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New Regulations For Insurance Telemarketers

Law360, New York (April 16, 2009) -- The Federal Trade Commission's (the "FTC") recent amendment to its Telemarketing Sales Rules ("TSR")[1] significantly impacts the right of insurance carriers and their direct marketers and other insurance agents to deliver prerecorded telemarketing calls to sell insurance products and services.

The Prerecorded Telemarketing Call Amendment (the "Amendment") to the TSR applies not only to consumers who have not registered their telephone numbers on the federal Do-Not-Call List and, with respect to a particular seller, its company specific do-not-call list for the seller or insurer whose products are being telemarketed, but perhaps more importantly also to customers with whom a seller has an existing business relationship.[2]

These amendments establish important new compliance requirements for both insurance companies and their distributors and marketers requiring (1) specific opt-out mechanisms for consumers who receive these types of calls and (2) callers to obtain the prior written consent for placing prerecorded telemarketing calls to consumers, including consumers with whom a caller has a pre-existing business relationship.

The Amendment finalized the FTC's original notice of proposed rulemaking regarding prerecorded telemarketing calls or use of predictive or robotic dialers for telemarketing purposes and resulted in the rejection of its former Nov. 17, 2004, proposed safe harbor approach for prerecorded telemarketing calls made to persons with whom the seller has an existing business relationship, which would have permitted prerecorded telemarketing calls to existing customers if the calls complied with contemplated amendments to the existing call abandonment safe harbor rule.

Based on the comments that the FTC received in response to the Amendment, the FTC discerned four major themes:

- 1) prerecorded message calls are abusive and coercive to consumers,

- 2) sellers' self-interest in retaining established customer relationships is insufficient to prevent abuse through excessive prerecorded telemarketing calls,
- 3) prerecorded message calls impose costs and burdens on consumers, and
- 4) opt-out approaches for consumers to cease receiving prerecorded telemarketing calls are likely to provide adequate protection of consumers.

Opt-Out Requirement for Prerecorded Telemarketing Calls

Effective Dec. 1, 2008, a telemarketing call that includes a prerecorded message must contain a quick and easy method for the recipient of the call to opt-out of receiving future prerecorded telemarketing calls from the telemarketer.

The TSR does not define what is a prerecorded message, which is self-evident as any message not delivered by a live human voice.

If a seller or telemarketer complies with the following rules for prerecorded telemarketing calls, the seller or telemarketer will obtain safe harbor protection against a violation of the prohibition against making such calls without the first obtaining the written permission of the person called.

For a call to induce the purchase of a good or service, the seller or telemarketer making the call must allow the phone to ring at least 15 seconds (approximately four rings) before disconnecting the call and, within two seconds after completion of the greeting of a person who answers the call, the call must provide a prerecorded message that clearly:

- 1) identifies the seller,
- 2) states that the purpose of the call is to sell goods or services,
- 3) describes the nature of the goods or services offered for sale and
- 4) states that if a prize promotion is offered, no purchase or payment is necessary to be able to win a prize or participate in a prize promotion and that a purchase will not increase the person's chances of winning.

If the person called answers the call in person, the prerecorded message must inform the person that he or she can at any time during the call use an automated interactive voice and/or telephone key press activated out-out mechanism to make a do-not-call request.

The opt-out mechanism must remain available for the duration of the call and, if used by the person called, must automatically add the number called to the seller's company specific do-not-call list and immediately disconnect the call.

Similarly, if the prerecorded telemarketing message is left on an answering machine or voicemail system, the prerecorded telemarketing message must provide a toll-free number the recipient can call to request to be added to the seller's company specific do-not-call list.

This toll-free number must be available for the duration of the seller's telemarketing campaign and must provide the consumer with an automated mechanism for being placed on the company specific do-not-call list.

Prior Written Consent Requirement for Making Prerecorded Telemarketing Calls

To reduce the burden to obtain the consumer's written consent to receive prerecorded telemarketing calls, especially for consumers with whom a seller has an Existing Business Relationship ("EBR"), the FTC delayed the effective date for compliance with this part of the Amendment.

Commencing on Sept. 1, 2009, prerecorded telemarketing calls may not be made to a person unless the seller first obtains the express written agreement of that person to receive such prerecorded calls from that particular seller.

