Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

PETITION FOR FORBEARANCE BY THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association ("DMA") files this petition to request the Federal Communications Commission ("FCC" or "Commission") to forbear from enforcing the new disclosure requirements contained in Section 64.1200(f)(8) (i)(A) and (B) of the Rules as amended by the Commission's Order of February 15, 2012 in this Docket: these subparagraphs require disclosure, informing consumers, that sales are not conditioned on consent and that the seller is using an automatic telephone dialing system ("autodialer"), in connection with marketers existing written consent agreements.

In its Report and Order released February 15, 2012, [1] the FCC announced rule changes to the Telephone Consumer Protection Act ("TCPA")[2] that will directly affect how the companies who are members of trade associations like the DMA conduct business, as of the revised rule's effective date, October 16, 2013. In particular, the disclosure parts of the rule change could

[1] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) ("TCPA Order" or "Order").
[2] 47 U.S.C. § 227.

prevent businesses from continuing to serve customers that have agreed (in most cases via confirmed opt-in) to receive autodialed calls, including text messages.[3]

The DMA is the leading global trade association of businesses and non-profit organizations using and supporting multichannel direct marketing tools and techniques. It represents thousands of companies and not-for-profit organizations that use and support data-driven marketing practices and techniques, including Internet-based businesses, cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, and a host of other segments devices.

In its Order, the FCC stated that its primary goal in revising its TCPA provisions was to make them consistent with those of the Federal Trade Commission ("FTC").[4] With that stated goal in mind, the Commission articulated a new standard for placing autodialed calls or texts to wireless devices, or placing prerecorded telemarketing calls under the TCPA:

> "a consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received 'clear and conspicuous disclosure' of the consequences of providing the requested consent… and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained 'without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.'"[5]

Further, the new FCC Rule contained at the end of the Order states:

> (8) The term *prior express written consent* means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8774, para. 43 (1992) (concluding that text messages would be subject to the TCPA).
[4] *See* 16 C.F.R. § 310.4(b)(v)(A)(ii) ("FTC Rule").
[5] TCPA Order at P 33.

telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.[6]

The DMA understands the importance of the FCC's changes to its rules, and the DMA did not oppose the Commission's extension of the prior written consent standard to autodialed telemarketing calls.[7] The DMA is not seeking forbearance from the enforcement of the requirement of prior express written consent. Indeed, most marketers already obtain "written consent," and acquire confirmed opt-in consent for business reasons, and under the DMA's *Guidelines for Ethical Business Practice*,[8] marketers need to establish a record that consent has been obtained. The FCC has made it abundantly clear that written consents obtained prior to the promulgation of the new rule, and its effective date, constitute valid written agreements under the new rule.

However, the DMA does respectfully request that the FCC forbear from enforcing, in regard to existing written agreements, that portion of the new rule that requires a disclosure that sales are not conditioned on executing the written agreement and that the seller will use an

[6] TCPA Order at 34 (citing the amended 47 C.F.R. § 64.1200(f) ("FCC Rule")).
[7] *See* Cross-Industry Reply Comment on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (submitted June 21, 2010).
[8] *See Guidelines for Ethical Business Practice*, Article 50, "Use of Prerecorded Voice Messaging," available at http://thedma.org/wp-content/uploads/DMA-Ethics-Guidelines.pdf.

autodialer. There is a significant difference between the FCC's description of the new requirement prohibiting conditioning sales upon written consent and the text of the amended 47 C.F.R § 64.1200(f). The explanation at paragraph 33 of the Order states that consent must be obtained "without requiring, directly or indirectly" that consent be a condition of the sale. This explanation simply means that a marketer is prohibited from imposing a requirement of consent upon sale. This description is thus entirely consistent with the text of the FTC regulations from which the explanation is taken almost verbatim.

Unfortunately, in drafting the amended 47 C.F.R § 64.1200(f), the FCC departed from both its own explanation in paragraph 33 of the Order and the companion FTC regulation. The FCC Rule states that the written agreement must "include a clear and conspicuous **disclosure** informing the person signing that… [t]he person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of …" making a purchase of goods or services. Thus, the FCC Rule, unlike the FTC Rule and the FCC's explanation at paragraph 33, requires that the marketer affirmatively **disclose** to its customer that it is not acting to condition sale on the written agreement. As a practical matter, this disclosure—that there is no condition to consent—is peculiar and certainly will cause confusion among consumers. 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 <u>not</u> used, neither the rule nor the statute applies.

The end result is that the literal terms of the new 47 C.F.R. § 64.1200(f) expose marketers to the risk of regulatory sanctions and lawsuits for failure to make the disclosures specified in (i)(A) and (B), even though the previously obtained consent otherwise complies with the written consent requirement set forth in (f)(8) and does not violate the FTC companion rule. The DMA

questions whether that is really what the FCC intended, and if so, what reason there is for departing from the FTC formulation when the stated purpose of this docket is to conform the FCC's rules with those of the FTC.

This anomaly in the language of the FCC Rule cannot be defended on grounds that marketers had 12 months to go back to consumers from whom they had previously obtained written consent to "amend" their existing written agreements to incorporate the new "disclosure" requirements. The cost of doing so would be exorbitant and would cause confusion among customers who were not coerced in the first instance. Prohibiting coercion protects consumers, but requiring a disclosure stating that the consumer is not being coerced does not enhance that protection. While there may be no harm in preserving the rule as it is worded and applying it to consents obtained after October 16, 2013, there is no valid reason in law or policy to subject marketers to exposure to lawsuits and regulatory sanctions for perfectly valid written consent agreements obtained before the effective date of the rule, based on disclosure requirements which add nothing to the purpose of the written consent requirement. This is particularly true because 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. In addition, due to the ease of opting out, it is most likely that consumers who currently receive text message advertising want to receive such messages and there is no reason to assume that the omission of the newly minted disclosures will affect consumer expectations.

For the foregoing reasons, the DMA respectfully asks that the Commission forbear from enforcing the new disclosure standards for companies' existing written consent agreements. Further,

since the Order does not explicitly state that the new standard applies retroactively, written consent that has been previously acquired in compliance with the current TCPA rules is valid, despite the fact that current agreements may not meet the new disclosure requirements.

Respectfully submitted,

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