Original Article

2008 telemarketing amendments: What now?

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ABSTRACT Telemarketing is defined as communication by telephone between organizations and customers or prospects. In the United States, the telemarketing industry is well established and mature. Productivity gains from technology, internet self-serve options and call center consolidation, as well as state and federal legislative restrictions, have affected US operations. Even with all these changes, telemarketing remains a very important marketing tool. There are 56900 call centers in the United States, employing over 3 million agents. It is important that the seller and its agents are aware of recent developments in telemarketing law, including administrative agency rules and regulations and agency opinion letters. This article gives a short history of this law and its accompanying rules and regulations, and then identifies the most recent legislative actions of the federal government in order to assist sellers and their telemarketing agents in using this valuable communication tool in its market.

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INTRODUCTION

Telemarketing is defined as communication by telephone between organizations and customers or prospects. In the United States, the telemarketing industry is well established and mature, but productivity

gains from technology, internet self-serve options and call center consolidation, as well as state and federal legislative restrictions, have all affected US operations. From 2006 to 2010, the number of call centers is estimated to decline by 2.8 per

cent to 55 300. In the same period, agent positions are expected to drop by 2.0 per cent (p. 35).¹ Nevertheless, even with these declines, telemarketing remains an important marketing tool. There are 56 900 call centers in the United States, employing over 3 million agents (p. 12).¹ It is important that the seller and its agents continue to be updated on current developments in telemarketing law, including administrative agency rules and regulations, and agency opinion letters. This article gives a short history of this law and its accompanying rules and regulations, and then identifies the most recent legislative actions of the federal government in order to assist sellers and their telemarketing agents in using this valuable communication tool in its market.

2003 AMENDMENTS TO THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)

In 2003, the Federal Communications Commission² amended the TCPA of 1991 by establishing the national do-not-call registry covering interstate and intrastate telemarketing calls by all telemarketers, with the exception of certain tax-exempt non-profits. The implementation and enforcement of the do-not-call registry was carried out in coordination with the Federal Trade Commission (FTC), which was to be the sole administrator. The states' do-not-call registries were to remain in effect but were required to include all the registrants on the national database for that state. Consumers could continue to register themselves on company-specific do-not-call registries, and could provide express written permission to any companies from which they wished to continue to receive telemarketing calls. Any residential or wireless number could be registered on the registry by telephone or the internet.

Further, under the 2003 do-not-call amendments, telemarketers could continue

to call individuals with whom they had an established business relationship (EBR) who had not placed their numbers on the do-not-call registry. The EBR was defined as one in which a consumer had been a customer for 18 months after a business transaction and 3 months after an inquiry or application. If a customer asked to be placed on the company's Do-Not-Call list, however, the company was not allowed to call the consumer, even if the customer continued its EBR with the company. Telemarketers had to allow the phone to ring for 15 seconds or four rings before disconnecting any unanswered call, and had to transmit caller ID information. Telemarketers could not block caller ID information. Calls that were not solicitations, like political and religious speech, were not subject to the do-not-call regulation, nor were calls by tax-exempt non-profit organizations.

The 2003 amendments defined an 'abandoned' call as one not transferred to a live sales agent within 2 seconds of the recipient's greeting. Under these 2003 amendments, predictive dialers could 'abandon' no more than 3 per cent of all calls placed and answered by a person, and, in the calls *within* the 3 per cent that were 'abandoned', telemarketers had to deliver a prerecorded identification message. Calls by tax-exempt non-profit organizations are exempt from the 'abandoned' call requirements, but calls from for-profit telemarketers soliciting contributions are not. The 2003 amendments exempted prerecorded messages sent to customers with whom they had an EBR from this 'abandoned' call rule.

FTC OPINION LETTERS IN 2006

In 2006, the FTC issued two staff opinion letters responding to inquiries with regard to 'upselling'. The letters do not have the force of law, but offer guidance on how the FTC staff approaches certain issues

(p. 583).³ The Telemarketing Sales Rule (TSR) defines upselling as ‘soliciting the purchase of goods or services following an initial transaction during a single phone call’. The upsell was defined as a ‘separate telemarketing transaction, not a continuation of the initial transaction’ (16 C.F.R. § 310.2(dd) (2006)).⁴ The question asked of the FTC was whether ‘initial transaction’ referred only to a *commercial* transaction or to *any* communication during a call, including a customer service contract. The FTC responded that the upselling definition is satisfied whenever a sales pitch follows *any* communication during the call, including a customer service contact. (p. 583, citing <http://www.ftc.gov/bcp/telemarketing/opinion0601.pdf>).³ In a second opinion letter, the FTC dealt with the question of lead generators (businesses that search for prospective customers for others) and the national do-not-call registry exception based on EBRs (p. 583, citing <http://222.ftc.gov/bcp/telemarketing/HudsonCookAdvisoryOp.pdf>).³ The FTC wrote that, according to a strict interpretation of the law, a business does not have an EBR with a consumer if the consumer gave his or her contact information to the lead generator. However, if the lead generator tells the consumer, before the consumer gives her number, that the consumer may be receiving telemarketing calls as a result of giving her telephone number, and the lead generator also tells the consumer the maximum number of entities from which she may receive these calls, the FTC would not apply the strict interpretation of the law. The reason for this opinion was that the FTC felt that consumers who provide their telephone numbers to a lead generator probably expect to receive calls from telemarketers.

