

**Before the
FEDERAL COMMUNICATIONS COMMISSION**

Washington, DC 20554

_____)	
In the Matter of DentalPlans.com's)	
Petition for Expedited Declaratory Ruling)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
_____)	

TO: The Federal Communications Commission

**PETITION FOR EXPEDITED DECLARATORY RULING OR IN THE ALTERNATIVE
A RETROACTIVE WAIVER**

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INTRODUCTION

Pursuant to 47 C.F.R. § 1.2, DentalPlans.com (“DentalPlans”) respectfully petitions the Federal Communications Commission (“FCC”) to issue a declaration regarding DentalPlans’ compliance with the Telephone Consumer Protection Act, 47 U.S.C. § 277 (“TCPA”). Specifically, DentalPlans seeks a declaration that (i) DentalPlans’ renewal notifications do not constitute telemarketing or advertising under the TCPA, and (ii) the language in its online enrollment forms and the language used by its customer service representatives during telephone conversations with potential DentalPlans customers satisfies the disclosure requirements set forth in 47 U.S.C. § 227(b)(1)(A)(iii) and 227(b)(2)(c).¹ The requested declaration is necessary because there is confusion as to whether subscription renewal notification calls constitute telemarketing, the FCC has not provided specific language that callers can rely upon when making disclosures, and the FCC rules interpreting what constitutes advertisement and telemarketing require clarification. By making this declaration, the FCC will provide certainty to callers with respect to their disclosure obligations under the TCPA.

BACKGROUND

DentalPlans sells dental savings plans (the “Plans”), or dental discount plans. Affidavit of Margaret Keen, attached as Exhibit 1. The Plans are an affordable, flexible alternative to traditional dental insurance. *Id.* at ¶ 5. To enroll in a Plan, customers can visit DentalPlans’ website or call its agents. *Id.* at ¶ 6. DentalPlans does not cold call prospective customers. *Id.* After

¹ DentalPlans is currently defending a lawsuit in which the plaintiff alleges that the renewal calls she received fall within the TCPA’s definition of telemarketing. DentalPlans disputes, however, that its renewal calls constitute “advertising or telemarketing” calls which, under the TCPA, require “prior express written consent.” *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1831 (2012).

purchasing a Plan, a customer gains access to a network of dentists who have agreed to provide discounted rates to plan members. *Id.* at ¶ 7. The Plans are annual, and members must renew their Plan each year to continue receiving discounts. *Id.* at ¶ 8.

When a member's plan is about to expire, DentalPlans will generally contact the member using a pre-recorded voice message. *Id.* at ¶ 9. These calls serve to notify the member that their plan is about to expire and provide them an opportunity to renew. *Id.* DentalPlans' members who receive these calls from DentalPlans have previously consented to receiving them. *Id.* at ¶ 10. The precise disclosures provided to prospective customers depends on whether a customer enrolls online or by phone. If they enroll online, the customer receives two separate consent disclosures. *Id.* at ¶ 14. First, on the "Create Account" page, DentalPlans discloses that:

"By clicking Continue, you agree to be contacted at the phone number provided using an automated dialing system, text messages, emails and/or pre-recorded calls; this consent is not a condition of purchase."

Then, on the "Plan Activation" page, DentalPlans discloses the following:

"By opting in, you agree that DentalPlans.com may contact you with marketing messages at the phone number you've provided. These communications may include, but are not limited to, calls made to you using an automatic telephone dialing system and or pre-recorded voice messages. You are not required to agree as a condition of purchasing any products and/or services."

Id.

If the customer enrolls over the phone, DentalPlans asks them whether they consent to receiving telemarketing calls from DentalPlans. While the exact language used can vary from call to call as customers often ask clarifying questions, DentalPlans agents are required to make the following disclosures contained in its consent script:

1. May I have your phone number, in case we get disconnected? Is this your mobile or home phone number? Do you have another number you'd like to give?

