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Electronic Marketing Law: An Update on Telemarketing, Commercial Email, and Fax Advertising

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The law governing electronic communications with consumers is increasingly complex, volatile, and fraught with risk. In this bulletin, we highlight recent events affecting electronic marketing and offer a background article that explores the question: How did telemarketing law get to be such a mess?

Recent Developments

Company-Specific Do-Not-Call Requests: Time to Scrub Your List?

According to the telemarketing regulations of both the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC" or "Commission"), telemarketers may not call consumers who previously have asked those callers not to call again. Such company-specific requests must be honored, even if the consumers' telephone numbers are not listed on the national do-not-call ("DNC") registry and even if the consumers have existing business relationships ("EBRs") with the callers. (An EBR exists when the consumer has made a purchase from the caller within 18 months before the call or has inquired about the caller's product or service within 3 months before the call.)

But the duty to honor such requests may not last forever. In fact, under the FCC's rules, the residential telephone numbers of consumers who have asked a company not to call them again can be put back on the company's calling list after five years. For many large companies, the growing volume of expired or soon-to-expire DNC requests represents a huge marketing opportunity.

Companies should not, however, be *too* quick to reactivate those numbers. The FCC's five-year rule notwithstanding, the laws of a number of states impose longer terms for company-specific requests, and the FTC – which also regulates telemarketing (see "The Telemarketing Mess," below) – requires company-specific requests to be honored until rescinded.

This is not to say that a company cannot scrub its DNC list of entries of more than five years' vintage – only that it should do so after consulting state laws and determining whether its telemarketing program is subject to FTC jurisdiction.

The state law problem is especially complex. Although the states arguably may regulate only intrastate telemarketing calls (that is, calls that originate and terminate within the borders of a single state), many states insist that their laws govern interstate calls as well. The FCC, unfortunately, has failed to respond to multiple requests to preempt interstate application of those laws. Where scrubbing of old DNC requests is concerned, this leaves telemarketers with two choices: to scrub customers' numbers from their lists after five years regardless of the customers' states of residence, or to scrub selectively, continuing to honor requests in states that impose longer or indefinite retention periods. Until and unless the FCC takes action to preempt inconsistent state law, the first option presents substantial legal risk.

The FTC problem is only slightly more straightforward. That agency's jurisdiction over telemarketing is limited by the Federal Trade Commission Act, which denies the FTC power to regulate banks,

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common carriers, and certain other businesses. The FTC has acknowledged that where its rules and those of the FCC differ, the FCC rules control those entities not subject to FTC jurisdiction. Logically, this means that if a bank, common carrier, or other exempt organization has a list of company-specific DNC requests that are more than five years old, it should be able to retire those numbers after five years as the FCC permits.

But the FTC is an aggressive agency that does not hesitate to push the envelope of its jurisdiction. Where telemarketing is concerned, the FTC has announced that it *will* act against telemarketing firms that violate its rules, even where those firms are working for companies that are themselves exempt from FTC jurisdiction. Effectively, this means that a company can only enjoy the benefit of its exemption from FTC telemarketing jurisdiction if it conducts its telemarketing campaigns in-house rather than through a telemarketing vendor.

Putting all of this together, a company that wants to reactivate older numbers on its company-specific DNC list must: (1) ensure that it is exempt from FTC jurisdiction; (2) place calls to persons with reactivated numbers only through in-house personnel and facilities; and (3) decide how it will deal with consumers in states that require those requests to be honored for more than five years.

FTC Still "Hanging Fire" on Enforcement of Its Robo-Call Rules

Company-specific DNC requests are not the only point of disagreement between the FTC's rules and those of the FCC. The two agencies also differ in their treatment of calls that deliver prerecorded marketing messages (sometimes referred to in the press as "robo-calls"). The FCC permits such calls to persons with whom the caller has an EBR; the FTC does not.

