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MEMORANDUM

August 1, 2003

To: Our Clients and Friends

Re: FCC's Do Not Call Rule

INTRODUCTION

The Federal Communications Commission has adopted a final rule¹ under the Telephone Consumer Protection Act of 1991 ("TCPA")² establishing a national do not call registry that is applicable to telephone solicitations to consumers made by all commercial organizations, including banks, persons engaged in the business of insurance, common carriers and airlines. The registry will permit consumers who do not want to be solicited by telephone to register their telephone numbers with a centralized database maintained by the Federal Trade Commission ("FTC"). A business will not be permitted to call a telephone number that is on the registry unless the company has an established business relationship with the consumer or unless the consumer has provided his or her prior written consent to the solicitation. The FCC's rule also establishes a maximum rate of 3 per cent on the number of abandoned calls companies may make and requires telemarketers to transmit caller ID information. The national do not call registry and call abandonment rule become effective October 1, 2003. The caller ID rule becomes effective January 29, 2004.

NATIONAL DO NOT CALL REGISTRY

In order to enable consumers to avoid unwanted telephone solicitations, the FCC has amended its rules to establish a national centralized do not call registry. The FCC's rule is substantially identical to the do not call rule adopted last January by the

¹ 68 *Fed. Reg.* 44144 (July 25, 2003); 47 C.F.R. § 64.1200, 64.1601, 68.318.

² 47 U.S.C. 227.

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FTC in its Telemarketing Sales Rule (“TSR”).³ However, the FTC’s TSR does not apply to banks, persons engaged in the business of insurance, common carriers and airlines. Because, according to the FCC, such entities are not exempt from the TCPA, the FCC determined to adopt its own do not call requirements to apply a uniform national standard to all industries.

Enrollment and Access to the Registry

Consumers may, without charge, register residential and wireless telephone numbers with the national do not call registry by telephone or through a dedicated web site. The registry will contain only telephone numbers and will not include names. The registration will be valid for five years. The FTC will periodically review the list and remove telephone numbers that have been disconnected or reassigned.

The list will be maintained by area codes. Under the fee schedule established by the FTC, the first five area codes will be provided free of charge to a company or telemarketer. An annual fee of \$25 will be imposed for each additional area code the company desires to obtain. The annual fee for the registry for the entire country will be \$7,375. Each entity on whose behalf a telephone solicitation is being made must purchase access to the portion of the national do not call list the company intends to utilize. Accordingly, a telemarketer will be required to pay a fee for each client on whose behalf telephone solicitations are made. In addition, a company may use the registry it has purchased only to comply with the FCC’s rule or a similar state requirement. It may not sell, lease or transfer the registry to another entity, including affiliated companies. The registry will be continually updated, and companies may access it as frequently as desired at any interval.

Telephone Solicitation

The FCC’s rule applies to a “telephone solicitation,” which is defined as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, good or services, which is transmitted to any person. The term does not include a call with the person’s prior written invitation or permission, a call to any person with whom the caller has an established business relationship, or by or on behalf of a tax exempt nonprofit organization. Accordingly, surveys and market research are not solicitations, unless they serve as a pretext for a solicitation. The FCC’s rule also does not apply where the caller has a personal relationship with the consumer. A “personal relationship” is one in which the consumer is a family member, friend or acquaintance of the person making the call.

³ 68 *Fed. Reg.* 4580 (January 29, 2003).

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A company may call a consumer whose telephone number is on the national do not call registry if it has received a prior signed, written agreement between the consumer and the seller which states that the consumer agrees to be contacted by the company. The term “signed” includes an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal or state contract law. If a consumer subsequently requests not to be called, the company must cease calling the consumer regardless of whether the consumer continues to do business with the company. Telemarketers may not call consumers on the national do-not-call list to request their written permission to be called unless they fall within some other exemption. Accordingly, prior express permission to call a consumer whose number is on the registry must be obtained by some other means such as direct mailing.

The FCC also determined not to create an exemption for calls made to set “face-to-face” appointments because it regards such calls as being made for the purpose of encouraging the purchase of goods and services. Therefore, such calls come within the definition of a telephone solicitation.

Established Business Relationship

The FCC has revised its previous definition of what constitutes an “established business relationship” to make it identical to the definition adopted by the FTC in the TSR. Under the FCC’s rule, an established business relationship is a prior or existing relationship formed by a voluntary two-way communication between a company and a consumer with or without an exchange of consideration, on the basis of the consumer’s purchase or transaction with the entity within the 18 months immediately preceding the date of the telephone call, or on the basis of the consumer’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, provided the relationship has not been previously terminated by either party. However, if a consumer requests the company to place his or her name on the company-specific do not call list, the established business relationship between the consumer and the company is terminated for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the company and even if the consumer’s telephone number is not on the national do not call list.

