressed in the FCC's *1992 Report and Order* and does not convey consent.¹³ Consent needs to be clear, and that does not mean buried in a user agreement's wall of text. In many situations, I am asked for my cellular telephone number for a seemingly limited purpose; PayPal would promote that to a general purpose. There must be a clear understanding at the time of release that automated calls will be made to that number; it should not depend on modified text.

C. The FCC consent requirement was always clear

Even in 1995, the FCC was making clear statements about when automated calls would be permitted. The customer had to understand the purpose. "Although the term "express permission or invitation" is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the

¹² PayPal User Agreement, <https://www.paypal.com/webapps/mpp/ua/useragreement-full>

¹³ FCC, *Report and Order*, 1992, FCC 92-443, ¶ 31.

telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.”¹⁴

Arguably, the FCC has required some sense of disclosure be a part of express consent long before 16 October 2013. Unfortunately, the advertisers ask “may we call you at that number?” and interpret the permission as not only for live calls but also for automated calls. Advertisers know if they ask permission for automated calls, then consumers will think twice – and probably deny permission.

IV. Conclusion

The DMA's request should be denied. The new FCC Regulations should apply to both new and old customers, and the prior express consent must be an opt-in and not a condition of providing service. If companies have not yet acquired the appropriate consent, then they should not use autodialers, text messages, or prerecorded messages.

¹⁴ FCC, *Memorandum Opinion and Order*, 26 July 1995, FCC 95-310, ¶ 11.