The FTC's prohibition on robo-calls has always been a concealed rather than an open obstacle. In fact, the FTC's Telemarketing Sales Rule ("TSR") does not mention prerecorded messages at all. However, a careful reading of the TSR's "call abandonment" provisions shows that calls that deliver prerecorded sales messages effectively are classified as unlawful "abandoned calls" under the TSR, even when those calls are made to persons with whom the caller has an EBR. In order to understand this result, which directly contradicts the parallel regulations of the FCC, it is necessary to know more about the two agencies' call abandonment rules.

Both agencies define "abandoned calls" as calls not answered by a live sales representative within two seconds of the called person's completed greeting. If a sales representative is not available to speak with the person answering the call, that person must receive, within two seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed. The identification message may not contain a sales pitch.

The agencies' rules deal differently, however, with calls that deliver prerecorded sales messages. The FCC rules expressly state that a call placed to someone with whom the caller has an EBR is not "abandoned" when it connects to a prerecorded sales message rather than a live representative, so long as the recording begins within two seconds of the called party's greeting. The FTC's rules, however, do not contain this qualification. As a result, the FTC defines a call that does not connect to a live representative within two seconds as an abandoned call, even where that call delivers a prerecorded sales message within two seconds of a greeting from a person with whom the caller has an EBR.

Because of this difference in the two agencies' rules, the FTC and the FCC both reported, in 2003, that their rules on prerecorded calls were in conflict. Neither agency took any steps to resolve the conflict.

In November, 2003, Voice Mail Broadcasting Corporation ("VMBC") asked the FTC to confirm that delivery of a prerecorded message to a residential telephone subscriber with whom the caller has an EBR is permitted under the TSR. VMBC argued that by granting its petition, the FTC would conform its rules to those of the FCC without inviting the "dead air" and call hang-up problems that were the source of the call abandonment restrictions. VMBC also argued that callers are unlikely to abuse existing customers by using prerecorded messages excessively.

The Commission asked for comments on the VMBC proposal and announced that until the proceeding was concluded, it would "forbear" from enforcement actions against marketers who delivered prerecorded messages to persons with whom they had an EBR.

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In an order published October 4, 2006, the FTC rejected VMBC's arguments, finding that the proposed EBR-based "safe harbor" for prerecorded calls would not serve the public interest. Among other findings, the Commission concluded that permitting EBR-based prerecorded calls would lead to greater intrusions on consumer privacy, would interfere with consumers' ability to make and receive health and safety-related calls, and would erode the effectiveness of the federal Do-Not-Call Registry. More generally, the FTC found that encouraging wider use of inexpensive "prerecorded" telemarketing would increase commercial calling volumes and upset the "delicate balance" the Commission had struck between the privacy interests of consumers and the legitimate interests of businesses in contacting their existing customers. (The Commission also brushed aside the argument that it should harmonize its rules with those of the FCC.)

The FTC went beyond denial of the VMBC petition, however, and affirmatively decided to propose an amendment to its rules that would expressly prohibit "any outbound telemarketing call that delivers a prerecorded message when answered by a person, unless the seller has obtained the express agreement, in writing, of such person to place prerecorded calls to that person." Far from resolving the conflict between its rules and those of the FCC, the Commission proposed to carve that conflict in stone.

Finally, the FTC proposed to drop its policy of forbearance as to prerecorded sales messages delivered to persons with whom the caller has an EBR. Specifically, the FTC announced that, no later than January 2, 2007, it would resume active enforcement of its prohibition. In December, 2006, the FTC extended that deadline until the conclusion of the pending proceeding its rules.

For the moment, therefore, companies subject to FTC jurisdiction may continue to deliver prerecorded marketing messages to consumers with whom they have an EBR. When the present rulemaking concludes, however, with the FTC's expected adoption of a clear prohibition on robo-calls, companies subject to the FTC must cease making those calls. Companies not subject to FTC jurisdiction will be free to make such calls to consumers with whom they have an EBR, so long as those marketing campaigns are carried on in-house rather than through third-party vendors.