An established business relationship is not limited to the products and services which the consumer has acquired from the company. Accordingly, a company may solicit a customer with whom it has an established business relationship for a broad range of products and services.

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An established business relationship does not exist if the inquiry made by the consumer relates to such matters as hours of operation or location. However, an inquiry regarding the company's products and services is sufficient to result in an established business relationship.

A consumer's established business relationship with a particular business entity does not extend to the company's affiliates unless the consumer reasonably expects them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate. In addition, the FCC indicated that the established business relationship exemption does not permit companies to make calls based upon referrals from existing customers.

Errors

A company will not be liable for violations that result from an error if it can demonstrate that (1) it has established and implemented written procedures to comply with the do not call rule; (2) it has trained its personnel in the procedures; (3) it has maintained and recorded a list of telephone numbers the company and its representatives may not contact; (4) it uses a process to prevent telemarketing to telephone numbers on a list using a version of the registry no more than three months old and the company maintains records documenting the process; and (5) any subsequent call which violates the do not call rule is a result of error.

The McCarran-Ferguson Act

The FCC also considered comments that expressed the view that the rule does not apply to entities engaged in the business of insurance because such rules conflict with the McCarran-Ferguson Act. The McCarran-Ferguson Act provides that the business of insurance shall be subject to the laws of the states which relate to the regulation of such business. 15 U.S.C. 1012(a). The McCarran-Ferguson Act further provides that no act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance unless such act specifically relates to the business of insurance. 15 U.S.C. 1012(b). Commenters stated that because insurers' marketing activities are extensively regulated at the state level, the rule intrudes upon the insurance regulatory framework established by the states and therefore should not be applicable to insurers under McCarran-Ferguson.

The FCC concluded that the McCarran-Ferguson Act does not exempt insurance companies wholesale from liability under the TCPA. The McCarran-Ferguson Act applies only when the activities constitute the business of insurance, the state has enacted laws for the purpose of regulating the business of insurance, and the

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TCPA would impair, invalidate, or supersede such state laws. Accordingly, the FCC stated that to the extent that any state law regulates the business of insurance and the TCPA is found to invalidate, impair or supersede that state law, it is possible that a particular activity involving the business of insurance would not fall within the reach of the TCPA. The FCC concluded that any determination about the applicability of McCarran-Ferguson requires an analysis of the particular activity and state law regulating it. Accordingly, the FCC stated that to the extent that the operation of McCarran-Ferguson on the TCPA is unclear, it will raise the issue in the report it is required to make to Congress.

State Do Not Call Laws

The FCC rule recognizes that many states have already adopted laws establishing do not call registries. The FCC is encouraging states to download their state databases into the national registry to create a single national database. With regard to the interaction between state laws and its rule, the FCC has concluded the following. By operation of general conflict preemption law, the FCC's rule constitutes a floor, and therefore supersedes all less restrictive state do-not-call rules because such rules frustrate the federal objectives in protecting consumer privacy rights under the TCPA. Accordingly, telemarketers must comply with the FCC's rule even if the state in which they are telemarketing has adopted a less restrictive law or an otherwise applicable exemption. Because the TCPA applies to both intrastate and interstate communications, the minimum requirements apply throughout the nation.

In addition, the FCC recognizes that states may adopt more restrictive do not call laws governing intrastate telemarketing. The FCC takes the position that generally the TCPA prohibits it from preempting any state law that imposes more restrictive intrastate requirements. With regard to state laws that impose more restrictive regulations on interstate calls, the FCC has concluded that such rules may be preempted if they conflict with the FCC's rules. As a result, the FCC has determined that any state regulation of interstate telemarketing calls that differs from its rule almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. It will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. A party that believes a state law is inconsistent with the FCC's rules may seek a declaratory ruling from the FCC.

Company Specific Do Not Call Lists

As indicated above, if a consumer requests a company to place his or her name on the company specific do not call list, the company may not initiate telephone solicitations to the customer. The rule does not specify the manner in which

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companies must permit consumers to register their request. However, companies must honor company specific requests within a reasonable time, not to exceed 30 days from the date of the request, or earlier if the company has the capability to do so. In addition, the FCC's rule provides that a specific request by a consumer to be added to a company's do not call list will also apply to all telemarketing campaigns of the company and to any affiliated entities that the consumer reasonably would expect to be included given the identification of the caller and the product being advertised.

