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Advisory

August 13, 2003

COMMUNICATIONS LAW

Do Not Call: A Summary of New FTC and FCC Regulations for Telemarketers

The Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) have regulated telemarketing since the early 1990s. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, which required the FCC to enact rules to protect residential telephone subscribers' privacy rights to avoid receiving unwanted telephone solicitations. In 1994, the Telemarketing Act was signed into law and required the FTC to issue a Telemarketing Sales Rule (TSR) prohibiting deceptive or abusive telemarketing acts or practices. 15 U.S.C. §§ 6101-08. In addition to federal regulation, numerous states have enacted their own laws to regulate telemarketing practices.

Recent amendments to both the TCPA and the TSR have resulted in tougher regulation for telemarketers and more options for consumers to avoid unwanted telemarketing calls. Following is a summary of the new regulations adopted by the FTC and the FCC and an analysis of how each agency's rules apply to telemarketers as well as companies who use third party telemarketing firms to conduct solicitations on their behalf.

The FCC and the Telephone Consumer Protection Act

Following a rulemaking proceeding in which it determined that the changes in the telemarketing industry over the past decade required modification to existing rules, the FCC released amendments to the TCPA on July 3, 2003. The TCPA regulates telephone marketing calls and practices that are considered an invasion of consumer privacy, and in some cases, a threat to public safety. The FCC's new rules implement "do-not-call" regulations that allow consumers to opt out of unwanted telemarketing calls. The rules also place restrictions on telemarketers when placing telephone marketing calls. All companies that participate in telemarketing, either through their own telemarketing efforts or by hiring direct marketing firms that make telemarketing calls on their behalf, should be aware of these new rules and their potential consequences. Highlights of the FCC's rules include:

- **Predictive Dialers, Caller ID Blocks, Unsolicited Faxes.** The FCC banned or tightly regulated automated dialing systems, which include predictive dialers, artificial and pre-recorded messages, caller ID blocking mechanisms, and the use of telephone facsimile machines to send unsolicited advertisements. The FCC determined that these practices inappropriately shift marketing costs from sellers to consumers, and in some cases, threaten public safety. By regulating the use of these technologies, the FCC intended to address and reduce customer complaints about some of the worst abuses of telemarketing.
- **Abandoned calls.** The FCC's rules require that a telemarketer may abandon no more than three percent of calls answered by a consumer. When abandoning a call, a telemarketer must deliver a pre-recorded message within two seconds after the consumer answers the call. This is known as the "two-second transfer rule."
- **Caller ID transmission.** The FCC's rules require telemarketers to transmit called ID information to a consumer's caller ID equipment, where available.
- **Company-specific do-not-call lists.** In addition to the national list, consumers may also, if they wish, use company-specific do-not-call registries that were required to be maintained by telemarketers by earlier FCC rules to eliminate even the chance of being called by a telemarketing

entity under the established business relationship exemption.

- **Calls to wireless telephone numbers.** It is unlawful to make any call to a wireless telephone number using an automatic dialing system or artificial or pre-recorded message. Live telemarketing calls to wireless telephone numbers are, however, subject to the same requirements as calls to landline telephone numbers.
- **State telemarketing laws limited to intrastate calls.** The FCC determined that states will be permitted to continue to use their own do-not-call lists, but states that do so must include in their own registry that part of the national do-not-call database related to that state. The FCC rules set a floor for state "do-not-call" requirements, but states can adopt even *more* restrictive laws for *intrastate* telemarketing calls. States cannot regulate *interstate* telemarketing calls in a manner inconsistent with federal rules.
- **The Established Business Relationship exemption.** The FCC rules allow a company to call a customer with whom it has had an "established business relationship" within *18 months* of the consumer's last "purchase or transaction." Even where the consumer has only made an "inquiry or application regarding products or services offered by" the company, the "established business relationship" exemption continues for *three months* from the date of such an inquiry or application.

During the TCPA rulemaking there was a fair amount of controversy about whether the "established business relationship" exemption should apply to telemarketed offers for different products and services offered by the same company that has currently, or had in the recent past, a business relationship with a customer based on only one type of service that the company offered. The FCC agreed that companies could call for 18 months about their additional products and services beyond the service previously sold to the customer. The FCC, however, did not apply the existing business relationship exemption in the same manner to "affiliates" of a covered entity with which the consumer has an established business relationship. The exemption from the do-not-call list would not apply "unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate." The example the FCC gives of an *included* affiliate is a Bell Operating Company that jointly markets the services of its long-distance affiliate. The FCC, however, did not adopt one commenter's position that the exemption should extend to a common carrier's unaffiliated "marketing partner" for purposes of telemarketing joint offers.

