



ALERT

For Clients and Friends of DREHER LANGER & TOMKIES L.L.P.
December 20, 2006

FTC CONTINUES TO FORBEAR FROM ENFORCING PROHIBITION AGAINST PRERECORDED CALLS

The federal Telemarketing Sales Rule ("TSR") prohibits telemarketers from abandoning calls. A call is "abandoned" if the telemarketer does not connect the call to a sales representative within two seconds of the completed greeting of the person who answers. 16 C.F.R. § 310.4(b)(1)(iv). Notwithstanding this prohibition, the TSR contains a safe harbor designed to preserve telemarketers' ability to use predictive dialers. The safe harbor is available if the telemarketer or seller: (i) abandons no more than three percent of all calls answered by a person; (ii) allows the telephone to ring for 15 seconds or four rings; (iii) plays a prerecorded message stating the name and telephone number of the seller on whose behalf the call was placed whenever a sales representative is unavailable within two seconds of the completed greeting of the person answering the call; and (iv) maintains records documenting compliance. *Id.* § 310.4(b)(4). Thus, to comply with the TSR, at least 97% of a telemarketer's calls that are answered by a person must be connected to a live sales representative. A telemarketing campaign that consists solely of prerecorded messages would violate the above prohibition and would not meet the safe harbor requirements.

In November 2004, the Federal Trade Commission published a notice of proposed rulemaking seeking comment on an industry petition to change the call abandonment provisions to allow telemarketers to place calls delivering a prerecorded message to consumers with whom the seller has an "established business relationship." As part of the November 2004 notice, the FTC announced that, pending resolution of proposed amendment, no enforcement action would be initiated against any seller using prerecorded messages in accordance with the proposed amendment. 69 Fed. Reg. 67,287 (Nov. 17, 2004).

In October 2006, however, the FTC issued a notice denying the petition to amend the TSR as described above. The notice, among other things: (i) indicated that the FTC would forbear until

January 2, 2007 from initiating enforcement actions for violations of the TSR's call abandonment prohibition against companies that use prerecorded messages; and (ii) proposed to amend the TSR to explicitly prohibit sellers and telemarketers from delivering a prerecorded message when a person answers a telemarketing call, except in the very limited circumstances permitted in the call abandonment safe harbor, and when a consumer has consented, in writing, to receive such calls. 71 Fed. Reg. 58,716 (Oct. 4, 2006).

On December 18, 2006, the FTC issued a notice indicating that, pending completion of the prerecorded call amendment proceedings, the FTC would continue to forbear from bringing enforcement actions for violations of the TSR's call abandonment prohibition against a seller of telemarketer that places telephone calls delivering prerecorded messages to consumers with whom the seller on whose behalf the telemarketing call is placed has an established business relationship, provided the seller or telemarketer conducts this activity in conformity with the following terms:

- The seller or telemarketer, for each such telemarketing call placed, allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call; and
- Within two seconds after the person's completed greeting, the seller or telemarketer promptly plays a prerecorded message that (i) presents an opportunity to assert an entity-specific do not call request pursuant to the TSR at the outset of the message, with only the prompt disclosures required by Section 310.4(d) or (e) of the TSR preceding such opportunity; and (ii) complies with all other requirements of the TSR and other applicable federal and state laws.

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