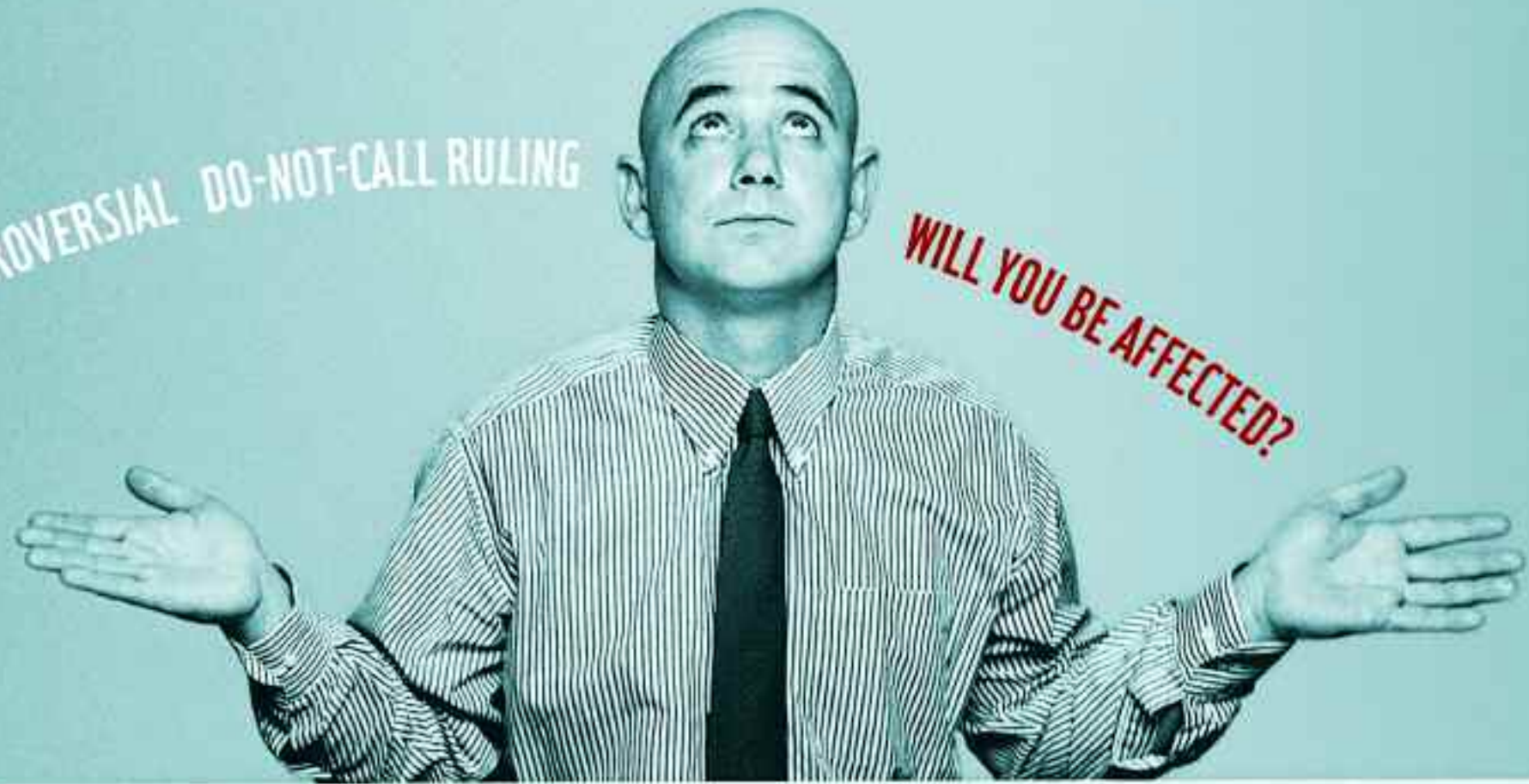


THE FCC TAKES ANOTHER STAB AT THE CONTROVERSIAL DO-NOT-CALL RULING



WILL YOU BE AFFECTED?



