# SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into by and between the Data & Marketing Association (formerly known as the Direct Marketing Association, Inc.) (the "DMA") and the Colorado Department of Revenue and Barbara J. Brohl in her capacity as executive director of the Colorado Department of Revenue (collectively, the "Department").

WHEREAS, the DMA filed an action against the Department in the U. S. District Court for the District of Colorado, captioned *The Direct Marketing Association v. Barbara J. Brohl, in her capacity as Executive Director, Colorado Department of Revenue*, 10-cv-01546-REB-CBS (the "Federal Action");

WHEREAS, the DMA filed an action against the Department in the Colorado District Court for the City and County of Denver, captioned *Direct Marketing Association, a New York nonprofit corporation v. Colorado Department of Revenue and Barbara Brohl, in her capacity as Executive Director, Colorado Department of Revenue*, 2013CV34855 (the "State Action");

WHEREAS, the DMA in the Federal and State Actions challenged the constitutionality of § 39-21-112(3.5)(c) & (d), C.R.S. (2010) ("the Act") and the Act's implementing regulations, 1 COLO. CODE REGS. § 201-1: 39-21-112.3.5 (2010) ("the Regulations"), with claims based upon the dormant Commerce Clause ("DCC claims") and other constitutional claims ("non-DCC claims");

WHEREAS, based upon the DCC claims, a preliminary injunction issued on January 26, 2011 in the Federal Action, and a permanent injunction issued on March 30, 2012 in the Federal Action, preventing enforcement of the Act and Regulations;

WHEREAS, based upon a ruling by the Tenth Circuit Court of Appeals that the federal district court lacked jurisdiction over the DCC claims under the Tax Injunction Act, 28 U.S.C. § 1341 ("TIA"), the Federal Action injunctions were dissolved on December 10, 2013;

WHEREAS, the DMA stipulated to the dismissal, without prejudice, of the non-DCC claims in the Federal Action, and the federal district court accordingly dismissed the non-DCC claims without prejudice on December 31, 2013;

WHEREAS, based upon one of the DCC claims, a preliminary injunction issued on February 18, 2014 in the State Action, again preventing enforcement of the Act and Regulations;

WHEREAS, the United States Supreme Court on March 3, 2015 unanimously reversed the ruling of the Tenth Circuit Court of Appeals that the federal court lacked jurisdiction over the DCC claims;

WHEREAS, the federal Court of Appeals for the Tenth Circuit subsequently entered a decision on February 22, 2016 in the Federal Action holding that the Act and Regulations did not violate the DCC;

WHEREAS, on December 12, 2016 the United States Supreme Court denied the DMA's petition for a writ of certiorari to review the Tenth Circuit's decision, and the DCC claims in the Federal Action are now finally resolved;

WHEREAS, the injunctions issued in the Federal and State Actions have prevented enforcement of the Act and Regulations for nearly seven years, and have created uncertainty for retailers;

WHEREAS, the DMA and the Department (collectively, the "Parties") now wish to resolve all of the DMA's claims pending in the State Action as well as the non-DCC claims that could be refiled in the Federal Action by agreeing to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration for the terms, conditions, and mutual promises set forth herein, the sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Upon execution of this Agreement by both parties, the Parties shall promptly execute, and the DMA shall file in the State Action, a Joint Stipulation of Dismissal With Prejudice and Motion to Dissolve Preliminary Injunction Forthwith, in the form attached hereto as Exhibit A, in which the Parties shall stipulate that:
    a. the DMA, a New York nonprofit corporation, solely for itself, its officers, and its directors, dismisses its DCC and non-DCC claims, with prejudice;
    b. the preliminary injunction issued February 18, 2014, shall be dissolved forthwith; and
    c. each Party shall bear its own costs and attorneys' fees.

