

**To: All Clients**

**September 9, 2008**

**FTC AMENDS RULES FOR PRERECORDED TELEMARKETING CALLS;  
AMENDED RULE CONFLICTS WITH FCC'S RULES FOR  
TELEPHONE SOLICITATIONS UNDER THE TCPA**

The Federal Trade Commission (FTC) recently amended its Telemarketing Sales Rule (TSR) regarding prerecorded calls. The amended rule applies to every business (including broadcasters) that uses prerecorded interstate calling services to sell goods and services in the U.S., except for common carriers, banks, healthcare and insurance providers, non-profit entities, and a limited number of other entities that are outside the jurisdiction of the FTC. Purely informational prerecorded calls, such as appointment reminders, delivery times or travel updates, are not subject to the TSR because they do not attempt to sell goods or services to the called party. Promotional calls by broadcasters to encourage listenership or viewership that do not also attempt to sell goods or services are exempt for the same reason.

Regulatory Conflict over Prerecorded  
Telemarketing Calls to Consumers with  
Existing Business Relationships

The most significant change in the TSR is the prohibition on telemarketing sales calls that deliver prerecorded messages, whether answered in person by a consumer or by an answering machine or voicemail service, unless the seller has previously obtained the recipient's signed, written agreement to receive such calls. The FTC no longer allows for an "existing business relationship" (EBR) exception. This change conflicts with the Federal Communications Commission's (FCC) regulations under the Telephone

Consumer Protection Act (TCPA), which allows an EBR exception. Sellers may obtain the required permission for prerecorded message sales calls from a consumer electronically as permitted by the Electronic Signatures In Global and National Commerce Act (E-SIGN Act), or by obtaining a manual signature. Verbal consent is not sufficient.

Prior to obtaining written consent, a consumer must first be provided a clear and conspicuous disclosure that he or she is consenting to receive prerecorded calls, and such consent must not be a condition of purchasing any good or service.

The FTC's TSR applies only to interstate telemarketing calls made by covered entities (which includes broadcasters), whereas, the FCC's TCPA applies to all interstate and intrastate calls. Nonetheless, if an entity subject to the FTC's jurisdiction will be placing both in-state and out-of-state prerecorded calls, it would be prudent to follow the stricter standard of the FTC's TSR.

Telemarketing calls delivered by a live person are still permissible without obtaining prior written consent as long the calls comply with the other requirements of the TSR, including that calls must be made between 8 AM and 9 PM and that the caller must disclose material restrictions, limitations or conditions that would likely



affect a person's choice to purchase goods or services.

New Requirements for Prerecorded Calls

Any prerecorded telemarketing call must:

- 1) allow the telephone to ring for at least 15 seconds or four rings before an unanswered call is disconnected;
- 2) begin the prerecorded message with the mandatory disclosures of the seller's identity, purpose of the call, nature of the goods and services, and if applicable, specific information related to a prize promotion within two seconds of a completed greeting by the consumer who answers;
- 3) disclose at the outset of the call that the recipient may ask to be placed on the company's do-not-call list at any time during the message;
- 4) in cases where the call is answered by a person, make an automated interactive voice and/or keypress-activated opt-out mechanism available during the message that automatically adds the phone number to the company's Do-Not-Call list and then immediately disconnects the call; and
- 5) in cases where the call is answered by an answering machine or voicemail, provide a toll-free number that allows the person called to be connected to an automated interactive voice and/or keypress-activated opt-out mechanism anytime after the message is received.

Call Abandonment Rate Calculation

At least 97 percent of a telemarketer's calls must be answered in person - not by an answering machine - and be connected to a salesperson within two seconds after a consumer answers. The FTC believes this will minimize the number of "dead air" and "hang-up" calls that result when no

salesperson is available to take the call. The amendment permits this call abandonment rate to be calculated over a 30-day period, or any part thereof, rather than on a daily basis as required in the past.

Effective Dates

The amendment requiring written permission from consumers to receive prerecorded telemarketing calls will become effective September 1, 2009.

The amendment requiring that all prerecorded telemarketing calls provide an automated interactive opt-out mechanism will become effective on December 1, 2008.

The amendment modifying the method for measuring the maximum allowable rate of call abandonment will become effective on October 1, 2008.

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If you have any questions concerning these TSR amendments or telemarketing regulations in general, please contact an attorney in our office at (202) 429-8970.

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