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FTC Amends Telemarketing Sales Rule to Increase Recordkeeping Requirements and Cover Business to Business Telemarketing Calls

On March 7, 2024, the Federal Trade Commission (FTC) announced substantial revisions to the Telemarketing Sales Rule (TSR). In particular, the FTC will require that sellers and telemarketers maintain additional records of telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business (B2B) telemarketing calls, and add a definition for the term “previous donor.”

Background

The TSR was promulgated in 1995 pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act from the previous year, aimed at curtailing harmful telemarketing practices while granting important protections against fraud and invasions of privacy for consumers. Generally, the TSR prohibits deceptive or abusive telemarketing practices, which include making material misrepresentations or misleading statements to induce a person to pay for goods or services. Moreover, to demonstrate compliance with the TSR, sellers or telemarketers must make certain clear disclosures and maintain comprehensive records of their telemarketing transactions. Excluding the present amendment, since 1995, the FTC has amended the TSR four times, including in: (1) 2003, creating the National Do Not Call Registry and expanding the TSR to cover charity calls; (2) 2008, prohibiting prerecorded messages in sales and charity calls; (3) 2010, prohibiting telemarketing related to debt relief services requiring an advance fee; and (4) 2015, banning the use of telemarketing of certain payment mechanisms associated fraudulent transactions.

Record retention

Perhaps the most substantial changes to the TSR involve recordkeeping requirements. Under the TSR's existing recordkeeping requirements, sellers or telemarketers have been required to keep records for a 24-month period, including: (1) all substantially different advertisements or telemarketing scripts; (2) lists of prize recipients, customers, and telemarketing employees involved in sales or solicitations; and (3) records of express informed consent or express agreements.

However, the finalized rule amends the existing recordkeeping requirements to: (1) increase the record retention period from 24 months to five years; (2) clarify which records are necessary to demonstrate that the person calling has received consent to call; and (3) specify formatting for records that include phone numbers, time, or call duration. More substantially, the final rule expands the recordkeeping requirements such that sellers or telemarketers are required to retain:

1. a copy of each unique prerecorded message;
2. call detail records of telemarketing campaigns;
3. records sufficient to show a seller has an established business relationship with a consumer;
4. records sufficient to show a consumer is a previous donor to a particular charitable organization;
5. records regarding the service providers that a telemarketer uses to deliver outbound calls;
6. records of a seller or charitable organization's entity-specific do-not-call registries;
7. records of which version of the Commission's DNC Registry were used to ensure compliance with this rule.

Although the new TSR amendments greatly increase the recordkeeping requirements, the rule builds in a safe harbor that allows companies a 30-day window to cure any deficiencies following the date of discovery.

TSR applied to B2B telemarketing

Since its inception, the TSR has exempted B2B calls, except those concerning the sale of nondurable office and cleaning supplies, which, at the time the TSR was enacted, the FTC recognized as the most prominent issue in B2B telemarketing. At the same time, the FTC stated that it would reconsider the scope of the B2B exemption if additional B2B marketing activities became problematic. Now, the final rule narrows the B2B exemption, such that B2B telemarketing calls must comply with prohibitions against sellers and telemarketers making: (1) certain material misrepresentations in the sale of goods

or services; and (2) false or misleading statements to induce a person to pay for goods or services or induce a charitable donation. Notably, despite the narrowing of the B2B exemption, the final rule does not require B2B sellers and telemarketers to comply with the TSR's recordkeeping requirements. In addition, the TSR's DNC fee access requirements also do not apply to B2B calls.

New definition: previous donor

In 2008 the FTC amended the TSR to prohibit robocalls but maintained an exemption for charity robocalls if the recipient was "a member of, or previous donor to, a non-profit charitable organization on whose behalf the call was made." However, the FTC did not define "previous donor." The final rule defines the term "previous donor" as "any person who has made a charitable contribution to a particular charitable organization within the two-year period immediately preceding the date of the telemarketing call soliciting on behalf of that charitable organization." The new definition clarifies that charity robocalls are prohibited unless the call recipient donated to the soliciting charitable organization within the last two years.

Effective and compliance dates

The finalized amendments to the TSR will become effective 30 days after the date of publication in the federal register, and compliance will be required 180 days after publication in the federal register.

What this means to you

Businesses, including businesses who make outgoing sales calls to other businesses, must be cognizant of the new rules. Violations of the TSR can carry penalties of over \$50,000 *per call*. Consequently, businesses should start considering revising and strengthening their TSR compliance management processes in order to mitigate the risk of compliance failures.

Contact us

If you have any questions about these amendments to the Telemarketing Sale Rule, please contact Chris Friedman, Jacob Huston, or your Husch Blackwell attorney.