2. The Department specifically finds reasonable cause for non-compliance with the Act and Regulations pursuant to subsections 39-21-112(3.5)(c)(II), -112(3.5)(d)(III)(A) and (B), C.R.S., due to the uncertainty caused by the Federal and State Actions, which have collectively delayed enforcement of the Act and Regulations for nearly seven years. Having found reasonable cause for non-compliance, the Department shall not require compliance with the Act and Regulations until July 1, 2017, and will waive any and all penalties for non-collecting retailers who fail to comply with the Act and Regulations prior to July 1, 2017. Penalties for non-compliance with the Act and Regulations on or after July 1, 2017 will not be waived based on the Federal and State Actions or this Agreement, and the Act and Regulations shall be fully implemented and enforced on and after July 1, 2017.

3. This waiver of penalties shall apply to the requirements of the Act and Regulations as follows:

   a. Transactional Notice: The Department will waive all penalties for non-collecting retailers who fail to issue the Transactional Notice required by § 39-21-112(3.5)(c)(I), C.R.S., and 1 COLO. CODE REGS. § 201-1: 39-21-112.3.5(2) prior to July 1, 2017;

   b. Annual Summary: The Department will waive all penalties for non-collecting retailers who fail to send an Annual Summary required by § 39-21-112(3.5)(d)(I), C.R.S., and 1 COLO. CODE REGS. § 201-1: 39-21-112.3.5(3) with respect to transactions occurring prior to July 1, 2017. Therefore, the Department will waive all penalties for non-collecting retailers who do not include customer purchases made prior to July 1, 2017 in any Annual Summary provided to Colorado customers on or before the January 31, 2018 deadline. To facilitate customer compliance with Colorado law, however, the Department will encourage non-collecting retailers, to the extent practicable, to include all reportable 2017 customer purchases in the Annual Summary provided to Colorado customers on or before January 31, 2018. The first Annual Summaries required of non-collecting retailers shall be mailed to customers by January 31, 2018;

   c. Customer Information Report: The Department will waive all penalties for non-collecting retailers who fail to file a Customer Information Report required by § 39-21-112(3.5)(d)(II), C.R.S., and 1 COLO. CODE REGS. § 201-1: 39-21-112.3.5(4) with respect to transactions occurring prior to July 1, 2017. Therefore, the Department will waive all penalties for non-collecting retailers who do not include customer purchases occurring prior to July 1, 2017 in their Customer Information Report provided to the Department on or before the March 1, 2018 deadline. To facilitate customer compliance with Colorado law, however, the Department will encourage non-collecting retailers, to the extent practicable, to include all reportable 2017 customer purchases in the Customer Information Report provided to the Department on or before March 1, 2018. The first Customer Information Reports required of non-collecting retailers shall be filed with the Department by March 1, 2018.

4. The Parties agree and understand that this Agreement is a public record subject to disclosure pursuant to the Colorado Open Records Act, Title 24, Article 72, Part 2, C.R.S. This Agreement does not contain any confidential taxpayer information pursuant to section 39-21-113, C.R.S. The Parties may disclose and publicize this Agreement

without restriction. The Department agrees to inform non-collecting retailers of their obligations in accordance with the terms of this Agreement through information timely presented on its website, www.colorado.gov/revenue.

5. The Department shall not adopt any amendments to the Regulations, or any new rules or regulations, inconsistent with the terms of this Agreement. The Department may otherwise convene working groups and engage in rulemaking proceedings regarding the requirements of the Act.

6. The DMA, for itself, its officers and directors, hereby covenants not to bring suit against the Department, the State of Colorado or any department or political subdivision thereof in state or federal court challenging the Act and/or Regulations as enacted, promulgated, and enforced. Neither DMA nor any of its officers and directors shall promote or support any action challenging the Act or Regulations by any other party against the Department, the State of Colorado, or any department or political subdivision thereof.

7. Each party shall bear its own costs and attorneys' fees associated with the Federal and State Actions, except that the DMA has stipulated that it will pay the Department's costs as set forth in the Department's Bill of Costs filed November 15, 2016 in the Federal Action.

8. The Parties enter this Agreement based on the valuable consideration and mutual promises described herein, the receipt and adequacy of which is specifically acknowledged by each of the Parties. This Agreement is intended as the complete integration of all understandings between the Parties. No prior or contemporaneous addition, deletion, or other amendment to this Agreement shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written agreement properly executed by the Parties. This Agreement and any properly executed amendments shall be binding upon the Parties, their successors and assigns.