The FTC and the Telemarketing Sales Rule

The FTC promulgated its amended rules as part of the Do-Not-Call Implementation Act, Pub. L. No. 108-10 ("Do-Not-Call Act"), enacted by

Congress earlier this year. The Do-Not-Call Act's biggest change to the Telephone Sales Rule is the establishment of a national do-not-call registry that will require covered telemarketers to search the registry every three months and synchronize their marketing lists with the numbers on the registry. While the FTC will administer the registry, the FTC and the FCC will jointly enforce compliance with the registry.

The FTC's rules provide for an established business relationship exemption similar to the FCC's rules. A company with whom a customer has an established business relationship may call the customer for 18 months after the customer's last purchase, unless the customer asks that the company not call the customer again. Telemarketers may call individuals who make inquiries or submit applications to companies for up to three months after the individual contacts the company.

In addition, the amended TSR contains provisions that:

- **Restrict unauthorized billing.** Telemarketers must obtain a customer's express informed consent to charge a specific amount to the customer's credit card. Where telemarketers already have a customer's billing information on file from a previous transaction, the telemarketer must ask the customer to confirm the credit card number by repeating the last four digits on the card and must record the entire phone transaction for the customer's protection.
- **Reduce abandoned calls.** Effective October 1, 2003, telemar-

eters will be required to connect consumers to a sales representative within two seconds of the consumer's greeting. Where telemarketers make calls using automated dialing equipment and a representative is not standing by, a recorded message must play, letting the consumer know who is calling and what number they are calling from.

- **Require caller ID transmission.** Effective January 29, 2004, telemarketers must transmit their telephone number and, if possible, their name, to customers' caller ID service.

Enforcement of Telemarketing Rules by the FCC Versus the FTC

The FCC's TCPA and the FTC's Telemarketing Sales Rule are parallel regimes of regulation. Each agency's rules apply to those entities subject to the agency's jurisdiction. The FTC's jurisdiction over telemarketing extends to those entities subject to the FTC's jurisdiction under the FTC Act, which include most for-profit businesses and sellers. The FTC's rules under the Do-Not-Call Act apply to these entities' plans, programs or campaigns to sell goods or services through interstate phone calls, but do not extend to companies' intrastate telemarketing calls. Additionally, the FTC's rules do not cover in-house calls made by common carriers or calls by airlines, banks, credit unions, savings and loans, and companies engaged in the business of insurance. The FTC's rules also do not apply to non-profit organizations unless they use for-

profit telemarketers for marketing purposes. Finally, the FTC's rules do not preempt state do-not-call laws. At this time, 38 states have their own telemarketing laws.

The FCC's rules are intended to be consistent with the FTC's rules. The FCC's authority under the TCPA allows it to regulate solicitations to residential telephone subscribers. The FCC's rules apply without exception to any entity engaged in any of the telemarketing activities targeted by the TCPA and the FCC's rules, but they do not apply to (a) calls to residential telephone subscribers made by tax-exempt non-profit organizations, such as charities, or (b) calls placed to business telephone numbers. The FCC's rules also do not apply to non-profit organizations, unless a for-profit organization is conducting telephone marketing on their behalf.

The FCC agreed with the FTC that one national do-not-call list is preferred, so the FCC approved the national do-not-call registry established by the FTC for consumers who wish to avoid telemarketing calls and did not establish a separate list. The FTC will administer and maintain the database, and the FCC will participate in enforcing compliance with the registry.

The FCC recognized that the FTC's rule changes expanded the FTC's jurisdiction over telemarketing significantly. However, significant gaps exist in the FTC's authority over telemarketing activities. The FCC's rules are designed to co-exist with the FTC's rules, and as a result, create an overlap in federal regulation.

Telemarketers may be subject to both FTC and FCC rules. The FCC has therefore stated that its enforcement efforts will focus on those entities that are outside the scope of the FTC's jurisdiction, including common carriers, banks, insurance companies, and airlines. However, the FCC plans to assume a prominent role in enforcement in the telemar-

keting area and will not limit its enforcement activities to only activities, transmissions, or entities outside the FTC's jurisdiction. The FTC and the FCC will jointly negotiate a Memorandum of Understanding that outlines the agencies' overlapping as well as conflicting areas of regulation and creates uniform national regulations and an effective

enforcement strategy. The FCC, along with the FTC and the states, will begin enforcing the national do-not-call registry and their respective regulations on October 1, 2003.

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Please call if you have any questions as to the application of the FCC's or FTC's rules in specific circumstances.