



FCC Revises Telemarketing Rules; Delays New Fax Advertising Rules

On July 3, 2003, the Federal Communications Commission (the “FCC” or “Commission”) issued a Report and Order (“Order”) amending the rules that implement the Federal Telephone Consumer Protection Act of 1991 (“TCPA”). The amended rules establish the National Do-Not-Call Registry, and require telemarketers to provide caller ID information. The FCC also modified existing restrictions on autodialing and the sending of prerecorded messages, and attempted to clarify its position on the use of such telemarketing practices by radio and television stations. The Commission also moved to more strictly limit the circumstances in which unsolicited faxes may be distributed, while narrowing the liability exceptions applicable to fax broadcasters, but delaying enforcement of some of the fax provisions until January 1, 2005.

1. National Do-Not-Call Registry

The FCC in these amended rules, and the Federal Trade Commission (“FTC”) in the recently amended Telemarketing Sales Rule (“TSR”), together established the National Do-Not-Call Registry. Both the amended TCPA and TSR prohibit companies from contacting any consumer that (1) specifically asks not to be called or (2) has registered with the National Do-Not-Call Registry (“National Registry”) (operated by the FTC on behalf of both agencies). Although recent court challenges seek to invalidate the National Registry, enforcement of the National Registry began on October 1, 2003. Therefore, companies required to access the National Registry and remove the numbers on the National Registry from their calling lists must have done so by October 1, 2003 to be in compliance.

Exceptions to the do-not-call rules permit businesses to make unsolicited phone calls to numbers on the National Registry only if the business has either: (1) express written consent from the customer; (2) an established business relationship, defined under the amended rules to allow a company to contact a customer for eighteen months after a business transaction and three months after an inquiry or application; (3) exempt status as a nonprofit organization; or (4) a personal relationship with the consumer. Additionally, calls that are not “telephone solicitations” are not restricted by do-not-call requirements. Such permissible calls include market research, surveys, or calls constituting political or religious speech.

States may impose more stringent telemarketing and do-not-call rules governing intrastate telemarketing. Therefore, companies that conduct intrastate telemarketing must be careful to comply with both state and federal telemarketing and do-not-call rules.

2. Caller ID

Both the amended TCPA and TSR require telemarketers to transmit caller ID information to any caller ID service in use by the recipient and prohibits telemarketers from blocking such



information. Caller ID information is required for all telephone solicitations, including faxes and prerecorded messages, whether delivered by automated dialing equipment or by a live person. Prerecorded messages must identify the name and telephone number of the telemarketer or the company on behalf of which a call is placed.

The caller's name, for purposes of the TCPA, must include the legal name under which the business, individual or entity calling is registered to operate, and may be supplemented by an alias or "d/b/a." The telephone number supplied must be operational during normal business hours (*i.e.*, 9 a.m. – 5 p.m., Monday through Friday). The caller ID provisions of the amended TCPA and TSR go into effect on January 29, 2004.

3. Automated Dialing Systems

The amended TCPA and TSR tighten the restrictions on automatic telephone dialing systems such as autodialers, which deliver prerecorded messages to large numbers of potential customers, and predictive dialers, which initiate phone calls while telemarketers are talking to other consumers, and which frequently abandon calls before a telemarketer is free to take the next call.

Specifically, the rules limit the number of calls that may be "abandoned" using predictive dialers. Under both sets of rules, a call is considered "abandoned" if it is not transferred to a live sales agent within two seconds of the recipient's greeting. To reduce the number of phone calls that result in "hang up" or "dead air" due to abandonment, the amended rules require that predictive dialers abandon no more than three percent of all calls placed and answered by a person. Telemarketers are also required to deliver a prerecorded identification message when abandoning a call.

4. Prerecorded Messages

The current TCPA provision restricts sending prerecorded messages to residential telephone lines but exempts calls made for a commercial purpose that do not include any unsolicited advertisement is defined. This exception left open the question of how an unsolicited advertisement under the rule, a question of particular concern to radio and television broadcasters who may send prerecorded messages encouraging listeners or viewers to tune in for a chance to win a prize, or simply to listen or watch.

In the Order, the FCC attempted to clarify the definition of an unsolicited advertisement but may have further muddied the waters. The FCC stated that the rule does not preclude the delivery of prerecorded messages by radio and television stations inviting a consumer to listen to or view a broadcast. Under the amended rule, such commercial calls are permissible as they do not "include the transmission of any unsolicited advertisement" under the current rules and do not "include or introduce an unsolicited advertisement or constitute a telephone solicitation" under the amended rules.



However, the FCC went on to explain that the amended rules prohibit messages that “are a part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services.” Narrowly construed, this language seems to bar prerecorded advertisements that ask consumers to enter a contest that has a commercial sponsor. The FCC also states that messages that encourage consumers to listen to or watch programming would be considered advertisements under its rules.

Follow-up conversations with FCC staff regarding their interpretation of this section of the Order confirm that while pre-recorded messages inviting consumers to listen or view a broadcast are acceptable under the amended TCPA rules, a pre-recorded message inviting a consumer to listen to win and containing a reference to an advertiser-sponsored contest or to station programming may not be acceptable under the amended rules. Further clarification of this issue is being sought.

5. Unsolicited Facsimile Messages

The amended rules will make it more difficult to send unsolicited faxed messages containing advertisements. The Order prohibits businesses from sending unsolicited facsimile advertisements by telephone facsimile machine, computer or other device without obtaining prior consent from the recipient. Consent must be in writing and include the recipient’s signature and fax number.

The previous rules allowed unsolicited faxed advertisements to be sent if there was an “established business relationship” between the sender and recipient of the fax. In this Order, the FCC determined that the “established business relationship” would no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements. Instead, the Commission concluded that the recipient’s express invitation or permission must be in writing and include the recipient’s signature. The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and must provide the individual’s or business’ fax number to which faxes may be sent.

Under these rules, both an advertiser and a third-party fax broadcaster may be held jointly and severally liable for violations of the rule where both parties demonstrate a “high degree of involvement” in the delivery of unsolicited faxed advertisements. Therefore, stations that hire direct marketing companies to send faxed advertisements to listeners must themselves comply with the new rules.

The amended fax rules went into effect on August 25, 2003. However, several recent court challenges to the new rules from business groups, mostly in opposition to the prior written consent aspect of the unsolicited fax rule, have prompted the FCC to delay enforcing the provision that eliminates the “established business relationship” exception until January 1, 2005. Therefore, until January 1, 2005, stations may continue to transmit unsolicited facsimile advertisements to recipients with whom they have an “established business relationship.” If the



station does not have an “established business relationship” with a recipient, the station must get prior written consent to send the fax.

6. Consumers Have a Private Right of Action Against Violators

Consumers have two separate private rights of action for violations of the TCPA. A consumer may file suit immediately in state court if a telemarketer violates the TCPA’s prohibitions on the use of artificial or prerecorded voice messages, automatic dialing systems, or unsolicited facsimile advertisements. A consumer may also sue after any twelve-month period in which the consumer receives two or more telephone calls from or on behalf of the same company in violation of the telephone solicitation rules.