

ADVISORY

FEBRUARY 2010

FCC PROPOSES REVISED TELEMARKETING “ROBOCALL” RULES

The Federal Communications Commission (FCC or Commission) has adopted a Notice of Proposed Rulemaking (Notice) proposing to revise its telemarketing rules, including rules governing prerecorded telemarketing calls—so called “robocalls”—to harmonize them with the Federal Trade Commission’s (FTC’s) recently amended Telemarketing Sales Rule, which is more restrictive than the FCC’s rules. While most entities that use robocalls are regulated by both the FTC and the FCC, certain entities fall only under the FCC’s jurisdiction (such as common carriers, banks, and insurance companies) and are subject to less restrictive standards. The FCC’s proposed changes would not affect prerecorded message calls made by or on behalf of tax-exempt nonprofit organizations, calls for political purposes, calls for other noncommercial purposes, and calls initiated for emergency purposes. Comments on the Notice are due 60 days after the date of publication in the Federal Register. Reply comments are due 30 days after the deadline for filing initial Comments. As of the date of this advisory, Federal Register publication has not yet occurred.

BACKGROUND

FCC Rules. The Telephone Consumer Protection Act (TCPA) restricts the use of a telephone network for unsolicited advertising by telephone or fax. Among other things, the TCPA regulates the use of automated telephone equipment, including prohibiting non-emergency prerecorded calls to a residential line without the recipient’s prior express consent, although it authorizes the FCC to enact exemptions to this prohibition in order to permit calls that are made for a noncommercial purpose and commercial calls that the FCC has determined neither adversely affect the recipient’s privacy rights nor transmit an unsolicited advertisement. The TCPA also prohibits other categories of non-emergency automated calls absent prior express consent, including the use of automatic telephone dialing systems or prerecorded messages when calling emergency telephone lines, healthcare facilities, wireless telephone numbers, and services for which the recipient is charged for the call. Pursuant to the TCPA, the FCC has adopted company-specific “do-not-call” lists as well as a national do-not-call registry that is jointly administered by the FCC and the FTC and has exempted from the prohibition against calls to residential lines calls to a recipient with whom the caller has an established business relationship and calls by or on behalf of tax-exempt nonprofit organizations.

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FTC Regulation. The FTC is authorized to regulate telemarketing, including “unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,” through the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act), and adopted the Telemarketing Sales Rule to implement the Telemarketing Act. However, three types of entities—common carriers; banks, federal credit unions, and federal savings and loans; and nonprofit organizations—are specifically exempt from FTC jurisdiction. Like the FCC, the FTC has established company-specific do-not-call lists, and jointly administers a national do-not-call registry with the FCC. In 2008, the FTC amended its Telemarketing Sales Rule to (1) prohibit sellers or telemarketers from making prerecorded telephone calls unless the seller has previously obtained the recipient’s signed, written consent to receive such calls; (2) require that prerecorded telemarketing calls include an automated, interactive mechanism by which the recipient could opt out of receiving future prerecorded messages from the seller; and (3) modify its method for calculating telemarketers’ “call abandonment rate” (which is capped at three percent and monitors the rate of calls that the caller does not connect to a sales representative within two seconds of the recipient’s completed greeting). The FTC acknowledged the distinctions between its amended rule and the FCC’s rules governing robocalls, but noted that because there is no conflict between the two sets of rules, entities should comply with the FTC’s more restrictive standards.

PROPOSED CHANGES TO FCC RULES

The FCC proposed five amendments to its rules to conform them to the more restrictive standards recently adopted by the FTC.

1. Written Consent Requirement. While the FCC’s rules prohibit the delivery of prerecorded messages absent “prior express consent,” consent may be oral or written if the recipient’s number is not listed on the national do-not-call registry, and must be written if the recipient’s number is on the do-not-call registry. The amended FTC

Telemarketing Sales Rule requires that prior express consent to receive robocalls must be in writing. In order to harmonize the rules, the FCC proposes requiring that telemarketers must obtain consumers’ prior express written consent for prerecorded calls to residential lines as well as emergency lines, healthcare facilities, and cellular services. The FCC seeks comment on, among other things:

- its authority to adopt a written consent requirement;
- whether concerns about the burden of obtaining written consent remain relevant given the ability of telemarketers to obtain written consent via electronic means authorized by the Electronic Signatures in Global and National Commerce Act (E-SIGN Act);
- if it is determined that the FCC lacks authority to require written consent, how to verify that oral consent was given;
- its tentative conclusions that harmonizing the sets of rules will reduce the potential for industry and consumer confusion regarding a telemarketer’s obligations, enhance the FCC’s enforcement efforts, and protect against erroneous claims that consent was or was not given by providing a paper or electronic record of consent; and
- whether it should adopt the same implementation period as the FTC (12 months) to ensure that companies have sufficient time to prepare to comply with the express written consent requirement.

