

April 15, 2004

FCC Telemarketing Enforcement

Telemarketing practices, and the related regulation, have been the subject of much attention in Congress and before regulatory agencies. Enforcement activity in this area is, and will likely remain, vigorous. This advisory provides a snapshot of recent enforcement activity in this increasingly sensitive area.

Background

Last year, the Federal Communications Commission (FCC) adopted new rules and policies which significantly expanded its rules implementing the Telephone Consumer Protection Act of 1991 (TCPA). Among other things, the FCC and the Federal Trade Commission adopted rules establishing a national Do-Not-Call Registry for consumers wishing to avoid unsolicited commercial telemarketing calls. The FCC's rules went on to prescribe, among other things, that telemarketers transmit caller ID information; adopted restrictions on the use of so-called predictive dialers (devices which dial consumers and place them on hold until a sales agent becomes available); and mandated that express written permission be obtained before unsolicited advertisements can be faxed to a customer. The Do-Not-Call rules do not apply to tax-exempt, nonprofit organizations, nor calls for political and religious fundraising. The "established business relationship" exception, under which businesses have been entitled to make unsolicited calls, was revised to limit the exception to the period expiring 18 months after a sale or 90 days after an inquiry. The exception will be phased out for unsolicited faxes by January 1, 2005, unless the FCC changes its ruling on reconsideration.

FCC Enforcement

Besides adopting new rules, the FCC has been particularly active on the enforcement front. In the past three months alone, the agency has issued 25 citations for violation of the telephone marketing and broadcast fax rules. In most instances, the FCC citation represents a warning shot, *i.e.* it advises the recipient that any further violation will subject the recipient to fines not to exceed \$11,000 per violation or each day of a continuing violation.

Two major fines have been imposed for violation of the telemarketing rules thus far, with many more (as seen above) in the processing line.

In one, the FCC imposed a \$780,000 fine on AT&T for making 78 unsolicited sales calls to consumers who had previously requested that their names be entered on AT&T's do-not-call registry. Each of the violations was fined at the base rate previously set by the FCC for violation of the junk fax rules, *i.e.* \$10,000. Significant to the size of the fine was the fact that the FCC had received 360 complaints against AT&T over an eight-month period, which was more than for any other company.

For the second case, the Commission fined an entity known as Fax.com, Inc. over \$5 million for violations of the TCPA and the agency's rules. Fax.com was engaged in the business of faxing messages on behalf of others. The FCC imposed the maximum forfeiture of \$11,000 for each of 489 separate violations. In so doing, the agency observed that "Fax.com's primary business activity itself constitutes a massive on-going violation of the TCPA."

Moreover, in the earlier stages of the proceeding, the FCC issued citations to over 100 businesses that had used Fax.com's services. The citations advised the recipients of their liability for FCC fines if they continued to send unsolicited advertisements to fax machines, either using Fax.com or otherwise. The agency expressed the view that Fax.com's "unscrupulous practices" had exposed its customers, primarily small businesses, to federal, state, and private enforcement actions that could involve substantial penalties.

Observations

Given the size of these fines and the enforcement actions pending, advertising agencies, and their clients, should take heed. It is clear that the regulators are on the warpath regarding telemarketing – notwithstanding the important contribution that telemarketing makes to the economy: it has been estimated that telemarketers attempt as many as 104 million calls to consumers each day and that telemarketing generates over \$600 billion in sales annually; and 300,000 persons were employed in telemarketing at the time the TCPA was enacted in 1991.

With the recent decision of the U.S. Court of Appeals for the Tenth Circuit upholding the Do-Not-Call Registry against constitutional challenge, the FCC's disposition to continue its politically popular enforcement campaign will likely continue. Indeed, in response to recent legislation passed by Congress, the FCC has adopted a proposal to further extend the reach of its telemarketing rules to include unwanted commercial messages sent to wireless devices like cell phones.

For More Information

If you have any further questions about the telemarketing rules, or how they impact your business, please contact Eric J. Sinrod in our San Francisco office at 415.371.2219, Ken Keane in our Washington, D.C. office at 202.776.5243 or the Duane Morris lawyer with whom you are regularly in contact.