Telemarketer Agrees to Pay $1,000,000 Penalty

The FTC is serious about its abandoned call rules. In a stipulated judgment entered on February 2, 2007, The Broadcast Team ("TBT"), an automated telemarketer, agreed to pay $1 million in civil penalties for making "abandoned calls" and placing calls to numbers listed on the national do-not-call registry. The FTC also had accused TBT of placing calls on behalf of sellers that had not paid the required annual fee for access to the registry.

In bringing its complaint against TBT, the FTC might appear to have violated its own commitment to forbear from enforcing its abandoned call rule until conclusion of its deliberations on the VMBC petition (see previous article). However, that forbearance commitment only extended to the making of prerecorded calls to persons with whom the seller has an established business relationship. TBT and its clients apparently did not have EBRs with the persons to whom the calls were placed, with the result that the FTC's forbearance decision did not apply to TBT's conduct.

Among other things, the TBT decree underscores the FTC's determination to seek monetary penalties from companies that violate its consumer privacy, data protection, and telemarketing rules. In this sense, the decree carries on the strong enforcement policy the FTC followed in its 2005 action against Columbia House, in which a telemarketing company was assessed $300,000 for violations of the do-not-call rules.

Members of Congress Want Tougher Anti-Spam Law

On January 30, 2007, members of the House Energy and Commerce Committee sent a bipartisan letter to FTC Chairman Majoras, questioning the effectiveness of the CAN-SPAM Act of 2003 in controlling unsolicited commercial email. The Committee members' concern was prompted by reports of "explosive growth in unwanted email or spam," which suggested to the members that "CAN-SPAM has not really helped to solve the underlying problem." In light of these developments, the Committee members asked the FTC if it still believed, as it concluded in a report to Congress in December, 2005, that "the Act has been effective" in achieving its goals.

The letter also implies some doubt, not just about the adequacy of the Act, but also about the adequacy of the FTC's enforcement efforts. For example, the letter specifically reminds the FTC of its statutory authority to adopt a plan and timetable for a national "do-not-email registry" and to

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make recommendations for a system of rewards to persons who supply information about CAN-SPAM violations – programs for which the FTC has shown slight enthusiasm. In fact, the FTC recommended against adoption of a do-not-email registry in 2004, and advised Congress that same year that a rewards program would deliver "unclear" benefits and impose substantial costs. By mentioning these dormant programs, the members might be implying that the FTC has failed to take full advantage of the statutory authority it already has.

In any case, the letter raises the possibility of House Energy and Commerce Committee hearings sometime this year on the effectiveness of the CAN-SPAM Act. The FTC can be expected to point to the nearly 90 enforcement proceedings that have been brought against spammers since the Act was passed, but the members might not be appeased. Companies that use legitimate email as a marketing channel should watch any such hearings closely, especially since consumer advocates are likely to renew their demands for an "opt-in" amendment that effectively would outlaw commercial emails not previously requested by the recipients.

Background Article

The Telemarketing Mess

Telemarketing regulation, which reached its high-water mark with the adoption of the national DNC registry, has steadily eroded a lawful but deeply unpopular industry. We must reach back many years – perhaps to the prohibition on television advertising of tobacco products – to find a governmental action that works such a drastic restriction on commercial speech.[1]

As the regulatory vise was closing, telemarketers might have hoped that the narrow field of action left to them would at least be clearly defined. But, as the two lead articles in this Bulletin point out, even that favor has been denied. The rules of the road for telemarketers have only grown more uncertain, potentially increasing costs to consumers and giving larger companies an advantage over smaller companies in the conduct of their marketing campaigns. The story behind this mess is a cautionary tale of legislative and bureaucratic failure.

Like so many good horror stories, this one begins in Congress, which enacted the Telephone Consumer Protection Act ("TCPA") in 1991. The TCPA created some definite rules for telemarketers and delegated to a single federal agency – the FCC – the authority to make additional regulations as the public interest required. Unfortunately, the TCPA sowed the first seeds of confusion by failing to preempt inconsistent state laws in plain, unmistakable language. That failure led to today's bewildering patchwork of state and federal telemarketing rules.

