

April 11, 2003

[Name]
[PIC; Community Affairs; TCB]
[address]

Re: Regulations Affecting Telemarketing Activities

Dear XX:

The purpose of this letter is to advise you of some significant legal developments that affect the regulation of telemarketing activities. There is an important lawsuit pending between the teleservices industry, represented by The Direct Marketing Association ("DMA"), and the Federal Trade Commission ("FTC"). That lawsuit pertains to certain recently amended provisions in the Telemarketing Sales Rule ("TSR"), including the "Abandoned Call Rule" which prohibits call abandonment of more than 3% of the telemarketer's outgoing calls, measured on a daily basis.

In a setback for telemarketers, after hearing oral argument on Wednesday, March 26, 2003, the United States District Court for the Western District of Oklahoma denied the DMA's request for a preliminary injunction with respect to the amended TSR. The DMA's primary argument was not over jurisdiction or constitutionality, but rather that (i) compliance was essentially impossible because of the unavailability of the requisite technology, and (ii) that the time frame for compliance was unrealistic.

However, the Federal Trade Commission ("FTC") itself granted the DMA's request for a stay of enforcement until October 1, 2003. The stay announced by the FTC means that the DMA in its lawsuit, as well as other organizations which have challenged the TSR, will have enough time to pursue the matter in the courts before the rule goes into effect. Hopefully, one or more judgments invalidating the challenged provisions can be achieved before the FCC takes action. For example, the ATA has also moved for a preliminary injunction in its case against the FTC. Argument on that issue was heard on Friday, March 28, 2003 in Denver. In addition, a third lawsuit was filed in Washington, D.C. on behalf of an insurance company. Like nonprofits, insurance companies are exempt from the TSR, unless they use an independent telemarketing service bureau.

Other important developments are as follows:

1. Do-Not-Call Implementation Act. This statute, funding the national do-not-call registry, was signed into law on March 11, 2003. The FTC subsequently announced the following schedule: (1) commencing in July 2003, consumers will be able to register, (2) in September, 2003 the registry will become available, and (3) in October, 2003 the FTC and the states will begin enforcing this provision – unless it is invalidated by the pending litigation.

2. FCC. The Do-Not-Call Implementation Act also contains a provision which requires the FCC to issue a final rule within 180 days (from March 11, 2003) to “consult and coordinate” with the FTC’s TSR. The FCC is currently seeking comments. Keep in mind that the FTC lacks jurisdiction over a number of primary users of telemarketing, *e.g.*, insurance, financial, communications, political calling, etc. Because of these exemptions, the FTC regulates some telemarketing but not others. This makes the TSR vulnerable to constitutional challenge. If the FCC closes the circle by eliminating the exemptions, then legal challenges could be thwarted.

3. Nonprofit Challenge. We have learned that a lawsuit may be filed very soon in Baltimore on behalf of the National Federation of the Blind and Special Olympics Maryland. If that happens, it would be the fourth such challenge to the new provisions in the TSR. It is our understanding that the case will focus on the jurisdiction of the FTC and the constitutionality of the TSR – not the cost of the new technology.

On a special note: Please contact this office if you are interested in helping to support this important litigation. We believe the case is extremely important to all telemarketing firms providing services to nonprofits.

4. Indiana Lawsuit. A challenge to the Indiana do-not-call law on behalf of four nonprofit organizations is moving towards its oral argument. On April 7, 2003, the plaintiffs filed their reply to the state’s motion for summary judgment. The plaintiffs anticipate that the court will then close the pleadings and set the matter for oral argument shortly thereafter.

If you have any questions concerning these developments, please do not hesitate to contact this office.

Very truly yours,

Daniel Alcott
For the Firm