2008 AMENDMENTS TO THE TCPA

The final rule amending the TCPA in 2008 was passed on 20 August 2008 and

became effective, in part, on 1 December 2008, and will become effective, in part, on 8 October 2008, and in part on 1 September 2009.⁵

Effective on 1 December 2008

- *Prerecorded messages*
 - When the caller has an EBR with the consumer being called, prerecorded messages are permitted until 1 September 2009.
 - Any permitted prerecorded message must provide the called consumer with an interactive means to opt out of receiving future calls from the seller or fundraiser using the prerecorded message.
 - The interactive opt-out must be available at any time while the message is playing by pressing a particular number (keypress opt-out) or saying a particular word (voice opt-out).
 - Once the consumer has opted out, his or her phone number must be automatically added to the in-house Do-Not-Call list of the calling seller or fundraiser, the call ended and the consumer’s line cleared.
 - If the permitted prerecorded telemarketing message is left on an answering machine or voicemail service, it must include a toll-free opt-out number.
 - When the toll-free opt-out number is called, it must connect to an automated keypress or voice opt-out mechanism.
 - The interactive opt-out mechanism must be available at any time, day or night, that the consumer retrieves his or her messages.
 - Once the consumer has opted out, his or her phone number must be automatically added to the in-house Do-Not-Call list of the calling seller or fundraiser.
 - Calls placed by telemarketers to solicit sales or goods and services and charitable

donations must comply with these requirements.

- Exempted from these requirements are prerecorded messages made
 - for political purposes,
 - by bona fide market surveyors,
 - by in-house callers from banks or telephone companies,
 - for health-care purposes covered by the Health Insurance Portability and Accountability Act of 1996 and
 - by pure informational callers.
- The FTC warned against sales calls made in the guise of informational calls.

Effective on 8 October 2008

- *Abandoned Calls*
 - Predictive dialers place calls in anticipation that a salesperson will become available by the time one of the numbers called is answered.
 - The 2003 amendments required that at least 97 per cent of the calls be connected to a salesperson within 2 seconds after the consumer answers.
 - The new amendments retain the 3 per cent permissible abandonment rate. If the sales campaign is less than a 30-day period, the 3 per cent may be calculated over the campaign. If the sales campaign is longer than 30 days, the 3 per cent may be calculated over each 30-day period. The percentage does not have to be calculated on a daily basis as previously required.

Effective 1 September 2009 – Obtain written permission

- Sellers may use prerecorded messages only on calls to consumers who have expressly agreed to receive them, in advance, in a signed written agreement. Permission for prerecorded message sales calls
 - may be received from a consumer in any manner permitted by the Electronic

Signatures in Global and National Commerce Act (E-Sign Act);

- must be obtained after clear and conspicuous disclosure that the purpose is to authorize the seller to place prerecorded telemarketing calls to that person;
- cannot be required as a condition of purchasing a good or service;
- must evidence willingness to receive prerecorded sales calls by or on behalf of a specific seller; and
- must include the recipient's telephone number and signature.
- Once permission is received to send the prerecorded message
 - in cases in which the call is answered by a person, provide an automated keypress or voice-activated opt-out mechanism that adds the phone number to the company's Do-Not-Call list and immediately ends the call; and
 - in cases where the call is answered by an answering machine or voicemail, provide a toll-free number that allows the person called to be connected to an automated interactive voice and/or keypress-activated opt-out mechanism any time after the message is received that adds the phone number to the company's Do-Not-Call list.

ENFORCEMENT

The FTC has been aggressive in pursuing violators of the 2003 amendments. Direct TV and its network of telemarketers have paid significant fines, verifying the fact that retailers are responsible for their telemarketers. Other enforcement actions have shown that a company may not avail itself of its sister company's EBR; that, even if a consumer has not put his number on the national Do-Not-Call list, a company must honor a consumer's specific request to be put on that company's Do-Not-Call list; and that a caller may not conceal her identification information.

In 2005, the FTC brought action against The Broadcast Team (TBT) and its two principals, Robert J. Tuttle and Mark S. Edwards, for violating the FTC's TSR by charging that the defendants made tens of millions of calls that were answered by people rather than answering machines or voice mail services and ended the calls immediately or hung up after playing a recording. The TSR limits telemarketers' use of recorded messages by requiring that calls answered by a person be connected to a live representative within 2 seconds. The injunction and judgment enjoined the defendants and barred them from violating the TSR by hanging up when a person answers or by playing a recorded message instead of connecting the call to a salesperson. The judgment prohibited TBT and its owners from improperly calling persons on the Do Not Call (DNC) Registry, or making calls without paying the fees to support the Registry. The civil penalty imposed was US\$2.8 million against

TBT and its owners, of which \$1.8 million was suspended. In 2008, a \$3 million judgment was entered against the defendants, Voice-Mail Broadcasting Corporation and Jesse Crow, for the same violation of the abandoned calls rule.

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