Making Sense of the Telemarketing Laws: How the FTC Rule, the FCC Rule, and State Laws Fit Together

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As most telemarketing companies have discovered by now, there are three legal regimes that apply to telemarketing—the Federal Communication Commission Rule,[1] the Federal Trade Commission Rule,[2] and state laws. The involvement of two federal agencies as well as the states attests to the long-term concern about telemarketing but, until recently, no effort to develop a truly national approach to regulation.[3]

The most important recent development in telemarketing regulation does reflect a national effort—the bar on calling numbers registered on the national Do Not Call (DNC) registry administered by the FTC. This consumer protection program has to be one of the most popular ever conceived in the United States. At this writing more than 58 million numbers are registered, representing far more individuals. The speed and zeal with which households registered suggest the pervasiveness of telemarketing as a phenomenon and the public's desire to be free of it most of the time.

The media's focus upon the national DNC has tended to obscure the fact that there are a number of federal and state laws which impose separate duties and prohibitions on telemarketers. These laws address disclosures that must be made during the call, calling hour restrictions, limitations on the use of pre-recorded messages and automatic dialing equipment, limits on "abandoned calls" (i.e., calls made by a computerized dialing system that fail to connect a live operator when the consumer answers), and more. Inconsistencies exist between the state and federal regimes, and, indeed between the FTC Rule and the FCC Rule.

This article describes how these various regulatory schemes do and do not fit together and what happens when they clash. As we shall see, there are still some major unanswered questions, particularly the extent to which state laws can be preempted.

The Do Not Call Lists

There are currently three kinds of DNC lists: company-specific lists that are maintained by individual companies based on consumer requests; state lists, many of which have existed for several years; and the national DNC registry, administered by the FTC. The FTC plans to integrate

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[1] Restrictions on Telemarketing and Telephone Solicitation, 47 C.F.R. Part 64, Subpart L (FCC Rule).

[2] Federal Trade Commission Telemarketing Sales Rule, 16 C.F.R. Part 310 (FTC Rule).

[3] Both the FTC and the FCC have statutory authority to regulate telemarketing calls and to create a DNC registry. *See infra* note 7. Sensibly enough, the FCC has said that there will only be one national list administered by the FTC. FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ¶ 75. (released, July 3, 2003) (FCC Order), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf.

existing state lists into the national list.[4] As states integrate their lists into the national list, there will no longer be a requirement for telemarketers to access the state lists. Many states have already begun this process, but the process of integration may take some time.[5] In the interim, telemarketers have to be aware of the existence of multiple DNC lists.[6] For example, if Indiana has not integrated its list into the national registry, telemarketers calling into Indiana need to download numbers from the state list in addition to the national registry.

Scope of the Rules

Not surprisingly, since they are based on different sources of authority, the FTC Rule, the FCC Rule, and the various state laws do not have identical scope.[7] The FTC rule applies only to interstate calls. In addition, the FTC Statement makes clear that the Commission interpreted its statutory authority not to extend to entities that are exempt from the FTC Act: banks, credit unions, savings and loan institutions, airlines and other common carriers,[8] the business of insurance,[9] and non-profit entities.[10] On the other hand, telemarketers that make calls on behalf of exempt entities are subject to the FTC Rule.[11]

The reach of the FCC Rule extends much further. The FCC Rule essentially applies to all entities in the United States, including both persons that are exempt from the FTC Act and persons that are subject to the FTC Rule. Most significantly, the FCC Rule applies to intrastate as well as interstate calls.[12]

State laws vary widely in coverage. Many have exemptions for certain industries, such as charitable organizations, and real estate brokers. Moreover, many states claim the authority to apply their statutes to calls originating outside the state.[13]

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[4] FTC Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4641 (Jan. 29, 2003) (FTC Statement), *available at* http://www.ftc.gov/os/2003/01/tsrfrn.pdf.

[5] Indiana, for example, has indicated that it may take three years to import its DNC list into the national registry. *Id.*

[6] The FTC Rule defines "telemarketer" as any person who "in connection with telemarketing, initiates or receives telephone calls from a customer or donor." § 310.2(bb). That definition includes direct product sellers and companies that specialize in making telemarketing calls on behalf of sellers. In this article, I use the term "telemarketing companies" to refer to the latter group.

[7] The FCC Rule is based on the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227. The FTC Rule is based on the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108.

[8] FTC Statement, *supra* note 4, at 4586.