Before requesting the consumer's agreement, the telemarketer must first provide a "clear and conspicuous disclosure" to the consumer that the purpose of the agreement is to authorize the seller to make prerecorded telemarketing calls and cannot be conditioned upon the purchase of any good or service.

The agreement must evidence the willingness of the recipient to receive prerecorded telemarketing calls by or on behalf of the specific seller.

In the comments to the Amendment, the FTC made clear its intention that the agreement authorizing prerecorded calls be limited to calls made by or on the behalf of the specific seller identified in the agreement and that the agreement is not transferable to any other party.

Further, the agreement must include the recipient's telephone number and signature. The signature may include "an electronic or digital signature to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law."

The FTC did not address, in either the plain language of the Amendment or in the comments thereto whether a caller who represents multiple sellers such as an independent insurance agent, is required to obtain a separate written agreement for each seller (i.e., insurer) that the caller represents.

It is significant that the clear and conspicuous disclosure, unlike the agreement, is not required to be in writing. Consequently, the additional burdens under the Federal E-SIGN Act for providing consumer disclosures required by law to be given in writing should not apply.

The federal and state electronic signature laws permit companies to provide written disclosures to consumers exclusively through electronic means, as well as obtain consumers' signatures using various forms of electronic signatures.

Among the ways consumers may sign electronically, under electronic signatures laws, are selecting a number on a key pad on the telephone or saying, "I agree" on the phone.

How to comply with the e-disclosure and e-contracting requirements under the federal and state electronic signature laws are beyond the scope of this article. [Click here for additional information on mitigating the risks of ineffective e-contracting.](#)[3]

In the explanatory text with the Amendment, the FTC warned telemarketers that they should pay attention to the requirements of the Federal E-SIGN Act, "The FTC will monitor E-SIGN compliance closely to ensure that consumers' privacy preferences are protected."

Exemption for Health Care Industry

The Amendment does not apply to any outbound call delivering a prerecorded health care message by a "covered entity" or its "business associate" subject to the privacy regulations established under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

Health insurers are covered entities and health insurance agents are business associates under HIPAA's privacy regulations.

The FTC's decision to exempt prerecorded health care calls from the Amendment is based primarily on the fact that health care-related calls are already subject to federal regulation by HIPAA and its view that the number of health care providers that would make prerecorded telemarketing calls to their patients is "inherently limited" and that reasonable consumers do not view prerecorded health care calls abusive or coercive.

Further, HIPAA specifically requires that a "covered entity" obtain an individual's authorization before using or disclosing protected health information for marketing purposes.

As a practical matter, this HIPAA restriction effectively regulates the making of prerecorded telemarketing calls by a "covered entity" or its "business associate."

Many States Have More Restrictive Laws

There are significant differences between the FTC Rule and some state telemarketing laws. The FTC has expressly stated that its Rule does not preempt more protective state laws.

Because telemarketers are effectively required to comply with the more restrictive of the FTC Rule or state law when making interstate telemarketing calls, less restrictive state laws are rendered inapplicable in these cases. The FTC Rule is in effect a “floor” on regulation of interstate telemarketing calls.

More than 40 states have enacted statutes restricting the use of prerecorded telemarketing calls. The most common state-level restriction requires a telemarketer to obtain the express consent of the person to be called before making a prerecorded telemarketing call.[4]

The telemarketing statutes of each relevant state should be analyzed on a case by case basis to determine the impact of state restrictions on the use of prerecorded telemarketing calls.

Insurance companies, especially those with many, varied types of distribution systems, will need to augment their compliance policies and procedures to assure their agents’ compliance with these new rules.

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The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] 16 C.F.R §§310.1 et. seq.

[2] Telemarketing Sale Rule; Final Rule Amendments, 73 Fed. Reg. 51,164 (Aug. 29, 2008) (to be codified at 16 C.F.R. pt 310).

[3] Electronic Signatures, LLB&L Brochure (September 2008).

[4] Most states telemarketing statutes deem an existing business relationship, customer request or inquiry to meet their statutory consent requirement. However, some states have more restrictive telemarketing statutes, for example Arizona and Tennessee both ban automated calls, regardless of consent. See Ariz. Rev. Stat. §44-1278(4) and Tenn. Code Ann. §65-4-401.