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## FTC Bans Prerecorded Messages in Telemarketing Calls

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On August 19, 2008, the Federal Trade Commission announced several new rules affecting telemarketing.<sup>1</sup> First, the FTC announced that by December 1, 2008, any telemarketers using prerecorded messages must implement an automated opt-out mechanism. Second, the FTC announced that it will prohibit the use of prerecorded messages in telemarketing sales calls altogether after September 1, 2009, unless customers expressly provide prior written consent to receive such calls. Finally, at the request of the telemarketing industry, the FTC also modified its method of calculating the "call abandonment rate" to allow telemarketers to use "predictive dialers" for smaller marketing campaigns and programs, such as in test markets.

The ban on prerecorded messages is stricter than both the Federal Communication Commission's telemarketing rules and the laws in effect in many states, which continue to allow the use of prerecorded messages to customers with whom the seller has an existing relationship. The FTC acknowledged this disparity, but asserted that its action creates no "conflict" for parties observing the various laws. In essence, notwithstanding the supposed "concurrent" jurisdiction of the FTC and the FCC, as well as state authority, the FTC has now taken over regulation of prerecorded messages by raising the regulatory floor.

The specific changes to the FTC's Telemarketing Sales Rule (TSR) include the following:

- *Prerecorded Call Mechanics.* The FTC imposed additional procedural requirements on prerecorded marketing calls, which become applicable as of **December 1, 2008**. These requirements will continue to apply once the more restrictive signed written consent requirement takes effect next year (see below).
  - *Call Disconnections.* Telemarketers using prerecorded messages must allow the telephone to ring for at least 15 seconds or four rings before an unanswered call is disconnected.
  - *Prompt Disclosures.* The prerecorded message must begin within two seconds of a completed greeting by the consumer who answers, and promptly deliver the disclosures required for all telemarketing sales calls, *i.e.*, the identity of the seller, that the purpose of the call is to sell goods or services, the nature of the goods or service, and that no purchase or payment is necessary to win any prize.

- *Automated Opt-Out Mechanism.* Sellers and telemarketers must provide automated mechanisms to opt-out of the receipt of further pre-recorded calls, and must inform consumers about those mechanisms immediately following the required disclosures described above. The call must notify consumers, as applicable, that:
  - In cases where a call could be answered by a person, that the person called can use an automated interactive voice and/or keypress-activated opt-out mechanism to assert a Do Not Call request at any time during the message. The mechanism must automatically place the consumer on the company-specific do-not-call list and immediately end the call. The mechanism must be available for use at any time during the message.
  - In cases where a call could be answered by an answering machine or voicemail, that the person called can use a toll-free telephone number to assert a Do Not Call request. The number provided must connect directly to such an automated opt-out mechanism.
  - If a seller or telemarketer is able to determine whether a call is answered by a person or by an answering machine or voicemail service, it may either tailor the message to include the appropriate opt-out message and mechanism or include both messages.
- *Prerecorded Message Ban.* Beginning in fall 2009, prerecorded telemarketing sales messages will no longer be permitted, whether answered by a consumer or by an answering machine, unless marketers have previously obtained the recipient's signed, written consent. Once the ban goes into effect, companies may no longer rely on the existence of an "established business relationship" to use prerecorded marketing calls--an exception that was previously permitted under the FTC's rules and that continues to be permitted under the FCC's rules. This rule becomes effective on **September 1, 2009**.
  - *Disclosure.* Signed written consent must be accompanied by clear and conspicuous disclosure to the consumer that the purpose of the consent is the authorization of prerecorded calls. The burden of proof to demonstrate adequate disclosure is on the telemarketer, and the FTC warns that obtaining consent through a disclosure in an end-user license agreement or on the back of a form will not suffice.
  - *Signatures.* The agency clarified that sellers may obtain the required signed consent from consumers in any manner permitted by the Electronic Signatures In Global and National Commerce Act (E-SIGN Act).
  - *Exemptions.* Charitable solicitations and certain health care-related calls are exempt from the prerecorded message ban. In addition, the ban does not affect "informational" prerecorded messages, such as those informing customers of flight cancellations, reminding them of service appointments, or similar messages.
- *Call Abandonment Standard.* For telemarketing campaigns using automated "predictive dialers," the FTC had previously imposed a 3% limit for call abandonment, *i.e.*, calls that are not connected to a live sales representative within two seconds after a customer answers a call. In response to industry suggestions, the FTC will now permit the 3% calculation to be done over a 30-day period, rather than on a daily basis as is now the

case. This amendment will become effective on **October 1, 2008**. This change, sought by the telemarketing industry, will help to reduce the difference on this issue between the TSR and the FCC's rules, as well as similar state requirements.

<sup>1</sup>See 73 Fed. Reg. 51, 164 (Aug. 29, 2008).