

FTC Issues New Rules on Prerecorded Telemarketing Calls: Prior Express Consent Required for Most Sales Calls Beginning September 2009

On August 19, 2008, the Federal Trade Commission (FTC) released an order adopting new rules governing prerecorded telemarketing calls. These rule changes affect businesses that use prerecorded telemarketing calls to reach prospects and customers. In particular, the FTC will mandate, as of *September 1, 2009*, that prerecorded telemarketing calls may only be conducted if the seller has previously obtained from the recipient a signed, written agreement to receive sales calls. Sellers may obtain the consent electronically, where the form of signature is recognized as a valid signature under applicable law. The FTC exempted certain calls from this consent requirement, as discussed in greater detail below.

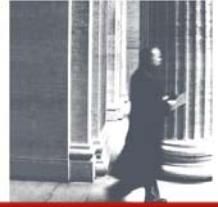
BACKGROUND

The FTC's Telemarketing Sales Rule prohibits telemarketers from abandoning calls. The FTC deems an outbound telemarketing call "abandoned" if the telemarketer does not connect the call to a sales representative within two seconds of the called party's completed greeting. As consumers who receive a prerecorded message would not be connected to a sales representative within that time frame, the FTC previously reasoned that a telemarketing campaign consisting solely of prerecorded messages would violate the Telemarketing Sales Rule's prohibition on call abandonment. (In contrast, the Federal Communications Commission's rules permit prerecorded telemarketing calls where there is prior express consent from the called party or an existing business relationship between the calling party and the called party). During the pendency of the FTC's proceeding to review the prerecorded telemarketing call rule, the FTC announced it would forbear from bringing enforcement actions against sellers and telemarketers using prerecorded telemarketing calls, provided certain conditions were met.

NEW FTC RULES ON PRERECORDED CALLS

The highlights of the August 19, 2008 order are as follows:

- Beginning September 1, 2009, all prerecorded telemarketing calls (*i.e.*, those that induce the purchase of any good or service) may only be initiated if the seller has obtained from the recipient of the call an express agreement, in writing, that:
 - the seller obtained after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to the person;



- the seller obtained without requiring that the agreement be executed as a condition of purchasing any good or service;
 - evidences the person's willingness to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and
 - includes such person's telephone number and signature.
- Point-of-sale (POS) agreements can be obtained on POS devices or on paper, so long as consumers have a clear choice to receive, or not receive, prerecorded message calls, *e.g.*, "I would like to receive telephone calls with prerecorded messages from ABC Co. that provide special sales offers such as _____ at this telephone number: _____."
 - The FTC did not mandate specific language, however, preferring to allow industry some flexibility rather than to prescribe language.
 - Disclosures hidden in lengthy end user agreements or on the back of printed forms "will not pass muster" under the FTC's revised rules, nor will a consumer's oral response to an in-store request from a sales clerk seeking the consumer's agreement to receive prerecorded message calls.
 - Beginning December 1, 2008, any *permitted* call delivering a prerecorded message must:
 - allow the consumer's telephone to ring for at least 15 seconds or four rings before an unanswered call is disconnected;
 - begin the prerecorded message within two seconds of the completed greeting;
 - disclose promptly at the outset of the call the means by which the person may assert a company-specific Do Not Call request at any time during the message;
 - if the call might be answered in person, promptly make an automated interactive voice- and/or keypress-activated opt-out mechanism available at all times during the message that automatically adds the telephone number called to the seller's entity-specific Do Not Call list and that thereafter terminates the call;
 - if the call might be answered by an answering machine or voicemail, promptly provide a toll-free telephone number that allows the person called to connect directly to an automated voice- and/or keypress-activated opt-out mechanism that is accessible at any time after receipt of the message; and
 - comply with all other requirements of the FTC's rules and applicable state and federal laws (*e.g.*, time of day restrictions).



EXEMPTIONS

- Until September 1, 2009, an existing business relationship can serve as authorization for placing a prerecorded telemarketing call (provided the requirements set forth above, effective December 1, 2008, are met and the calls comply with existing federal and state laws).
- The FTC reiterated that prerecorded messages communicating delivery or service dates or times, and similar information, are informational calls that fall outside the scope of the Telemarketing Sales Rule's regulation of telemarketing. Sellers may continue to use prerecorded messages for these purposes (provided there are no sales pitches included).
- Other non-telemarketing calls (*e.g.*, political calls, pure surveys) remain exempt.
- The FTC specifically exempted outbound telephone calls that deliver a prerecorded healthcare message made by, or on behalf of, a covered entity or its business associate under the Health Insurance Portability and Accountability Act (HIPAA).
- The FTC also exempted from the written agreement requirement all charitable solicitation calls placed by for-profit telemarketers that deliver prerecorded messages on behalf of nonprofit organizations to members of, or previous donors to, the nonprofit organization, but requires that such calls include a prompt keypress- or voice-activated opt-out mechanism.

OTHER ISSUES

- Recognizing that technology is rapidly evolving, the FTC indicated that it would entertain petitions seeking further amendment of the Telemarketing Sales Rule or exemptions from the new provisions as technology advances.
- The FTC also modified its method of calculating the maximum permissible level of call abandonment.

FOR MORE INFORMATION

For more information, contact partner Michelle Cohen in our Washington, D.C. office, 202.263.4151 or Michelle.Cohen@ThompsonHine.com, or any other member of our **Telecommunications** practice group.

If you do not wish to receive future communications by email, please reply to this email with "unsubscribe" in the subject line.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2008 THOMPSON HINE LLP. ALL RIGHTS RESERVED.