PRERECORDED MESSAGES

Under the FCC's rule, a company may not initiate a telephone call to a consumer using an artificial voice or prerecorded message without the consent of the consumer unless the message does not include an unsolicited advertisement or a telephone solicitation. A prerecorded message containing a free offer and information about goods and services that are commercially available is prohibited if not otherwise exempted. For example, a prerecorded message that contains language describing a new product which asks the consumer to call a toll-free number for more information is an unsolicited advertisement under the TCPA if sent without the consumer's express invitation or permission, or unless it is made to a person who has an established business relationship with the company. However, if the message is limited to identification information only, such as name and telephone number, it will not be considered an unsolicited advertisement.

Dual purpose calls such as those from mortgage brokers to their clients notifying them of lower interest rates, or calls from credit card companies offering overdraft protection to existing customers would, in most instances, constitute unsolicited advertisements regardless of the customer service element to the call. The FCC considers such calls as motivated in part by the desire to sell additional products. If the call is intended to offer property, goods, or services for sale either during the call or in the future (such as in response to a message that provides a toll-free number), that call is an advertisement. However, if the message is delivered by a company that has an established business relationship with the recipient, it would be permitted under the rule. Absent an established business relationship, the telemarketer must first obtain the prior express consent of the consumer in order to lawfully initiate the call. Purporting to obtain consent during the call, such as requesting that a consumer 'press 1' to receive further information, does not constitute prior consent because the instruction is part of the telemarketing call.

The FCC's rule requires that all artificial or prerecorded messages delivered by an automatic telephone dialing system identify the business, individual, or other entity initiating the call, and the telephone number or address of such business, individual or other entity. The prerecorded message must contain, at a minimum, the

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legal name under which the business, individual or entity calling is registered to operate. The FCC recognizes that some businesses use d/b/a's for marketing purposes. The rule does not prohibit the use of such additional information, provided the legal name of the business is also stated. The FCC rule also requires that the telephone number stated in the message be one that a consumer can use during normal business hours to ask not to be called again. If the number provided in the message is that of a telemarketer hired to deliver the message, the company on whose behalf the message is sent will be liable for failing to honor any do not call request.

ABANDONED CALLS

The FCC's rule requires that telemarketers ensure that any technology used to dial telephone numbers abandons no more than three percent of calls answered by a person, measured over a 30-day period. A call will be considered abandoned if it is not transferred to a live sales agent within two seconds of the recipient's completed greeting. When a call is abandoned within the three percent maximum allowed, a telemarketer must deliver a prerecorded identification message containing only the telemarketer's name, telephone number, and notification that the call is for telemarketing purposes. To allow time for a consumer to answer the phone, the telemarketer must allow the phone to ring for 15 seconds or four rings before disconnecting any unanswered call. Telemarketers using predictive dialers must maintain records that provide clear and convincing evidence that the dialers used comply with the three percent call abandonment rate, ring time and two second transfer rule.

CALLER IDENTIFICATION

All companies and telemarketers are required to transmit caller ID information, regardless of their calling systems. In addition, any person or entity engaging in telemarketing is prohibited from blocking the transmission of caller ID information. If the information required is not passed through to the consumer through no fault of the telemarketer originating the call, the telemarketer will not be held liable for failure to comply with the rule.

UNSOLICITED FACSIMILE ADVERTISEMENTS

The TCPA requires a person or entity to obtain the prior express invitation or permission of the recipient before transmitting an unsolicited fax advertisement. The express invitation or permission must be in writing and include the recipient's signature. The requirement applies even if the company has an existing business relationship with the consumer. Under the new FCC rule, permission to send fax advertisements must be provided in writing, include the recipient's signature and

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facsimile number and cannot be in the form of a “negative option.” A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes would constitute a negative option. However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company. Such statement, if accompanied by the recipient’s signature, will constitute the necessary prior express permission to send facsimile advertisements to that individual or business.

TIME OF DAY RESTRICTIONS

The FCC currently restricts telephone solicitations to between the hours of 8 a.m. and 9 p.m. The final rule does not alter the time period during which telephone solicitations may be made.

PRIVATE RIGHT OF ACTION

Under the TCPA, consumers have a private right of action if otherwise permitted by the laws or rules of a state court.⁴ The FCC declined to make any determination about the specific contours of the TCPA’s private right of action on the basis that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those courts’ rules.

⁴ 47 U.S.C. § 227(c)(5).