BY ED WINN III

For some time, the American public made it clear that it was tired of being interrupted at home by unsolicited sales calls coming at odd times during the day, but most often during the dinner hour. The public outcry culminated with the U.S. Congress enacting the Do-Not-Call Implementation Act (2003) and a Federal Communications Commission rule that went into effect October 1, 2003. FCC Chairman Michael Powell called the new rule “the most sweeping consumer protection measure ever adopted by the FCC.” Since consumers began listing home telephone numbers on the federal do-not-call list last summer, more than 50 million numbers have been accumulated. 📞 Rental dealers are not primarily telemarketers—the specific group at which the rule was aimed—but some rental dealer marketing activities will fall within the coverage of the new rule. This article will summarize how the new rule will impact rental dealers. Dealers wanting more specific information can find the full text of the FCC’s 164-page report and order at www.fcc.gov/cgb/donotcall/.

DO NOT CALL: ONCE AND FOR ALL?

While the new rule has decimated the telemarketing industry, it should only have a minor impact on rental industry practices. It will, however, have some impact as the rule specifically covers telephone calls made to consumers "for the purpose of encouraging the purchase or rental of...goods or services."

RENTAL DEALERS AND THE FCC RULE

The new rule will affect rental dealers in at least three areas:

1. There are a few rental dealers who conduct true telemarketing. They purchase lists of consumers, use telephone directories and otherwise make cold calls to consumers at their homes and attempt either to rent them something on the phone or get them to come down to the store to rent something or at least look around.

2. Some rental dealers regularly revisit old customer files and make telephone calls to former customers and perhaps their references as well to see if they are interested in coming back in to rent something.

3. Some rental dealers, when they are calling references on an account, add a rental pitch to the verification process. This practice is becoming increasingly frequent in the industry.

Each of these activities is covered by the broad language in the new rule and qualifies the dealers as a telemarketer.

EXCLUSIONS TO THE FCC RULE

What is not covered under the rule are regular conversations with existing customers and telephone collection efforts by rental dealers. Some customers might wish that placing their home phone number on the federal do-not-call register would keep rental dealers from being able to call them about their past due accounts, but that was never the intent of Congress or the rule makers and that is not how the rule reads. The do-not-call rule has no applicability to rental dealers' collection efforts.

Cold calls to potential customers, however, are covered by the rule. Telephone calls to former customers are not covered by the rule as long as they are made within 18 months of the last transaction with that customer. Fairly read, the rule allows rental dealers to make solicitation calls to former

customers within 18 months of the expiration of the last paid rental period on an agreement with that customer.

The rule also excludes calls made to prospective customers within 90 days of the customer's last contact with the store. Rental dealers can call consumers who fill out a rental order/application for 90 days without having to comply with the rule. The commentary suggests that a consumer who calls the store merely inquiring about pricing or availability may not fit within the 90-day exclusion, although there is consumer conduct contemplated by the rule short of filling out a rental order/application that would be included within the 90-day exclusion.

The 18-month and 90-day exclusions are the most important exclusions for rental dealers. The FCC considered and rejected a small business exception. Other exclusions that dealers may use from time to time include the following:

1. **Business to business calls.** Only consumer home phone and cell phone numbers can be put on the federal do-not-call list. There are no restrictions on rental dealers soliciting commercial

accounts on the phone.

2. **Signed written consent.** Rental dealers may call consumers who have given the dealer a signed written consent to do so, even if their telephone number is on the federal list. The consent will be valid until the consumer revokes it in writing.

3. **Family and friends.** Rental dealers and their employees may make unsolicited telephone solicitations to people with whom they have a personal relationship without checking the federal list. A personal relationship means a family member, friend or acquaintance.

Unless a rental dealer can fit the telephone call into one of these exclusions, then the call is covered by the rule and the dealer must comply with it. Dealers should note that the rule purports to regulate both interstate and intrastate calls. It remains to be seen whether the FCC has the constitutional authority to

RENTAL DEALERS SHOULD BE AWARE THAT THE ISSUE AND THE RULE HAVE GOTTEN A LOT OF PUBLICITY AND THAT CONSUMERS ARE GENERALLY AWARE OF THE DO-NOT-CALL LIST, ESPECIALLY IF THEY HAVE TAKEN THE TIME TO GET ON IT. THEY ARE QUICK TO FILE COMPLAINTS AGAINST COMPANIES WHO CALL THEM WHEN THEY SHOULDN'T.

regulate calls made entirely within a state, but the FCC has concluded that it does have that authority since having one national do-not-call database is the most efficient and economical way to regulate unsolicited sales to consumers in their homes.