9. Nothing in this Settlement Agreement prevents the DMA from filing suit to challenge any other statute enacted by the Colorado General Assembly or regulation promulgated by the Department, or prevents the Department or the Executive Director from enforcing any other statute enacted by the Colorado General Assembly or regulation promulgated by the Department.

10. This Agreement and all rights and obligations hereunder, including matters of construction, validity and performance, shall be governed by and construed in accordance

with the laws of the State of Colorado. The Court shall retain jurisdiction over any action regarding the interpretation and/or enforcement of this Settlement Agreement. Venue for any litigation arising out of this Agreement shall be in the District Court for the City and County of Denver, State of Colorado.

11. The DMA represents and warrants that it has taken all actions that are necessary or that are required by its procedures, bylaws, or applicable law to legally authorize the undersigned signatory to execute this Agreement on behalf of the DMA, and its officers and directors and to bind the DMA, and its officers and directors, to its terms. The person executing this Agreement on behalf of the DMA warrants he or she has full authorization to execute this Agreement.

12. This Agreement may be executed in counterparts. Facsimile and PDF copies of the Parties' signatures shall be treated as originals. This Agreement shall be effective upon execution by both Parties.

**This Agreement is made and is effective as of the last date written below.**

**FOR DMA:**

By:_____
Thomas J. Benton, CEO

Dated: 02/15/17

**FOR THE DEPARTMENT:**

By:_____
Barbara J. Brohl, Executive Director

Dated: 2/22/17

**EXHIBIT A**

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| DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO<br>1437 Bannock Street<br>Denver, CO 80202 | |
| THE DIRECT MARKETING ASSOCIATION, a New York nonprofit corporation,<br><br>Plaintiff,<br><br>v.<br><br>COLORADO DEPARTMENT OF REVENUE and BARBARA BROHL, in her capacity as Executive Director, Colorado Department of Revenue,<br><br>Defendants. | |
| George S. Isaacson (Maine Bar No. 1838)<br>Matthew P. Schaefer (Maine Bar No. 7992)<br>Brann & Isaacson<br>184 Main Street, P.O. Box 3070<br>Lewiston, ME 04243-3070<br><br>Adam W. Chase (No. 20750)<br>Keith M. Edwards (No. 42666)<br>Emily M. Nation (No. 43738)<br>Hutchinson Black & Cook<br>921 Walnut Street, Suite 200<br>Boulder, CO 80302<br><br>***Attorneys for Plaintiff***<br><br>Cynthia H. Coffman, Attorney General<br>Melanie J. Snyder (No. 35835)<br>Stephanie Lindquist Scoville (No. 31182)<br>Grant T. Sullivan (No. 40151)<br>Ralph L. Carr Colorado Judicial Center<br>1300 Broadway, 8th Floor<br>Denver, CO 80203<br><br>***Attorneys for Defendants*** | **▲ COURT USE ONLY ▲**<br><br>Case No. 13 CV 34855<br><br>Courtroom/Division: 209 |

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE AND MOTION TO DISSOLVE PRELIMINARY INJUNCTION FORTHWITH**

The Plaintiff, the Data & Marketing Association, formerly known as the Direct Marketing Association, Inc. ("DMA"), and the Defendants, the Colorado Department of Revenue and Barbara J. Brohl, in her capacity as the Executive Director of the Colorado Department of Revenue, hereby jointly stipulate that:

a. the DMA, a New York nonprofit corporation, solely for itself, its officers, and its directors, dismisses its dormant Commerce Clause and non-dormant Commerce Clause claims, with prejudice;

b. the preliminary injunction issued February 18, 2014, shall be dissolved forthwith; and

c. each Party shall bear its own costs and attorneys' fees.

Respectfully submitted this ___ day of February, 2017.

***Attorneys for Plaintiff:***


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## CERTIFICATE OF SERVICE

I certify that on this ___ day of February, 2017, the foregoing **JOINT STIPULATION OF DISMISSAL WITH PREJUDICE AND MOTION TO DISSOLVE PRELIMINARY INJUNCTION FORTHWITH** was served upon the following:

*s/*_____