



WILMER, CUTLER & PICKERING

Telecommunications Law Update

OCTOBER 3, 2003

National Do-Not-Call List Compliance

The Federal Communications Commission (FCC) and Federal Trade Commission (FTC) have both issued regulations establishing a common national do-not-call list. These new FCC/FTC regulations allow consumers to place their telephone numbers on a national list, and prohibit most (but not all) telemarketers from making calls to solicit business from those consumers. Recently, a district court blocked the FTC from enforcing its regulations on First Amendment grounds, and the FTC has appealed this decision. Telemarketers also asked the Supreme Court to block the FCC from enforcing its do-not-call regulations, but the Court rejected this request. The legal battle over the agencies' regulations will likely be played out in the coming months; in the meantime, the federal list with more than 50 million telephone numbers went into effect on **October 1, 2003** with violators subject to possible FCC enforcement actions. The following questions and answers address practical compliance issues faced by virtually every business that uses telemarketers.

NATIONAL DO-NOT-CALL LIST

Are all telemarketers covered by the do-not-call list rules? No. The list covers *commercial* telemarketers only. It does not apply to tax-exempt non-profit organizations, telephone surveyors, or calls regarding political and religious speech. These exclusions have fueled the constitutional challenge to the FTC rules, however and they may be narrowed or eliminated in future legislation or regulations. While the FTC rules do not generally apply to banks, insurance companies, and common carriers (though the FTC asserts they do apply to telemarketers hired by such entities), or to intrastate calls, the FCC rules contain no such limitations.

Are business-to-business calls exempt? Yes, with few exceptions, the rules do not apply to business-to-business calls.

How often must the do-not-call list be checked? All businesses that engage in telemarketing must access the do-not-call list, which contains only telephone numbers, and scrub their calling lists against the national list no less frequently than every 90 days. The FTC maintains the list and charges a fee for access. The list is available online at <http://telemarketing.donotcall.gov>. It provides telephone numbers of registered consumers sorted by area code. As a result of the ongoing litigation, however, the list is currently unavailable to telemarketers.

Can a telemarketer ever call a consumer whose phone number appears on the list? Yes, but only if one of the following exceptions applies:

- Telemarketers may call if they obtain the consumer's express written permission.
- A company's telemarketers may call a consumer if the company has an "established business relationship" with the consumer. This means a telemarketer may call for 18 months after a purchase or business transaction and 3 months after an inquiry or application. To use this exemption, the business must continue to maintain customer lists in the normal course of business.

Telemarketers should note that if a consumer places his or her phone number on a company-specific do-not-call list, the telemarketer may not call that consumer even if a business relationship otherwise exists.

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If a consumer's phone number does not appear on the national list, is a telemarketer free to call him or her?

Not necessarily. The current company-specific do-not-call lists remain in effect, and businesses need to continue to maintain these registries. In addition, states are free to maintain their own do-not-call lists, provided that they include registrants on the national database in these lists (within 18 months, states must start regularly downloading their lists into the national list). Accordingly, telemarketers may need to check company-specific and state lists in addition to the national list.

Do state telemarketing rules that differ from the FCC rules continue to apply? It depends on the rule. First, states generally may adopt more restrictive do-not-call laws governing telemarketing within their borders (intra-state), and telemarketers in those states should follow their rules as well. The FCC has said, however, that any state regulation of *interstate* telemarketing calls that differs from the FCC rules would be preempted if less restrictive and would likely be preempted if more restrictive, although the Commission will consider any such conflicts on a case-by-case basis. Therefore, telemarketers must comply with the federal rules even if the state in which they are telemarketing has adopted an otherwise applicable exemption. As noted above, state do-not-call lists continue to apply.

Once a consumer registers his or her phone number, how long does it remain on the list? A consumer's name will remain on the list for five years. He or she can re-enter it after five years have passed, and may remove his or her name at any time.

