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CONSUMER NEWS

FEDERAL BAN ON AUTOMATED PRERECORDED MESSAGES, SO-CALLED “ROBOCALLS,” GOES INTO EFFECT

*Kyle Gaffaney**

INTRODUCTION

The Telemarketing Sales Rule (TSR) made headlines when it was originally written into law with the introduction of the National Do Not Call Registry. The TSR is once again back in the news with the beginning of the ban prohibiting the transmittal of prerecorded messages, also known as ‘Robocalls.’

The current version of the TSR that established the National Do Not Call Registry, became effective March 31, 2003.¹ The National Do Not Call Registry was only a part of the TSR from 2003; however, the publicity it received overshadowed the other requirements of the TSR. For example, many people are unaware that this rule requires telemarketers to transmit Caller ID information, limits when telemarketers may call consumers, and requires that specific business records be kept for two years.² Those requirements have had little impact on consumers’ daily life. However, the new ban on the transmittal of prerecorded messages directly affects consumers by eliminating the often-irritating interruption of an automated sales call.

AMENDMENTS TO THE TELEMARKETING SALES RULE

The recent amendments to the TSR, made by the FTC in

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¹ Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C § 6101 *et seq.*

² FTC Facts for Business, *Complying with Telemarketing Sales Rule*, available at <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>.

August of 2008, limit the use of prerecorded messages in telemarketing calls.³ The new rule limiting the use of prerecorded messages became effective on September 1, 2009.⁴

Now, in order for a telemarketer to deliver prerecorded messages, a prior written agreement with the consumer is required.⁵ Moreover, a previous business relationship is not enough to allow prerecorded messages to go through.⁶ The rule also forbids a business from withholding goods or services if a consumer does not sign an agreement that allows the business to transmit prerecorded messages to that consumer.⁷

Additionally, under the new rule, the beginning of the prerecorded call must include a message telling the receiver how they can stop future calls.⁸ A prerecorded call can have an automated opt-out option such as an automated key-press system or a voice recognition system. If the prerecorded call does not have the key press or voice recognition system, a toll free number must be provided so that the consumer may call and opt-out, speaking to an operator.⁹ Anyone found in violation of this new ban on prerecorded calls can face penalties up to \$16,000 per call.¹⁰

CALLS NOT AFFECTED BY THE BAN

However, not all prerecorded messages are subject to the ban. Purely informational messages, as opposed to those attempting to sell a product, are not prohibited.¹¹ Prerecorded messages from politicians, banks, telephone carriers, and most charitable organizations are still permitted under the new rule.¹² This means that calls from an airline telling you that your flight has been delayed and calls from your child's school district

³ *Id.*

⁴ Press Release, FTC, *FTC Settlement Bans Robocalls from Auto "Warranty" Company* (September 1, 2009), available at <http://www.ftc.gov/opa/2009/09/twi.shtm>.

⁵ *Id.*

⁶ FTC Consumer Alert, *New Rules for Robocalls*, available at <http://ftc.gov/bcp/edu/pubs/consumer/alerts/alt162.shtm>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ FTC Press Release, *supra* note 4.

¹¹ *Id.*

¹² *Id.*

announcing late starts are still permissible.¹³

SETTLEMENT BETWEEN THE FTC AND A 'ROBO-CALLER'

Interestingly, the day after the ban on transmitting prerecorded messages became effective, a settlement concerning just such calls was announced. This settlement involved the transmittal of prerecorded messages by Transcontinental Warranty Inc ("Transcontinental").¹⁴ The FTC sued Transcontinental in response to complaints it received regarding telemarketers using robocalls in an attempt to sell consumers automobile warranties on behalf of Transcontinental.¹⁵ The basis for the case against Transcontinental was that consumers were receiving prerecorded messages designed to deceive them into thinking their auto warranties were about to expire.¹⁶ Some of the consumers who received the calls didn't even own a car.¹⁷

The settlement entered into between the FTC and Transcontinental, along with its owner Christopher Cowart, bars the company from the use of the deceptive prerecorded messages it was using.¹⁸ The settlement also includes an additional requirement that prohibits the defendant from selling its customer list.¹⁹ The settlement included monetary damages payable to the FTC by the defendants jointly and severally in the amount of \$24 million dollars.²⁰ This amount is the full amount of consumer injuries the FTC claimed Transcontinental caused.²¹

However, the monetary damages against Transcontinental

¹³ FTC Consumer Alert, *supra* note 6. See also M.J. Stephey, *A Brief History of Robo-Calls*, TIME, Oct. 23, 2008, available at <http://www.time.com/time/politics/article/0,8599,1853436,00.html> (mentioning that robocalls were used by both major presidential candidates in the 2008 election).

¹⁴ FTC Press Release, *supra* note 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Sheryl Harris, *Auto Warranty Company Transcontinental Warranty Settles Case with FTC*, CLEVELAND PLAIN DEALER, Sept. 3, 2009, available at http://www.cleveland.com/consumeraffairs/index.ssf/2009/09/auto_warranty_company_transcon.html.

¹⁸ FTC Press Release, *supra* note 4.

¹⁹ *Id.*

²⁰ Stipulated Final Judgment and Order for Permanent Injunction, FTC v. Transcon. Warranty Inc., No. 09 C 2927 (N.D.Ill. 2009), available at <http://www.ftc.gov/os/caselist/0923110/index.shtm>.

²¹ *Id.* at 9-10.

were suspended in the settlement because Transcontinental and Cowart cited an inability to pay the amount in financial records submitted to the FTC.²² However, this fine will become payable in full if it is discovered that the Defendants were not truthful in disclosing the value of their assets.²³ Complaints were also filed against the companies who actually made the prerecorded calls on behalf of Transcontinental.²⁴ However, at the time of this article, both of those cases are still pending.²⁵

**ADDITIONAL PROVISION OF THE NEW RULE,
NATIONAL DO NOT CALL REGISTRY ACCESS FEE
INCREASE**

A change to the TSR that will not impact the average consumer but is still interesting to note is the increase in fees for the National Do Not Call Registry. On October 1, 2009, the fee charged to any person for using phone numbers on the National Do Not Call Registry will increase from \$54 to \$55 per area code.²⁶ The fee for those accessing the Registry during the second six months of the annual period will remain at \$27. The maximum anyone will be required to pay in one year also increases from \$14,850 to \$15,058. The fees and fee increases, while not significant, are required by statute.²⁷

²² *Id.* at 10; Harris, *supra* note 17.

²³ Stipulated Final Judgment and Order, *supra* note 20, at 12.

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ Do-Not-Call Registry Fee Extension Act of 2007, Pub. L. No. 110-188, 122 Stat. 852 (2008).

²⁷ Do-Not-Call Registry Fee Extension Act of 2007 § 635(d)(1)(B) (explaining that the annual rate for accessing the registry will increase each year at a rate based on the CPI. However, if the increase would be an increase of less than 1% there will not be an increase for that year. Any increase is rounded to the nearest dollar).