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Direct Marketing Association, Inc.

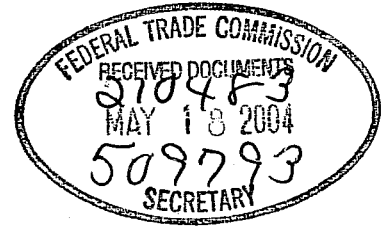
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May 18, 2004

BY HAND & FACSIMILE

Mr. Donald Clark
Secretary
Federal Trade Commission
6th & Pennsylvania Ave., NW
Washington, DC 20580

RE: Petition filed pursuant to 16 CFR§1.25 Regarding
Portion of the Amendments to the Telemarketing Sales Rule
16 CFR Part 310.

Dear Mr. Clark:

Pursuant to 16 C.F.R. §.1.25, we write on behalf of The Direct Marketing Association (The DMA), and its members, to request through this Petition that the Federal Trade Commission (FTC) amend one aspect of its safe harbor for abandoned calls under § 310.4(b)(4)(i) (the Abandoned Call Rule) of the Telemarketing Sales Rule (TSR). Specifically, The DMA requests that the FTC revise its current method for calculating abandoned calls from a per day, per calling campaign measurement in the Abandoned Call Rule to the per 30 day measurement adopted by the Federal Communications Commission (FCC) in its revisions to its telemarketing rules in 47 C.F.R. 64.1200(a)(6), as amended. Harmonizing the abandoned call standard of the two agencies can both serve the privacy interests underlying restrictions on abandoned calls and impose realistic obligations on those telemarketers who use predictive dialing equipment.

The FCC concluded that its "per 30 day" abandoned call standard "will ensure that consumers consistently receive fewer disconnected calls, and that telemarketers are permitted to manage their calling campaigns effectively under the new rules on abandoned calls". The FCC explained that the rate measured over a longer period of time than the FTC's calculation will allow for variations in telemarketing campaigns, such as calling times, number of operators available and number of telephone lines used. The DMA supported the "30 day" abandoned call standard in its comments to the FCC, stating that the per 30 day standard establishes a 3% abandoned call limit without negating the efficiencies of predictive dialer technology.

Conversely, DMA members have informed The DMA that meeting the 3% benchmark under the FTC's per day, per calling campaign standard presents a much greater compliance obstacle than meeting the FCC's abandoned call standard. Marketers who use predictive dialing technology are having difficulty configuring their software to comply with the FTC's per day, per calling campaign 3% standard. Changing the abandoned call 3% standard from "per month" to "per day" while retaining predictive dialers' efficiency gains is dramatically more difficult from a practical perspective, and, in fact, renders some predictive dialer applications unusable.

We have heard from many of our members regarding the severe operational difficulties that the 3% per campaign, per day standard presents.

The following is one DMA member's comments on the effect of the FTC Rule upon his company.

The FTC requires the 3% abandon average per campaign per day, which is virtually impossible for vendors who run multiple campaigns each day. On a typical day, we may run more than 100 individual client campaigns. The system manages the efficiency as an average of all campaigns per day, so it is inevitable that certain logins would end the day at say, 3.1% and others at 2.9%, yet the overall average would still be 3% or less.

Measuring the abandon rate for every individual program (not even a client wide requirement) on a daily basis would set productivity back and drive up the cost to consumers (and the cost of fundraising). This cost increase would fall most heavily on small marketers and marketers that target significantly to reach only consumers who are interested.

The DMA respectfully suggests that harmonizing the abandoned call measurement by adopting the FCC's abandoned call standard would serve the agencies' shared interest in reducing the number of abandoned calls while not imposing an inordinately burdensome and expensive requirement on marketers, many of whom would be forced to eliminate predictive dialer technology and its resultant productivity enhancement.

It is true that the former DMA Guidelines for Ethical Business Practices (The DMA Guidelines) used the "per day" standard for the maximum number of abandoned calls per campaign that companies who use predictive dialing equipment must satisfy as a condition of membership in The DMA. However, The DMA's abandoned call rate had been 5%, not 3%, and moving to a per 30 day standard would give more flexibility to allow marketers to reduce their abandoned call percentages to 3%. Thus, the FCC's per 30 day standard is more consistent with The DMA's standard.

In addition, the California Public Utilities Commission, whose 3% abandoned call rate was cited by the FTC in its rulemaking promulgation, also measures abandoned calls on a per 30 day basis (Order Instituting Rulemaking on the Commission's Own Motion to

Establish an Appropriate Error Rate for Connections Made By an Automatic Dialing Device Pursuant to Section 2875.5 of the Public Utilities Code, Decision 03-03-038, March 13, 2003, at 19). This is the standard that is currently in effect in California, and with which telemarketers have brought themselves into compliance for making calls to residents of that state.

Finally, we suggest that having the FTC adopt the FCC's abandoned call standard best comports with the two agencies' jurisdiction. In its comments to the FTC, The DMA and other parties consistently suggested that the setting of abandoned call rates (and, by implication, the method by which it calculates abandoned call rates) lies closer to the core expertise of the FCC than of the FTC. The FCC has based its exercise of authority over predictive dialers on its unambiguously granted statutory authority over wire and radio communications. The DMA respectfully suggests that it is more consistent with the grant of regulatory authority over the telephone network to adopt the FCC's abandoned call standard, rather than the standard adopted by the FTC.

We appreciate your consideration of this petition and would be pleased to address any questions that arise as the FTC considers it.

Respectfully submitted,

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