

Don't

CALL • EMAIL • FAX

The Consumer Advertising Labyrinth

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You are a new company with a fantastic new product that every home and business owner could use. Now all you have to do is let your target customers know about your product. You have a great mailing list that contains addresses, phone numbers, fax numbers and email addresses for your targets. Now all you need to do is implement that fantastic marketing plan, calling everyone on the list, emailing the latest updates, and faxing out those one-page “features and benefits” slicks produced by your graphics department. Then, in the middle of your marketing campaign, you get a notice from the Federal Trade Commission (FTC) that you are in violation of half a dozen regulations.

Over the course of a meticulously prepared meal at your family dinner table, your 11-year-old daughter is enthusiastically describing her upcoming dance recital when, suddenly, the phone rings. “Who could be calling now,” you ask yourself as you answer the phone, hoping the phone call will not be some sort of family emergency. No family emergency. It’s just Lloyd with your local phone company wondering if you are happy with your current long distance service. By the time you tell Lloyd you are not interested in what he is selling, your family has finished dinner, and your daughter’s enthusiasm has shifted to Instant Messaging her friends in her room.

Unsolicited emails, faxes and telephone calls are a consumer nightmare and a constitutional dilemma. How should we balance the valid commercial free-speech of an honest business trying to market its products/services against our individual right to privacy? It’s a question that is even more perplexing in an expanding age of technology, where both unsolicited intrusions, and the loss of goodwill that overly aggressive and intrusive marketing cause, can occur more easily than ever

before. In this balancing act, recent technological advances in telecommunications have resulted in a shift of federal and state regulations towards increased protections of personal privacy — a shift every business needs to be aware of.

The extent to which recent policy has shifted the scales in favor of increased personal privacy varies based upon the medium of communication. The FTC adopted a “National Do-Not-Call Registry” to prevent unsolicited telemarketing.¹ The “Controlling the Assault of Non-Solicited Pornography and Marketing Act (the “CAN SPAM Act”) created a number of restrictions for online advertisers with respect to emails.² The “Junk Fax Prevention Act” placed prohibitions on fax solicitations unless the solicitor has an established business relationship with the receiving party.³

Do not call

In response to the growing number of unsolicited telephone calls, in 1991 the U.S. Congress passed the “Telephone Consumer Protection Act” (TCPA).⁴ The regulations under this federal legislation were revised in 2003 by the FTC to create a national “do-not-call” registry.⁵ These regulations expand the compliance requirements applicable to businesses and placed greater constraints on telemarketers. Together, the TCPA, the FCC guidelines associated with the TCPA, and the FTC provisions related to the TCPA serve to regulate both advertising calls, and the companies that make those calls, to a reasonable set of consumer-friendly rules.

The FCC’s guidelines for telephone solicitations are relatively simple. Advertisers are prohibited from calling residential telephones between 9 p.m. and 8 a.m.⁶ The caller must also provide his/her name, the organization for which the

caller is working and the contact information for the organization. Callers must also display this information on the consumer's caller ID, if available.⁷ This caller ID display must include a phone number that the recipient may call during regular business hours to request that the company no longer call the consumer. This rule also applies to companies that have an established business relationship with a consumer.

Consumers have the right to register their residential telephone numbers, including wireless numbers,⁸ on the National Do-Not-Call Registry at no cost.⁹ The registry is nationwide, covering both interstate and intrastate telemarketing calls.¹⁰ With few exceptions,¹¹ telemarketers are not allowed to call consumers whose numbers are on the registry. Telemarketers must search the registry at least once every 31 days to synchronize their calling lists with an updated version of the registry and to ensure that any registered numbers are not included in their calling lists. As a result, consumers can, if they choose, reduce the number of unsolicited telephone calls to their homes. To date, more than 137 million phone numbers have been placed on the list.

There are a variety of telemarketing calls that are not considered telephone solicitations and, therefore, are not prohibited by the TCPA. The definition of a telephone solicitation does not extend to calls:

