

February 22, 2005

FCC Clarifies Telemarketing Rules

On February 18, the Federal Communications Commission (FCC) released its Second Order on Reconsideration (the "Order") of its 2003 Report and Order implementing the Telephone and Consumer Protection Act (TCPA). The Order clarifies several aspects of the FCC's telemarketing rules, including the regulations governing the National Do-Not-Call Registry; the established business relationship exception; company-specific do-not-call requests; artificial and prerecorded messages; and non-profit entities.

National Do-Not-Call Rules

The FCC's rules forbid initiating a telephone solicitation to any residential subscriber who has placed his or her telephone number on the National Do-Not-Call Registry. Several petitioners raised questions with the FCC about the administration and operation of the Registry, and the scope of the Do-Not-Call rules. In the Order, the FCC:

- Declined to exempt calls to home-based businesses – in contrast with Federal Trade Commission (FTC) guidance – but rather determined to review such calls on a case-by-case basis to determine whether a particular call was made to a "residential subscriber."
- Declined to exempt certain entities or categories of entities (including newspapers, real estate agents, and insurance agents) unless a call would otherwise fall with an exception.
- Declined to exempt telephone solicitations to individuals based on referrals.
- Clarified that calls made to purchase a product offered by a residential subscriber are not covered by the rules, because they fall outside the definition of a "telephone solicitation."
- Clarified that common carriers may provide the required annual do-not-call notice to subscribers not only by means of a bill insert, but also in a separate, clear and conspicuous message on a paper or Internet bill that the subscriber has opted to receive.

Established Business Relationship Exception

The TCPA exempts from the requirements of the Do-Not-Call Registry calls to individuals with whom an entity has an established business relationship. Under both FCC and FTC rules, an established business relationship is one where a consumer engaged in a transaction with an entity within 18 months preceding the call, or made an inquiry of an entity regarding a product or service within three months of a call. In response to petitions for reconsideration, the Order:

- Clarified that an established business relationship remains in effect throughout the life of a financial agreement, such as a bank account, insurance policy, or mortgage, so that the primary company (e.g., the bank or insurance company) may call its customer at any point while the account is active – even if the customer has not transacted business on the account within the prior 18 months.

- Clarified that, in contrast, intermediaries – such as mortgage brokers and insurance agents – may call customers only within the 18 months after those intermediaries completed their portion of the transaction (*i.e.*, arranged the mortgage or established the insurance policy).

Company-Specific Do-Not-Call Requests

The FCC's rules prohibit an entity from initiating a call for telemarketing purposes to an individual who has requested that the entity no longer call him or her. In the Order, the FCC:

- Clarified that a company-specific do-not-call request must be honored for five years from the date of the request, regardless of whether the request was made prior to the effective date of the existing telemarketing rules.
- Affirmed that telemarketers must honor a company-specific do-not-call request within 30 days after the request is made.

Artificial and Prerecorded Messages

The TCPA prohibits calls to residential subscribers using an artificial voice or prerecorded message subject to limited exceptions, including with prior express consent or if the call either is not commercial or is commercial but does not contain an advertisement or solicitation. In addition, the FCC's rules impose requirements on the substance of any artificial and prerecorded messages that are delivered, including that they state the registered name and telephone number of the calling party. Reconsideration petitions asked the FCC to clarify these requirements in several specific circumstances. The Order therefore:

- Clarified that “information-only” calls promoting goods or services at no cost constitute advertisements or solicitations because they describe the quality of, and may be part of a broader effort to sell, goods or services – and that they therefore generally may not be delivered using a prerecorded message.
- Clarified that the “prior express consent” required to send lawfully a prerecorded message need not be in writing, although telemarketers must be able to establish such consent by clear and convincing evidence.
- Affirmed that prerecorded messages inviting individuals to listen to or view a free radio or television broadcast are lawful as commercial calls that do not include an advertisement or solicitation, but that prerecorded messages promoting broadcasts for which consumers must pay (*e.g.*, cable or satellite) are not.
- Clarified that debt collectors are not required to disclose their state-registered names in prerecorded messages if doing so would conflict with other laws.

Non-Profit Entities

The TCPA exempts calls made by tax-exempt non-profit organizations from the definition of a “telephone solicitation.” In light of this, the FCC has held that calls made not only by non-profits, but also by third-party agents acting on behalf of non-profits, are not covered by its telemarketing rules. However, third-party telemarketers working for non-profits are likely subject to many of the FTC’s telemarketing rules other than the requirements of the Do-Not-Call Registry. The FCC’s Order:

- Affirmed that tax-exempt non-profits are not subject to the FCC’s telemarketing rules, even if they contract out their fundraising efforts to for-profit telemarketers.
- Clarified, in contrast, that for-profit entities are subject to the FCC’s rules even if they donate a portion of their proceeds to a non-profit entity.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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