

The National Do-Not-Call Registry

The Federal Trade Commission (FTC) recently announced that it has begun to implement its national do-not-call registry and that it expects that the registry will be fully operational by September 2003. Pursuant to recently enacted changes to the FTC's rules implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act (the Telemarketing Sales Rule), the national do-not-call registry will significantly impact telemarketing practices. Consumers can begin putting their names in the registry in July 2003, although the FTC will not begin enforcement until October 2003. Violations could incur fines of up to \$11,000. Businesses are not eligible to be listed in the national do-not-call registry.

In addition, the Federal Communications Commission (FCC), which has jurisdiction over all telemarketers (including those that are exempt from the Telemarketing Sales Rule), has an open rulemaking proceeding that is considering creation of a do-not-call list. The FCC is expected to issue its new rules in this area in the summer of 2003.

Specifically, once the FTC's registry is operational, it shall be an "abusive telemarketing act or practice" to call anyone whose telephone number appears on the registry and engaging in such an act or practice subjects a telemarketer to various enforcement actions and penalties by the FTC, states, and private parties. Furthermore, telemarketers are effectively required to access the registry and update their calling lists of registered names every three months.

A telemarketer, however, may call an individual in the national do-not-call registry, if the telemarketer has received express written authorization or if the telemarketer has an "established business relationship." An "established business relationship" exists where a consumer has: (1)

purchased, rented, or leased goods or services from the seller in the past eighteen months; or (2) made an inquiry or application regarding the seller's products or services in the past three months. Even where an established business relationship exists, however, such a consumer may not be called if they have stated that they do not wish to be called.

A telemarketer will not be liable for calling a number that is listed on the registry if it can demonstrate that: (1) it has established and implemented written procedures for complying with the rule; (2) it has trained its personnel in such procedures; (3) it has maintained a list of telephone numbers that it may not contact because that person has previously stated that he or she does not wish to receive calls from the telemarketer; (4) it has established a process to prevent telemarketing to numbers on the do-not-call registry employing a version of the registry obtained from the Commission no more than three months prior to the date of the call and maintains records documenting this process; (5) it monitors and enforces these procedures; and (6) any subsequent call in violation of the rule is the result of error.

The Telemarketing Sales Rule (TSR) applies to any person engaged in "telemarketing" which is defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." By way of example, market research, debt collection, or political campaign activities are not covered by the rule because they are not conducted to induce the purchase of goods or services or a charitable contribution.

Solicitations to induce charitable contributions (as well as sales of nondurable office or cleaning supplies) are specifically exempted from the do-not-call registry rules. Thus, it is permissible to solicit charitable contributions from individuals who list their phone numbers on the national do-not-call registry. Sales of franchises, pay-per-call services, and business-to-business telemarketing (excluding

sales of nondurable office or cleaning supplies) remain exempt from most provisions of the Telemarketing Sales Rule. Certain nonprofit organizations, banks, credit unions, savings and loans, common carriers engaged in common carrier activity, and insurance companies regulated by state law also remain exempt from all provisions of the FTC Act and, thus, the Telemarketing Sales Rule; however, if these entities hire an outside telemarketer to conduct their telemarketing, then that telemarketer is nevertheless subject to the Telemarketing Sales Rule. Additionally, firms that sell investments and are subject to SEC or CFTC jurisdiction are also exempt from the Telemarketing Sales Act.

Other changes to the Telemarketing Sales Rule that were recently adopted by the FTC include the following:

- A for-profit telemarketer soliciting on behalf of a charitable organization must promptly identify both the organization and the fact that the call is being made to solicit a charitable contribution.
- Telemarketers soliciting charitable contributions are not required to comply with the national do-not-call registry, but are required to accept and honor an individual consumer's specific request that they do not call.
- Call abandonment is prohibited, with a "safe harbor" provided for telemarketers if they meet the following four requirements: (a) ensure that no more than three percent of calls that are answered by a person are abandoned, measured per day per calling campaign; (b) allow each called consumer's telephone to ring for at least 15 seconds or four rings before disconnecting; (c) connect each call to sales representative within two seconds of the consumer's greeting, or, if a sales representative is not available to speak with the consumer within two seconds of the call being answered, play a recorded message stating the name and telephone number of the seller, which cannot include a sales pitch; and (d) maintain records showing compliance with the requirements for abandonment rate, ring time and recorded message.
- The amended TSR expands the requirement that a seller or telemarketer obtain a consumer's express verifiable authorization to be billed, to cover any payment method that does not already afford the consumer the liability limits and dispute resolution protections of the Fair Credit Billing Act or the Electronic Funds Transfer Act.

- The TSR requires that when the written confirmation method of obtaining express verifiable authorization is used, the confirmation must be sent, via first class mail, in an envelope clearly labeled as a confirmation. The written confirmation method is not allowed when a seller or telemarketer possesses pre-acquired account information and offers the goods or services on a free-to-pay conversion basis – that is, when the consumer is allowed to try out the goods or services for free for a limited time and then be charged automatically. When the oral authorization method of express verifiable authorization is used, two additional pieces of information must be provided to the customer or donor: the billing information, in specific, understandable terms so the customer knows that he or she will be billed, and the date the charge will be submitted for payment.
- Telemarketers are not allowed to traffic in unencrypted consumer account numbers for telemarketing. Telemarketers may not buy or sell unencrypted consumer account numbers.
- Telemarketers must obtain the consumer's "express informed consent" before submitting a charge for payment. The new TSR specifies that unauthorized billing is an abusive practice.
- In transactions involving pre-acquired account information and free-to-pay conversion offers, a company can obtain "express informed consent" only by doing all three of the following things: (1) obtaining the consumer's express agreement to be charged using a particular account number; (2) requiring the consumer to recite at least the last four digits of the account number to be charged; and (3) making an audio recording of the entire telemarketing transaction, not just a verification after the initial sales pitch.
- Telemarketers will be required to transmit their telephone number, and if possible, their name, to consumer's caller ID services. This provision will take effect one year after release of the amended TSR.

Clients who engage the services of a third party to conduct telemarketing should be certain that the contractual arrangements include indemnification provisions to protect against violations of the Telemarketing Sales Rule by the telemarketer. For more information on the Telemarketing Sales Rule and how it

can affect your business plans, please contact any of the lawyers in the Communications Practice Group.

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