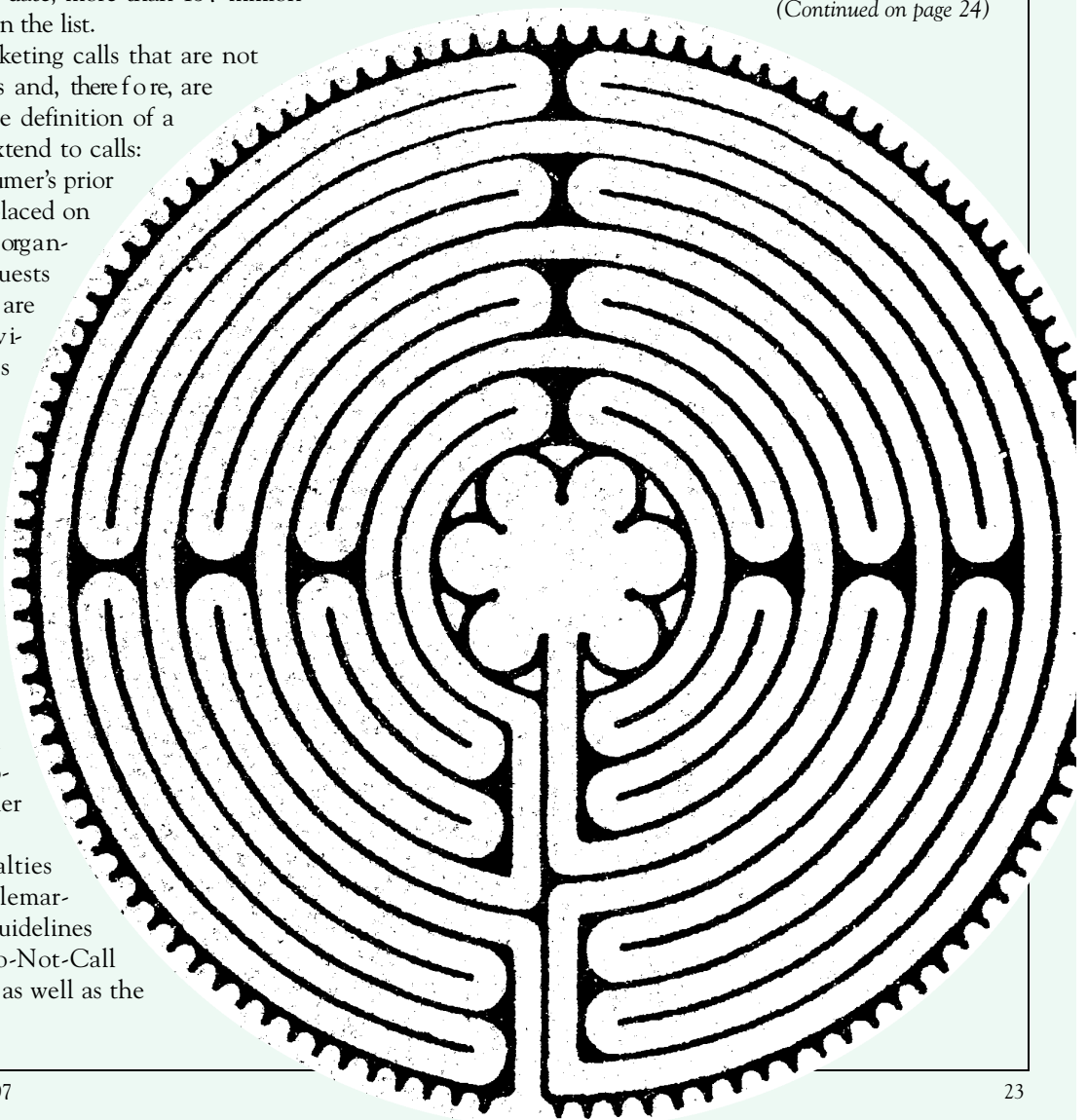
(1) that are placed with the consumer's prior explicit permission, (2) that are placed on behalf of a tax-exempt non-profit organization; (3) that are telephone requests for bona fide surveys; or (4) that are from an organization that has previously established a business relationship with the consumer.¹² There are established time limits to qualify what may be considered as an "established business relationship" sufficient to constitute the exemption. An established business relationship exists for three months after a consumer makes an inquiry regarding a business' products or services, or for 18 months after a consumer engages in a transaction with the seller.¹³ Also, business-to-business calls are not covered under the TCPA.¹⁴

There are a number of penalties that can be assessed against telemarketers who do not adhere to the guidelines related to the National Do-Not-Call Registry. The FCC and the FTC, as well as the

states, are authorized to bring actions against violators and to pursue fines of up to \$11,000 per violation. Some states allow the greater of \$500, or the actual monetary loss, as a remedy to consumers who are listed on the National Do-Not-Call Registry who receive telephone solicitations (and such awards can be trebled if it can be shown that such solicitations were done "willingly and knowingly").¹⁵

In addition to the National Do-Not-Call Registry, the FCC has also created a new Company-Specific Do-Not-Call Registry, which requires a person or entity placing live telephone solicitations to your home to maintain a record of your request not to receive future telephone solicitations from that person or entity.¹⁶ Organizations making telephone solicitations are required to maintain these lists and keep records of requests for five years. Companies' requests also extend to the soliciting organization's affiliates. Tax-exempt non-profit organizations are not required to keep do-not-call lists under the FCC's rules.