2. If mobile number – would you like to receive plan updates and promotions via text message?
3. At times we may contact you using an automatic telephonic dialing system and/or prerecorded voice message, is that OK?
4. You are not required to agree as a condition of purchasing any products and or services.

Id. at ¶ 12. DentalPlans’ agents are trained to use the script to obtain opt-in permission to call consumers using an ATDS and pre-recorded voice messages. *Id.* at ¶ 13.

ARGUMENT

Under the TCPA, it is unlawful for any person to “make any call . . . using any automatic telephone dialing system or . . . artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service” unless the call complies with exemptions promulgated by the FCC or was made “with the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A)(iii), 227(b)(2)(C). Automated or prerecorded calls containing “telemarketing message[s]” may only be made with the “prior express written consent” of the called party. *In the Matter of Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1838 ¶ 20 (2012) (hereinafter “2012 FCC Order”).

A. DentalPlans.com’s Renewal Notifications are Not Telemarketing Under the TCPA and the FCC’s Orders Interpreting It.

The TCPA defines an “advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services.” 47 U.S.C. 227(a)(5). Telemarketing is “the initiation of a telephone call or message for the purposes of encouraging the purchase or rental of, or investment in, property, goods, or services.” 47 CFR 64.1200(f)(12).

The FCC held that a facsimile is not an advertisement or telemarketing message if its “purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.” *In the Matter of Rules & Regs. Implementing the*

Telephone Consumer Protection Act of 1991, 21 F.C.C.R 3787, 3812, 2006 FCC LEXIS 1713 (F.C.C., Apr. 5, 2006) (hereinafter the “2006 FCC Order”). For example, a “subscription renewal notice would be considered ‘transactional’ in nature, provided the recipient is a current subscriber and had affirmatively subscribed to the publication.” *Id.* at 3813. Courts interpreting the 2006 FCC Order have expanded this rule beyond facsimile communications. *See, e.g. An Phan v. Agoda Co. Pte.*, 789 Fed. Appx. 157, 158 (9th Cir. 2020) (quoting the 2006 FCC Order).

Under the 2006 FCC Order and subsequent application of that Order to other mechanisms of communication, DentalPlans’ plan renewal calls to its members, including Plaintiff, do not constitute “advertisements.” Indeed, the plan renewal calls fall into the precise category of calls that the FCC intended to exclude from TCPA liability, namely “subscription renewal notice[s]” as they were only sent to existing customers who had “affirmatively subscribed” to a dental plan. FCC 2006 Order at 3813. Nor do the calls constitute “telemarketing” under 47 CFR 64.1200(f)(12). DentalPlans’ plan renewal calls were not intended to “encourag[e] the purchase” of a new DentalPlans product or service; instead, they specifically notified Dental Savings Plan members of the impending expiration of their *existing* Dental Savings Plans and encouraged consumers to renew their *existing* Dental Savings Plan.

Further, it would not be reasonable to interpret the 2006 FCC Order as permitting “subscription renewal notices” as non-advertisements while holding that those same “subscription renewal notices” are impermissible “telemarketing” messages. The FCC specifically described “subscription renewal notices” as transactional in nature, rather than advertising, and courts interpreting the 2006 FCC Order apply its rule in non-facsimile contexts. As such, the FCC should declare that DentalPlans’ plan renewal calls are not telemarketing or advertising calls under the TCPA.

B. DentalPlans' TCPA Disclosure Language Constitutes Prior Express Written Consent.

While, as shown above, DentalPlans' renewal notifications are not "advertisements" or "telemarketing" messages and do not require prior express written consent, DentalPlans nonetheless obtains prior express written consent. Prior express written consent is "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 telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." 47 CFR 64.1200(f)(9)(i). This agreement must 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 service." *Id.*

Both of DentalPlans' methods of obtaining consent comply with the TCPA's requirements.