The confusion increased drastically with enactment of the Telemarketing Consumer Fraud and Abuse Prevention Act in 1994. In this legislation, Congress gave the FTC authority to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." As the hearings and reports preceding the enactment of this law show, Congress's main concern was with fraudulent marketing schemes, of the kind the FTC already was accustomed to regulating in other contexts, that happened to be perpetrated over the telephone. Although the statute also directed the FTC to adopt time-of-day restrictions and caller identification and disclosure requirements, it did not expressly authorize the FTC to address other matters, such as prerecorded messages and do-not-call requests, that were well within the FCC's existing jurisdiction under the TCPA and the Communications Act. Unfortunately, the statute's broad mandate to the FTC to regulate "abusive" telemarketing practices blurred the boundary between the two agencies' authority. In other words, the federal-state mess was compounded by an interagency mess.

Of these two bad decisions – the failure to preempt state law and the delegation of rulemaking authority to two federal agencies rather than one – the creation of parallel regimes of telemarketing regulation at the federal level is especially hard to justify. If the FCC's jurisdiction under the TCPA had been somehow incomplete, supplemental regulation by the FTC might have made sense; but the FCC already had all the authority it needed to deal with telemarketing campaigns in all segments of the U.S. economy. In fact, it was the FTC, with its lack of jurisdiction over banks, common carriers, and various other businesses, that lacked the necessary authority to regulate all telemarketers.

The state preemption issue came to a head in 2003, when the FCC adopted its rules implementing the FTC's national do-not-call registry. Although the TCPA expressly gave the states continuing authority to regulate intrastate telemarketing calls, and gave the FCC jurisdiction to regulate both interstate *and* intrastate telemarketing, the TCPA was less clear on the subject of state regulation of

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interstate calls. Many states already had adopted their own DNC lists and a number of those states imposed restrictions on telemarketers that were more severe than those of the TCPA and the FCC's existing rules. If the states' authority extended only to intrastate calling, telemarketers might avoid the more restrictive state rules by placing all of their calls on an interstate basis. But, if the states insisted upon regulating calls placed to their residents from points outside their states, then the compliance burden would increase dramatically, and Congress's stated intention to create a uniform, nationwide regulatory regime would be frustrated.

The FCC responded to this challenge with apparent resolution. Stating that more-restrictive state laws almost certainly were preempted by the TCPA and the FCC's rules, the Commission invited telemarketers that faced state threats of enforcement action based on interstate calls to seek relief from the FCC.

Unfortunately, when preemption petitions were duly brought, the FCC simply failed to act. Political pressure from the states, and perhaps from their congressional delegations, apparently had weakened the Commission's resolve. At this writing, over eight such petitions remain pending, including a joint petition from 33 parties that was filed in April 2005.

The effect of all of this confusion can be briefly summarized.

First, on the state-federal front, telemarketers are forced to tailor their marketing campaigns around a patchwork of state laws that differ widely in critical provisions. As the joint petition filed with the FCC in 2005 pointed out, the differences include:

- Failure of many states to recognize established business relationships as an exception to calling restrictions, or state EBR definitions that are more restrictive than the EBR definition in federal law.
- Widely varying requirements concerning disclosures that telemarketers must make to persons answering telephones.
- Differences in time-of-day and holiday calling restrictions.
- Widely varying rules concerning solicitation calls by nonprofit organizations.
- Differing rules concerning the use of automatic dialing and announcing devices.
- Various requirements for registration of telemarketers and purchase of state DNC lists.

On the federal interagency front, the FTC's pending "abandoned calls" rulemaking, discussed above in our second article, typifies the confusion telemarketers face. The problem is compounded by that agency's determination to pursue third-party vendors that conduct telemarketing campaigns on behalf of entities not subject to the FTC's jurisdiction. Because of the FTC's enforcement policy, only companies that can afford to conduct their telemarketing campaigns in-house can take advantage of jurisdictional exemptions to which they otherwise are entitled.

Footnotes:

[1] And the DNC list, unlike the cigarette advertising ban, affects even the marketing of products that are in no way harmful to consumers.

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