Telemarketing companies immediately challenged the rule last October on First Amendment freedom of speech grounds and a federal district court initially determined that the rule was unconstitutional. However, the 10th Circuit quickly overruled the district court and allowed the rule to become effective. In theory, the federal government only has the power to regulate interstate commerce under the Constitution. The authority of the FCC to regulate purely intrastate telephone calls has not yet been challenged, but surely will be. Until then, the rule is in effect and will apply to a one-store dealer who makes unsolicited telephone calls with customers only in that state.

STATE DO-NOT-CALL STATUTES AND THE FCC RULE

Today, there are 36 states with their own do-not-call statutes and databases of telephone numbers. Some state statutes offer more consumer protection than the federal rule; some less. The FCC has announced its intention to harmonize the state and federal do-not-call lists and rule as much as possible and toward that end has adopted an 18-month transition period to allow states to download their lists into the federal lists.

Some states are currently prohibited from doing just that by their own state enactments. There is an ongoing debate as to the future of the various state do-not-call statutes. State attorneys general, for example, do not want to lose their ability to sue telemarketers in state court using their state's statutes. The FCC has declared that the federal rule is merely a floor and that the states can enact more rigorous consumer protections relating to telephone solicitations. At the same time, however, the Commission has announced its decided preference for one list and one rule to ease the compliance burden.

It is too early to tell whether the states will fall in line and allow the one-

list, one-rule notion to prevail. In the meantime, rental dealers will have to check in their own states to see if theirs is a more restrictive do-not-call statute than the FCC rule. For example, Louisiana, Missouri, Pennsylvania, Tennessee and Texas all have established business relationship exclusions shorter than the FCC's 18-month period. Presumably, those shorter state periods will prevail in those states unless those states adopt the legislation to conform their laws to the FCC rule.

COMPLIANCE ISSUES WITH THE FCC RULE

What does it mean to be covered by the FCC rule? It means that rental dealers will have to compare the telephone numbers that they want to call in any one of the three categories listed above against the numbers on the national do-not-call list and then refrain from calling any of the numbers on the federal list. Rental dealers can download up to five area codes on the list for free. After the first five, dealers will have to pay \$25 per area code. The entire national list with all area codes will cost \$7,350. The lists can be downloaded from www.telemarketing.donotcall.gov.

Rental dealers will have to update their lists quarterly. There is not yet software generally available that will compare telephone numbers automatically, but there soon will be. In the meantime, dealers must compare lists manually before making any calls covered by the rule.

COMPANY-SPECIFIC DO-NOT-CALL LISTS

In addition, the rule requires that rental dealers who make telephone solicitations covered by the FCC rule must also maintain an internal company-specific do-not-call list. Consumers can request that the dealers put their number on the company list and not call it. Dealers must keep numbers on the list for five years. The rule also requires dealers to have written policies in place concerning the company list. A dealer must make the policy available to a consumer upon request. The rule specifically allows consumers who would otherwise fall under an exception to the rule, e.g. a former customer

within the past 18 months, to get on the company do-not-call list, in which case, the company cannot call. The rule requires dealers to process requests to be put on a company-specific list within 30 days of the request.

SAFE HARBOR UNDER THE FCC RULE

There is a safe harbor defense to allegations that the dealer has violated the rule by calling someone whose number is on the federal list. There is no liability for a dealer who, as a part of its routine business practices, has 1) established and implemented written procedures to comply with the do-not-call rules, 2) trained employees in the procedures established pursuant to the do-not-call rules, 3) maintained and recorded a list of telephone numbers that may not be contacted, 4) uses a process to prevent telemarketing to any telephone number on any list established pursuant to the do-not-call rules using a version of the federal list dated not more than three months prior to the call and maintains records documenting this process, and 5) any subsequent call otherwise violating the do-not-call rules is the result of error.

There are separate rules for telemarketers using prerecorded messages, autodialers, fax machine solicitations and ID blocking devices on their phones that are beyond the scope of this article.

If dealers find the FCC rule too cumbersome, they can, of course, make the decision not to make the kinds of telephone calls that trigger coverage under the regulations. Otherwise, rental dealers should be aware that the issue and the rule have gotten a lot of publicity and that consumers are generally aware of the do-not-call list, especially if they have taken the time to get on it. They are quick to file complaints against companies who call them when they shouldn't. There have already been some six-figure fines assessed under the rule.

APRO member dealers wanting more information about how the rule works or information about state laws should contact the APRO office at 800/204-2776 or e-mail Ed Winn at edwinn@e-bylaw.com.

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