1. *DentalPlans' Telephone Consent Language Satisfies the TCPA Prior Express Written Consent Requirement.*

When a customer calls DentalPlans to request information or enroll in a plan, the DentalPlans agent follows a consent script with some variation depending on the flow of the conversation. Affidavit of Margaret Keen at ¶ 12. Although the script has changed over time, it has consistently required agents to expressly obtain prospective customers' consent to receive calls from DentalPlans. First, the agent collects the consumer's name and telephone number. *Id.* If the number provided is a cellphone number, the agent then asks, "would you like to receive plan

updates and promotions via text message?” *Id.* The agent continues: “At times we may contact you using an[] automated telephonic dialing system and/or prerecorded message, is that okay?” *Id.* Finally, the agent relates that “[y]ou are not required to agree as a condition of purchasing any products and or services.” *Id.*² These disclosures are “clear and conspicuous” and expressly satisfy the requirements under 47 C.F.R. 64.1200(f)(9)(i).

2. *DentalPlans’ Online Consent Disclosures Satisfy the TCPA Disclosure Requirement.*

DentalPlans Customers who enroll in a plan online are provided with two separate consent disclosures. The first is on the “Create Account” page: “By clicking Continue, you agree to be contacted at the phone number provided using an automated dialing system, text messages, emails and/or pre-recorded calls; this consent is not a condition of purchase.” *Id.* at ¶ 14. The second disclosure appears on the “Plan Activation” page: “By opting in, you agree that DentalPlans.com may contact you with marketing messages at the phone number you’ve provided. These communications may include, but are not limited to, calls made to you using an automatic telephone dialing system and or pre-recorded voice messages. You are not required to agree as a condition of purchasing any products and/or services.” *Id.*

Each disclosure “clear[ly] and conspicuous[ly] . . . inform[s]” the customer that he “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 “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 service.” 47 C.F.R. 64.1200(f)(9)(i). Consequently, DentalPlans’ online disclosures satisfy the TCPA prior express written consent requirement.

² This precise language is taken from the script in use until December 2020.

C. In the Alternative, the Commission Should Retroactively Waive Application of the Rules Regarding Advertisements and Telemarketing to DentalPlans' Renewal Calls.

In the event the FCC does not declare that DentalPlans' renewal calls are not telemarketing or advertising under the TCPA and that its disclosures do not constitute prior express written consent under the FCC rules, it should waive the application of the rules for the period prior to December 31, 2020³ for the reasons set forth below.

The FCC's rules expressly provide that the FCC may waive any provision of its rules "if good cause therefor is shown." 47 C.F.R. § 1.3. A waiver may be granted if: (1) the waiver would better serve the public interest than would the application of the rule; and (2) special circumstances warrant a deviation from the general rule. *Northeast Cellular Tel. Co. v. FCC*, 879 F.2d 1164, 1166 (D.C. Cir. 1990). In other words, the FCC "may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest." *Id.* The Commission regularly waives its rules in specific cases if it determines, after careful consideration, that such a grant would serve the public interest without undermining the policy that the rule in question is intended to serve. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 34 FCC Rcd. 4851, 4856, 2019 FCC LEXIS 1582 (FCC, June 13, 2019); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 FCC Rcd. 13998, 14008, 2014 FCC LEXIS 4445 (FCC, Oct. 14, 2014). DentalPlans respectfully submits that there is ample good cause present under the circumstances to justify a retroactive waiver.

³ In December 2020, DentalPlans modified its script to even more clearly notify consumers that they may receive prerecorded messages of a telemarketing nature.

As noted above, the FCC has interpreted its rules to exclude facsimiles from the definition of advertisement if its “purpose is to facilitate, complete, or confirm a transaction that the recipient has previously agreed to enter into with the send.” 2006 FCC Order at 3812. In particular, “subscription renewal notice[s]” do not fall under the TCPA and courts interpreting the 2006 FCC Order have expanded this rule beyond facsimile communications. *An Phan*, 789 Fed. Appx. at 158 (quoting the 2006 FCC Order). Thus, DentalPlans respectfully submits that it was reasonable for DentalPlans to assume that its renewal notifications to its existing customers were not telemarketing calls under the TCPA and the FCC’s rules interpreting it.