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Do not call, fax, email

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Do not email

Though telemarketing calls can be a nuisance, unsolicited email advertisements increasingly pose an uninvited and irritating intrusion to the recipient. In response to the growing number of unsolicited commercial emails, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM).¹⁷ The act: (1) creates a uniform, national standard for those who send commercial electronic mail, (2) articulates penalties for commercial emailers, and for companies that use email to advertise for their products, in violation of the act, and (3) allows consumers to request marketers to stop sending them unsolicited emails.¹⁸

Commercial email is defined as email whose primary purpose is to advertise or promote a commercial product or service, including content on an Internet Web site operated for a commercial purpose. The definition specifically excludes emails that are "transaction and relationship messages," which is an email that facilitates an agreement or transaction or updates a customer in an existing business relationship about a product that the consumer purchased or the status of a transaction.¹⁹

The rules

applicable to commercial emailers under the CAN-SPAM Act cover three main areas. First, the act bans false or misleading header information or subject lines in commercial emails.²⁰ Second, the act requires that commercial emails indicate that they are advertisements, provide a physical address for the party sending the email, have a functioning return address, and communicate that the recipient can choose to not receive future email solicitations from the sender.²¹ Third, the Act requires that commercial emailers provide a method in the email solicitation that instructs the recipients how to prevent receipt of future emails (an "opt-out" function). The emailer must be able to process opt-out requests for a period of thirty days following the original email and must stop sending emails within ten business days to recipients that use the opt-out mechanism. The act also prohibits involving a third party to send email on the solicitor's behalf or selling "opted-out" email addresses.²²

Penalties for a violation of these regulations include fines of \$250 per violation, up to a maximum of \$2 million.²³ Additional fines apply to commercial emailers who take further steps to circumvent the law, such as using scripts or other automated means to register multiple email addresses to send commercial email, relaying emails through a computer or network without permission, and using a computer without authorization to send

commercial email.²⁴ The act also includes requirements for appropriate warnings on the subject line of email that contains sexually explicit material.²⁵

Do not fax

The Junk Fax Prevention Act of 2005²⁶ amended the TCPA. The Junk Fax Prevention Act provides that it is unlawful to send unsolicited advertisements via fax unless the recipient has previously expressed an invitation or has granted permission for the company to send advertisements.²⁷ In April 2006, the FCC amended its rules for fax advertising, such that all companies that have established a business relationship (as defined in the regulations) with consumers are exempt from the prohibition on unsolicited faxes, provided the companies comply with the FCC notice and opt-out requirements. These new rules became effective Aug. 1, 2006.²⁸

The FCC's regulations under the Junk Fax Prevention Act provide that advertisers with whom the recipient has an established business relationship can send fax advertisements if: (1) the advertiser obtains the fax number directly from the recipient, (2) the advertiser obtains the fax number from the recipient's directory, advertisement, or website (unless the recipient notes that it does not wish to receive unsolicited advertisements at the fax number), (3) the advertiser takes reasonable steps to verify that the recipient consented to having the number listed in a directory, from which the number was obtained, or (4) the established business relationship existed and the sender possessed the fax number before July 9, 2005.²⁹

Although these regulations exempt a number of sources for potentially unwanted advertisements, exempted recipients can still avoid unwanted fax advertisements from parties with whom they have an established business relationship. In this regard, the FCC regulations allow recipients of unwanted fax advertisements an opt-out option similar to the email opt-out provisions of CAN-SPAM. Senders of unsolicited fax advertisements must include the telephone number, fax



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number, or email address for the opt-out on the first page of the fax.³⁰ Recipients need only reply using this information and stating the fax number(s) to which no future fax advertisements should be remitted. The FCC also requires that advertisers must comply with the opt-out request within thirty days.

The TCPA gives the FCC authority to impose fines of up to \$11,000 for each violation under the Junk Fax Prevention Act. Also, individuals who are the victims of violations are permitted to seek a judicial remedy or contact the FCC to obtain an enforcement action.³¹ Consumers who decide to seek a judicial remedy may recover the greater of \$500 or their actual monetary loss for each unsolicited fax transmission. The act requires receipt of only a single, unsolicited fax advertisement for a consumer to evoke these remedies.

Conclusion

The federal government (through legislation and regulations from the FTC and the FCC) and the Tennessee legislature have taken steps over the last few years to protect consumers from unsolicited telecommunication advertisements. These efforts have attempted to place minimal burdens upon telecommunication advertisers, while safeguarding the privacy of consumers. These new regulations affect every business's use of telephone, email, or fax for advertising purposes. Businesses need to be familiar with these new regulations and take the necessary precautions required under them. It's more than just good business to follow these state and federal regulations in order to preserve your customers' goodwill — it's a legal necessity to avoid violations and sanctions that could cost your business thousands of dollars. ✈

Notes

1. 47 C.F.R. § 64.1200(c)(2) and (f) (2005).

2. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699.

3. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (amending 47 U.S.C. § 227).

4. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394.

5. 68 Fed. Reg. 4580 V (Jan. 29, 2003).

6. <http://www.fcc.gov/cgb/consumerfacts/tcpa.html>.

7. <http://www.fcc.gov/cgb/consumerfacts/tcpa.html>; Tennessee also has a comparable provision which requires that no telephonic sales calls shall be made by a telephone solicitor to a consumer if the number of the caller is unlisted, or if the solicitor is using equipment which blocks the caller ID function, or equipment is used so that the number of the caller is not displayed. *Tenn. Code Ann.* §47-18-1526.

8. FCC regulations prohibit telemarketers from using automated dialers to call cell phone numbers. The federal government does not maintain a separate national cell phone registry. See *The Truth about Cell Phones and the National Do Not Call Registry*, available at <http://www.ftc.gov/opa/2005/04/dnc.htm>.

9. 47 C.F.R. § 64.1200(c)(2) and (f)(2005). Registration is for a period of five (5) years and renewable for five (5) year intervals.

10. 16 C.F.R. §§ 310.1-310.9 (2006); 47 U.S.C. §152 (2000). Tennessee has a comparable provision which provides that no unsolicited calls may be made unless there are procedures in place where a list of persons are maintained of those who do not wish to receive telephone solicitations. *Tenn. Code Ann.* §47-18-1526 (2006).

11. 2003 Telephone Consumer Protection Act (TCPA) Order, FCC Rel 03-153, 18 FCC Rcd. 14014, 14034, ¶ 28.

12. A business relationship is created when a consumer makes an inquiry, application, purchase, or transaction with the advertiser. 16 C.F.R. §310.2(n)(2006). Tennessee has a similar exception which includes calls: (i) made in response to an express request of the person called, (ii) made in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call; or (iii) made to a person where an existing business relationship exists. *Tenn. Code Ann.* §47-18-1526 (2006).

13. 16 C.F.R. §310.2(n)(2006).

14. 2003 Telephone Consumer Protection Act (TCPA) Order, FCC Rel 03-153, 18 FCC Rcd. 14014, 14034, ¶ 28.

15. 47 U.S.C. §227(b)(3), (c)(5), and (f).

16. See <http://www.fcc.gov/cgb/consumerfacts/tcpa.html>.

17. Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 1108-187, 117 Stat. 2699 ("CAN SPAM Act"). The Act became effective on January 1, 2004. Tennessee has enacted a similar act which governs unsolicited email advertising. *Tenn. Code Ann.* § 47-18-2501 (2006).

18. CAN-SPAM Act § 3(2)(A) (codified at 15 U.S.C. §7702). The Tennessee provision provides that a mandatory opt-out method via email or toll-free telephone number and that the subject line must include the words "ADV." *Tenn. Code Ann.* § 47-18-2501 (2006).

19. CAN-SPAM Act § 3(17)(A) (codified at 15 U.S.C. §7702(17)(A)).

20. CAN-SPAM § 5(a)(1)(codified at 15 U.S.C. §7704).

21. CAN-SPAM § 5(a)(3)(A)(codified at 15 U.S.C. §7704).

22. CAN-SPAM § 5(a)(4)(A)(iii)(codified at 15 U.S.C. §7704).

23. CAN-SPAM § 7(B)(3)(a) and (b)(codified at 15 U.S.C. § 7706).

24. A complete list of the violations that generate additional fines can be found at www.ftc.gov/bcp/online/pubs/buspubs/canspam.htm.

25. More information about these additions can be found at <http://www.ftc.gov/bcp/online/edcams/spam/rules.htm>

26. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat 359 (amending 47 U.S.C. § 227) ("Fax Act").

27. *Id.* Tennessee also has a corresponding provision which provides that unsolicited advertisements are prohibited; however not-for-profit membership organizations are exempt from the prohibition, provided that the fax is sent to current members. *Tenn. Code Ann.* § 65-4-502 (2006).

28. More information about the new rules and the Fax Act can be found at www.fcc.gov/cgb/consumerfacts/unwanted-faxes.html.

29. Fax Act § 2(a), 119 Stat. at 359-60.

30. Fax Act § 2(b)-(c), 119 Stat. at 361-62; Tennessee law provides that all faxes must include: (i) the date and time of the transmission; (ii) an identification of the sender; (iii) and the telephone number of the sender. *Tenn. Code Ann.* § 65-4-502 (2006).