2. Eliminating the Exemption for Prerecorded Telemarketing Calls to Established Business Relationship Customers. The FCC’s rules allow for robocalls to customers with whom the caller has an established business relationship, while the FTC’s Telemarketing Sales Rule does not contain a similar exception for established business relationships

and was amended in 2008 to state explicitly that an established business relationship will not authorize placing robocalls.¹ In order to harmonize the rules, the FCC proposes requiring express written consent to receive robocalls, even where there is an established business relationship. The FCC seeks comment on the proposed revision, including:

- whether a robocall may be deemed invited, not adversely affecting subscriber privacy interests, and not transmitting an unsolicited advertisement by virtue of an established business relationship;
- whether and how the proposed revision would impede communications between businesses and their customers; and
- its tentative conclusion that harmonizing the sets of rules will reduce the potential for industry and consumer confusion regarding a telemarketer's authority to place robocalls to established customers.

3. Exemption for Healthcare-Related Calls Subject to Health Insurance Portability and Accountability Act of 1996 (HIPAA). As discussed above, the FCC's rules provide exemptions from the ban on robocalls to residential lines for non-commercial calls and commercial calls that neither adversely affect the recipient's privacy rights nor transmit an unsolicited advertisement. However, the rules do not currently contain a specific exemption for healthcare-related robocalls that are subject to HIPAA. The FTC's Telemarketing Sales Rule contains such an exemption for healthcare-related calls, including reminders for immunization and prescription refills, calls to obtain necessary permission to contact doctors or obtain documentation for billing, follow up calls, etc. The FTC based the exemption on the fact that elderly and ill patients most in need of healthcare-related prerecorded messages may be unable or unlikely to provide their

express written consent to receive them. The FTC also determined that there was little risk that creating such an exemption would lead to abusive practices by healthcare-related entities. The FCC proposes exempting certain healthcare-related prerecorded calls from the general prohibition on prerecorded telemarketing calls to residential lines. The FCC seeks comment on:

- the frequency and volume of healthcare-related robocalls to individuals with whom the entity has no pre-existing relationship, noting that HIPAA provisions should limit the delivery of robocalls to individuals with whom the covered entity has no pre-existing relationship;²
- the extent to which consumers consider such calls an intrusion or invasion of privacy;
- whether HIPAA provisions would limit such cold calls; and
- how the disparity between the sets of rules impacts regulated entities.

4. Opt-Out Mechanism. The FCC's rules require that at the beginning of all robocalls, the message identify the entity responsible for initiating the call, and during or after the prerecorded message, provide a telephone number for consumers to make a company-specific do-not-call request. The FTC's Telemarketing Sales Rule, as amended, requires that, if a call is answered by the consumer in person, an opt-out mechanism be announced at the start of the call and be available for the duration of the call. When invoked, the opt-out mechanism must automatically add the recipient's name to the company-specific do-not-call registry and immediately disconnect the call. If a call is answered by voicemail, the FTC's Rule requires that the message include a toll-free number for the recipient to call and connect directly to an automated opt-out mechanism.

¹ However, an established business relationship does serve as authorization for placing live telemarketing calls under the FTC's Telemarketing Sales Rule.

² HIPAA provisions require a covered entity to obtain an individual's written authorization before using protected health information (including the individual's name and phone number).

The FCC proposes conforming its rule to the FTC's by requiring that robocalls include an automated, interactive opt-out mechanism. The FCC seeks comment on, among other things:

- its legal authority to require the opt-out mechanism;
- whether it may exempt healthcare-related robocalls from the opt-out requirement; and
- whether it should adopt the same implementation period as the FTC (three months) to ensure that companies have sufficient time to prepare to comply with the opt-out mechanism requirement.

5. Abandoned Calls. Both the FTC and the FCC impose restrictions on the percentage of live telemarketing calls that a telemarketer may abandon as a result of using predictive dialers.³ While the FTC and the FCC both impose a three percent abandonment rate (that is, a telemarketer would not be liable for violating the call abandonment restrictions if no more than three percent of all calls answered by a person are abandoned), the FTC and the FCC measure the rate differently. The FCC measures the three percent call abandonment rate over a 30-day period, but with no “per campaign” limitation, whereas the FTC measures the abandonment rate over a 30-day period for the duration of a single calling campaign. The FCC proposes revising its methodology to conform with the FTC's by implementing a “per campaign” limitation. The FCC seeks comment on, among other things:

- whether telemarketers subject to only the FCC's rules engage in the practice of computing a single abandonment rate for all campaigns conducted in a 30-day period and thereby allocate a greater percentage of abandoned calls to a less desirable

marketing campaign while allocating a smaller percentage to a more desirable campaign;

- whether its methodology for calculating the rate should include a per campaign limitation in order to eliminate telemarketers' incentive to engage in such practices and to harmonize the FTC and the FCC standards; and
- whether to adopt the FTC's definition of “campaign” (“the offer of the same good or service for the same seller”).

We will continue to follow telemarketing issues in future advisories. If you have any questions, please contact:

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³ A predictive dialer is an automated dialing system that automatically dials consumers' phone numbers in a way that predicts the time it will take for a consumer to answer the phone; its purpose is to minimize telemarketer downtime, but it sometimes results in a consumer answering the phone when a telemarketer is not free to take the call.