ADDITIONAL RESTRICTIONS ON TELEMARKETERS

In addition to establishing a national do-not-call list, the FCC's order created additional obligations for telemarketers.

May telemarketers use predictive dialing?¹ Yes, provided that they comply with the following rules. First, the predictive dialer may not abandon more than 3 percent of all calls placed and answered by a person. A call is considered "abandoned" if it is not transferred to a live sales agent within two seconds after the consumer answers the phone. This rule does not apply to pre-recorded messages sent under the "established business relationship" exception. Second, when a call is abandoned within the acceptable 3 percent range, the telemarketer must deliver a prerecorded identification stating the telemarketer's name, phone number, and that the call is for

"telemarketing purposes." Third, a telemarketer must allow the phone to ring for 15 seconds or four rings before disconnecting. Finally, telemarketers who use predictive dialers must maintain records that provide clear and convincing evidence of compliance with these rules.

May telemarketers use "war dialing?" No. The order prohibits this practice, which involves the use of technology to dial large blocks of telephone numbers in order to determine whether the line is a fax or voice line.

May telemarketers call consumers using prerecorded messages? Generally, no. The FCC order prohibits prerecorded messages containing free offers and information about commercially available goods and services, unless otherwise exempted. For example, telemarketers may send prerecorded messages to consumers with whom they have an established business relationship or whose consent they have expressly received, so long as they deliver their message within two seconds of the person's completed greeting. An entity calling with a permissible pre-recorded message must provide its name and telephone number in the message.

May telemarketers block caller ID information? No. Telemarketers must transmit caller ID information when made available to telemarketers by their telephone carrier.

When may a business send an unsolicited fax? A business may send an unsolicited fax to a consumer only if it obtains the consumer's express permission. Until January 1, 2005, an established business relationship will be considered sufficient to show the consumer has given the necessary permission. A business may also send unsolicited faxes to consumers whose permission it obtains in writing, even if no established business relationship exists. After January 1, 2005, the established business relationship will no longer suffice; a business will be allowed to send unsolicited faxes *only* to consumers who give their express permission in writing. This writing must include the fax number to be called. Fax broadcasters (that is, fax service providers) should note that they may now be liable for unsolicited faxing if they had a high degree of involvement or actual notice of the unlawful activity and failed to take steps to prevent such transmissions.

LIABILITY

What are the penalties for noncompliance? If a business calls a consumer on the do-not-call list, the consumer may file a complaint with the FCC and/or FTC. According to

¹ Predictive dialers use technology to initiate phone calls while telemarketers are talking to other consumers, attempting to predict the average length of a telemarketing call. Consumers complain about such dialers because they often hang up when a telemarketer is unavailable to take the next call, or keep the consumer on hold, resulting in "dead air."

the FCC, enforcement action could include forfeiture proceedings, cease and desist proceedings, injunctions, and revocation of common carrier operating authority. Under the FTC's rule, a business may face fines of up to \$11,000 for each violation. The agencies will work together to coordinate enforcement. Businesses also remain subject to consumer lawsuits under the Telephone Consumer Protection Act.

Is a telemarketer liable for inadvertent violations of the rules?

Not necessarily. The FCC and FTC have established a safe harbor for telemarketers who have made a good-faith effort to comply with the rules. A telemarketer is not liable for violating the national do-not-call rules if it can demonstrate that as part of its routine business practice: (1) it has implemented written procedures to comply with the rules and has trained its personnel in these procedures; (2) it has kept a list of telephone numbers it may not contact; (3) it uses a process to prevent calls to telephone numbers on any do-not-call list that it obtained, at most, three months prior to making the call and keeps records documenting this process; and (4) any subsequent call that otherwise violates the do-not-call rules is in error.

Additional information on the national do-not-call registry is available at <http://www.fcc.gov/cgb/donotcall> (FCC) and <http://www.donotcall.gov/default.aspx> (FTC).

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If you have questions or would like further information about the do-not-call regulations, please contact:

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