



“Don’t Call Us”

– Telemarketing Regulations Reach Out to Nonprofits

Don’t assume that the new telemarketing rules don’t affect you. Here’s what you need to know.

By Stefan M. Lopatkiewicz

Federal legislation to protect the interests of telephone subscribers has been on the books for over a decade. It wasn’t till the past three years, however, that this regulatory muscle attracted popular attention with the adoption of the Do-Not-Call Registry.

Nonprofit organizations that rely on telemarketing as a vehicle for fundraising have tended to discount the relevance of this development. It’s true that nonprofits are shielded from much of the legislation. Almost lost in the political and legal noise generated by the Do-Not-Call Registry, however, are some important restraints on the way nonprofit organizations can use telecommunications for solicitation purposes. These include two restrictions on telemarketing administered by the Federal Communications Commission (FCC) that aren’t limited to for-profit entities, and

expansion of the jurisdiction of the Federal Trade Commission (FTC) to encompass the activities of commercial telemarketers acting in the interest of nonprofit causes.

Some Background

Congress first adopted standards to protect consumers from unwanted telemarketing calls as early as 1991 with the passage of the Telephone Consumer Protection Act (TCPA). The TCPA defined “telephone solicitation” to exclude calls by tax-exempt nonprofit organizations. In its implementing regulations, the FCC broadened this exemption to exclude calls made “by or on behalf of” tax-exempt nonprofit organizations, thereby extending relief to for-profit agents retained by tax-exempt organizations.

Three years after the TCPA was passed, Congress adopted the

Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), which directed the FTC to adopt rules preventing deceptive telemarketing practices. The rules adopted by the FTC prohibited a telemarketer from approaching individuals who had specifically requested that the telemarketer not contact them (the so-called “company-specific” do-not-call list).

In 2002, responding to a groundswell of opinion that existing laws didn’t adequately protect consumers from telemarketing intrusions, the FTC proposed a national Do-Not-Call Registry. Following a public comment period that attracted widespread expressions of support, the FTC adopted the national Do-Not-Call Registry in January, 2003. The FCC in mid-2003 adopted rules that added its enforcement authority to that of

the FTC in administering the national Do-Not-Call Registry.

Telemarketing regulation at the federal level is often equated — erroneously — with the national Do-Not-Call Registry. While the Do-Not-Call Registry has limited reach for nonprofits, the combined FCC and FTC telemarketing rules do affect nonprofits' ability to use telemarketing.

Regulation by the FCC

1. Impact on nonprofit organizations that aren't tax exempt. Perhaps the most far-reaching impact on nonprofits is on organizations that haven't qualified for (or haven't elected to pursue) tax-exempt status. These nonprofits aren't protected under the FCC's implementing regulations.

Non-tax-exempt nonprofit organizations can still pursue "non-commercial" telemarketing activities, including fundraising. If they offer any goods or services through telephone solicitations, however, they

are subject to the full panoply of FCC telemarketing regulations. These regulations include the following:

- They must comply with the national Do-Not-Call Registry.
- They must adopt a complex set of internal do-not-call restrictions.
- They are prohibited from using artificial or prerecorded voice messages to contact residential subscribers without their prior express consent.
- They can call only between 8:00 a.m. and 9:00 p.m. in the called party's time zone.
- They must not disconnect their telemarketing call before four rings or 15 seconds if the call is unanswered.

The effect of these regulations shouldn't be underestimated. They may cause unscrupulous telemarketers to adopt a tax-exempt disguise to circumvent the FCC's regulations. The rules affect not only nonprofit organizations but

for-profit agents they might retain to conduct telemarketing efforts on their behalf.

2. Regulation of automatic dialing systems and artificial or prerecorded telephone messages. Nonprofit organizations aren't exempted from FCC regulations governing the use of "artificial or prerecorded telephone messages." All nonprofits, regardless of their tax-exempt status, must adhere to these requirements in fundraising and other telemarketing activities.

The impact of these rules can be significant, since artificial or prerecorded messages are often used in conjunction with automatic dialing systems. Tax-exempt nonprofits can use artificial or prerecorded voice messages without the approval of residential subscribers for non-commercial solicitation purposes. However, they must adhere to the following rules:

- They must identify themselves clearly at the beginning of the call.

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What Telemarketing Rules Affect Your Organization?



You may use faxes to send fundraising solicitations but not to advertise the commercial availability of goods or services without the recipient's permission.

If you use automatic dialing systems or prerecorded phone messages for telemarketing, you must follow all FCC rules. (You must identify your organization

and provide a toll-free number. You may not call cellphones or patients in hospitals, nursing homes, or similar facilities.)

If your nonprofit organization doesn't have tax-exempt status, you (or your for-profit fundraising agent) can still use telemarketing to raise funds. However, your calls are subject to all the FCC's regulations (you can only call at certain hours, for example, and can't disconnect the phone prematurely if it's not answered immediately).

If you use a for-profit company to telemarket on your behalf, that company must abide by the Telemarketing Act. (They may not call anyone who has asked them not to call. They must give caller-ID information and must promptly identify themselves. They may only call between 8:00 a.m. and 9:00 p.m. and must connect the call to a representative within two seconds of their greeting.) They aren't subject to the national Do-Not-Call Registry, however, as long as they're engaged in "solicitations to induce charitable contributions."

- The recorded message must provide the phone number at which the caller may be reached. This phone number can't require the called party to incur long-distance charges.

- They may not use automatic dialing systems or prerecorded voice message to call wireless phone numbers or phones in patient rooms of hospitals, health-care facilities, elderly homes, or similar establishments.

3. Regulation of unsolicited faxes. Both the TCPA's and FCC's

implementing regulations deal with faxes more restrictively than telephone contacts. Congress and the FCC have determined that unsolicited faxes constitute a substantial nuisance. The prohibition against fax machines, computers, "or other devices" to send "unsolicited advertisements" without the recipient's "prior express invitation or permission" makes no exception for tax-exempt nonprofit organizations.

"Unsolicited advertisements," however, are defined as "any material advertising the commercial availability or quality of any property, goods, or services." The restriction, therefore, doesn't impact fundraising solicitations.

Regulation by the FTC

In October, 2001, in the wake of the September 11 terrorist attacks, Congress adopted the PATRIOT Act. This legislation, among other things, amended the Telemarketing Act. It extended the Telemarketing Act's coverage to phone calls seeking "a charitable contribution, donation, or gift of money or any other thing of value." The PATRIOT Act further instructed that "fraudulent charitable solicitations" would be considered a form of deceptive practice. The intent was to provide a way for the FTC to control fraudulent telemarketing undertaken on behalf of charitable causes. Because the FTC lacks jurisdiction over nonprofit organizations, the law doesn't regulate nonprofits themselves but only telemarketing activities conducted on their behalf by for-profit agents.

Conclusions

The telemarketing rules administered by the FTC and FCC contain traps for the uninformed. While regulations that apply to nonprofit organizations are relatively limited, it's important to realize that a number do exist. These rules vary according to whether the nonprofit is conducting telemarketing activities on its own or through an outsourced commercial service. They also depend on whether the solicitation is for fundraising purposes or for the sale of goods and services. ■

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