Moreover, in an abundance of caution, Dental Plans utilized language that it reasonably believed satisfied the prior express written consent standard. The FCC, however, has not provided callers with specific language that satisfies the TCPA’s disclosure requirements. As a result, DentalPlans provided potential customers with disclosure language that mirrored the “clear and conspicuous” language provided in the FCC’s rules. 47 CFR 64.1200(f)(9)(i). Both DentalPlans’ consent script and online disclosures provide customers with language identical to that listed in the FCC’s rules governing disclosures. Thus, DentalPlans respectfully submits that it was reasonable for DentalPlans to assume that reciting the Commission’s rules, word-for-word, to customers satisfied the TCPA’s disclosure requirement and the FCC’s rules interpreting it.

It would be fundamentally unfair for DentalPlans to face crippling liability based on its reasonable reliance on FCC regulatory language, earlier FCC Orders, and D.C. Circuit statements. DentalPlans relied on the Commission’s prior orders in good faith and should not be exposed to potentially business-ending TCPA liability for providing its existing customers with reminders that their plans were about to expire. Failure to grant such a waiver would open the door for countless TCPA lawsuits against callers that provide their customers with subscription renewal

notices. Under these circumstances, strict compliance with FCC rules would not be in the public interest as it potentially removes a valuable service provided customers across the country. The Commission should grant a retroactive waiver as requested for any claims of TCPA violations prior to the date the FCC provides the requested declaratory relief.

REQUEST FOR RELIEF

Section 1.2 of the Commission's Rules allows the Commission to issue a declaratory ruling "removing uncertainty." 47 C.F.R. § 1.2. DentalPlans' TCPA disclosures provide customers with disclosure language nearly identical to the FCC regulations governing prior express written consent under the TCPA. Nevertheless, a declaratory ruling is necessary to remove uncertainty in light of a pending consumer class action lawsuit filed by a plaintiff challenging the adequacy of DentalPlans' consent disclosures.

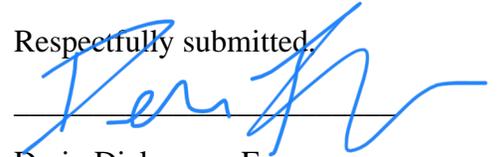
Although DentalPlans is confident that its renewal calls do not constitute "advertising" or "telemarketing" and its disclosures comply with the applicable provisions of the TCPA, a declaration is nonetheless appropriate because the Commission's rules and prior orders require clarification and do not provide guidance regarding specific language that satisfies the TCPA's disclosure requirement to obtain prior express written consent from customers. A declaratory ruling will provide definitive guidance, effectively terminate the controversy between DentalPlans and the plaintiff in the pending judicial proceeding, and give callers the clarity necessary to provide customers with proper TCPA disclosures without the risk of crippling damages in class action litigation. *Federal-State Joint Bd. on Universal Serv.*, 15 FCC Rcd. 15168, 15168 (July 11, 2000) (issuing a declaratory ruling where it was "necessary to remove substantial uncertainty regarding the interpretation of [the Communications Act of 1934] in pending . . . judicial proceedings"); *Blackboard, Inc.*, DA-16-890, at 19 (Fed. Comm'n Comm'n Aug. 4, 2016) ("[T]he Commission has the power to call balls and strikes when it comes to the [TCPA].").

CONCLUSION

For the reasons set forth herein, DentalPlans seeks a declaration that DentalPlans' consent language satisfies the TCPA's disclosure requirement to obtain express consent from customers.

Dated: January 3, 2022

Respectfully submitted,



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