

The Telemarketing Sales Rule

The Telemarketing Sales Rule (TSR), a regulatory rule implementing the Telemarketing and Consumer Fraud and Abuse Prevention Act, became effective on December 31, 1995. The TSR prohibits misrepresentations during telephone solicitations, requires certain disclosures and policies, and—with amendments that took effect in 2003—provides for a national “Do-Not-Call” (DNC) list.

In 2002, the Federal Trade Commission (FTC) announced major changes to the TSR, most of which became effective on March 31, 2003. In addition to the National Do-Not-Call List, the Amended Rule placed restrictions on the use of “upsells,” negative options, free-to-pay conversions, pre-acquired account information, and predictive dialers. While most of the Amended Rule became effective in March 2003, the DNC list became operational in October 2003.

The Federal Communications Commission (FCC) also regulates some telephone solicitations under authority of the Telephone Consumer Protection Act (TCPA). In 2003, the FCC made changes to its telemarketing rules. In addition to coordinating with the FTC on the creation of the DNC list, the FCC rules also address the use of predictive dialers and caller ID.

The FCC rules regarding DNC lists, predictive dialing, and caller ID effectively preempt state laws and regulations for *interstate* calls. The FCC will decide on a case-by-case basis whether it will allow states to regulate *intrastate* calls.

Some of the FCC rules differ from the FTC regulations—including the restrictions on predictive dialers. Most publishers are subject to FTC jurisdiction and must comply with the FTC rules. Under limited circumstances, some not-for-profit publishers may not be subject to either FTC or FCC regulation. Publishers are advised to consult with their attorneys to ensure they are in compliance with all applicable laws and regulations.

The Rule has been amended periodically since 2003 to adjust the fees associated with the National Do-Not-Call list. The complete text of the Amended TSR Rule is available at: <http://www.ftc.gov> and the FCC’s rule is available at <http://www.fcc.gov>.

National Do-Not-Call List

The FTC, in conjunction with the FCC, created the National Do-Not-Call List, allowing consumers to place their telephone numbers in a central DNC registry to

prevent sales solicitation calls from telemarketers. The following exceptions are allowed:

- Customers may be called for up to eighteen months after a customer's purchase, rental, or lease of the seller's goods or services or any other financial transaction between the customer and seller. For a magazine publisher, this exemption runs for 18 months from the delivery of the last magazine issue;
- Consumers may be called for up to three months after the consumer contacts the seller with an inquiry; and,
- Consumers may be called if they have given written consent to receive telemarketing calls.

Company-specific DNC lists

In addition to complying with the National DNC list, companies must establish and maintain company-specific DNC lists and may not call consumers on this list, even during the 3 and 18 month exception periods described above. Publishers must also ensure compliance with the company-specific DNC list by telemarketing agents working on their behalf.

Upsells

The FTC's Amended Rule defines upsells as a separate transaction subject to the same requirements as the initial transaction with the following exceptions:

In an **external upsell**, when the seller in the upsell transaction is different from the seller in the initial transaction, the telemarketer must disclose:

- The identity of the seller;
- That the purpose of the call is to sell goods or services; and
- The nature of the good and services.

During an **internal upsell**, when there is a single seller for both the initial and upsell transaction, the telemarketer must disclose the following:

- That the purpose of the call is to sell goods or services; and
- The nature of the goods and services.

Inbound upsells are exempt from the requirements of the national DNC list and time of day calling restrictions.

Preacquired Account information

If a transaction involves preacquired account information, which is defined as any type of information that enables the telemarketer to charge a consumer's account without obtaining the account number directly from the consumer during the

particular transaction in which the purchase occurs, the telemarketer must obtain the consumer's express informed consent by:

- Making all required disclosures;
- Obtaining the consumer's affirmative and unambiguous consent to the charge--silence does not equal consent;
- Identifying the account to be charged with specificity for the consumer to understand what account will be charged; and,
- Obtaining the consumer's express agreement to be charged using that account.

Note: If account information is obtained during an initial telephone solicitation and that account information is used in connection with an upsell transaction, the account number will be treated as preacquired account information with respect to that upsell and the seller must obtain express informed consent before charging the account.

Free Trial Offers

In a free-to-pay conversion, in which a customer receives a product or service for a free trial period but will incur a charge at the end of the trial period unless he or she takes some affirmative action to cancel during the trial period, the Amended Rule requires that the seller obtain from the consumer during the telephone solicitation at least the last four digits of the account number to be charged and the consumer's express agreement to be charged using that account number. The telemarketer must also make and maintain an audio recording of the entire telemarketing transaction.

For upsells, this means that the entire upsell must be recorded. For outbound calls, the entire call must be recorded, not just the verification.

Negative Option

A telemarketer using free-to-pay conversion offers, traditional continuity programs, and other recurring billing arrangements such as automatic renewal or continuous service programs shall disclose all material terms of the sale, including:

- the fact that the customer will be charged unless affirmative action to cancel is taken;
- the date that the charge will be submitted for payment; and,
- specific steps the consumer must take to avoid being charged

Novel Payment Methods

The Amended Rule requires express verifiable authorization for any payment method other than a credit or debit card. Express verifiable authorization can be obtained through:

1. Written authorization signed by the consumer;
2. Tape recorded oral authorization;
3. Written confirmation of the transaction sent via first class mail. Note: written confirmation **cannot** be used for offers involving the use of preacquired account information **and** a free trial offer. Those transactions must be recorded.

Consumer Billing Information

The amended Rule expressly prohibits companies from disclosing or receiving for payment or other consideration, unencrypted consumer account information for use in telemarketing. Marketers can still obtain lists with the last four digits of the account number appended and then obtain the complete billing information after obtaining the consumer's express informed consent to the charge. Marketers cannot sell or lease the consumer's entire account information for use in telemarketing

Abandoned Calls

The Amended Rule expressly prohibits abandoned calls, which are defined as any call in which the telemarketer does not connect the call to an operator within two seconds of the consumer's completed greeting.

A telemarketer must:

- Employ technology to ensure abandonment of no more than three percent of all calls per day, per campaign;
- Allow the phone to ring at least four times;
- Play a recorded message with the seller's name and telephone number if an operator is not available within 2 seconds of the consumer's completed greeting. This message must comply with applicable federal and state laws governing the use of recorded messages; and
- Retain records demonstrating its compliance with these requirements.

Caller ID

Telemarketers are required to transmit their telephone number and, where made available by the telephone carrier, name to any caller ID service used by the

consumer. The telemarketer may transmit any number associated with the telemarketer that allows the called consumer to identify the caller.

Sweepstakes

In addition to disclosure of the material terms of prize promotions, the telemarketer must explicitly state that any purchase or payment will not increase the person's chances of winning.