[9] The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), exempts the "business of insurance" from the antitrust laws, "to the extent it regulated by state law." FTC Statement, *supra* note 4, at 4584.

[10] FTC Statement, *supra* note 4, at 4585.

[11] *Id.* at 4586.

[12] FCC Order, ¶ 212 ("The FCC's jurisdiction over telemarketing is significantly broader than the FTC's. . . . [T]he FCC's telemarketing rules apply without exception to any entity engaged in any of the telemarketing activities targeted by the TCPA and the Commission's rules, including those that involve purely intrastate activities." Congress amended Section 2(b) of the TCPA to give the FCC authority over both interstate and intrastate calls. Congress was apparently concerned that the states could not regulate interstate calls. S. Rep. No. 102-178, at 3.

[13] "More than 300 enforcement actions have been taken against telemarketers, with nearly half of this number involving telemarketing companies calling from across state lines." Comments and Recommendations of the State Attorneys General n.34, FCC Docket No. 02-278 (Dec. 9, 2002) (State Attorneys General Statement). A number of decisions have upheld the applications of state laws. *See, e.g.*, State *ex. rel.* Nixon v. Beer Nuts Ltd., 29 S.W.3d 828, 833–36 (Mo. App. 2000); State *ex rel.* Miller v. Internal Energy Mgmt. Corp., 324 N.W.2d 707, 710 (Iowa 1982).

Inconsistencies Between the FCC and FTC Rules

There are only a few substantive inconsistencies between the FTC Rule and the FCC Rule. For example, the FTC Rule requires that a pre-recorded message be played in the case of an abandoned call and that the message include both the name and number of the seller on whose behalf the call was placed.[14] The FCC Rule requires, in addition, that the recorded message state that the call is for "telemarketing purposes." [15] Both rules provide a 3 percent safe harbor for abandoned calls—calls answered by a live person where no operator comes to the phone within two seconds.[16] However, the FCC calculates the safe harbor over a thirty-day period,[17] while the FTC Rule calculates the safe harbor on a daily basis for each calling campaign.[18] Allowing companies to calculate the 3 percent threshold over a longer period and over multiple campaigns is considerably more permissive. Both rules require disclosure of the name of the seller and a telephone number. The FTC Rule also includes a number of specific disclosures before a transaction is completed.[19] The FCC Rule, unlike the FTC Rule, has specific limitations on the use of faxes and automatic dialing equipment that leaves prerecorded messages.[20]

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Inconsistencies Between Federal and State Laws: The Problem of Preemption

While the FTC and FCC rules have only minor differences, there are significant differences between these two federal rules and state law. The FTC has expressly stated that its Rule does not preempt any state laws.[21] Nevertheless, since telemarketers are required to comply with both the FTC Rule and state law in the case of interstate calls, less restrictive state laws are rendered moot in these cases. The FTC Rule is in effect a "floor" on regulation of interstate calls made by any entities subject to FTC jurisdiction.

Exercising its authority one step further, the FCC has stated that its Rule constitutes a "floor" for both intrastate and interstate calls.[22] In addition, the FCC has taken the position that its statutory authority allows it to preempt more restrictive laws applicable to interstate calls. The FCC stopped short of saying that its rule preempts all inconsistent state laws, but it indicated strongly that almost all such laws are preempted.[23]

Of course, courts may not agree with the FCC's expansive claims for its statutory authority. In fact, the state attorneys general filed a lengthy comment with the FTC when the DNC Rule was being drafted, arguing that the FCC does not have the authority to preempt state laws applicable

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[14] FTC Rule, § 310.4(b)(4)(iii).

[15] FCC Rule, § 64.1200(a)(6).

[16] FTC Rule, § 310.4(b)(4)(i); FCC Rule, § 64.1200(a)(6). The FCC Rule specifically addresses the use of calls with prerecorded messages and provides that these calls can be made in certain situations, e.g., with prior consent or in the case of an established business relationship. § 64.1200(a)(2). A literal reading of the FTC Rule would conclude that all these calls are "abandoned." However, this appears to be an oversight since the TCPA expressly authorizes the FCC to regulate these calls, and the FCC Rule expressly permits them under certain circumstances.

[17] FCC Rule, § 64.1200(a)(6).

[18] FTC Rule, § 310.4(b)(4)(i).

[19] FTC Rule, § 310.3(a)(1).

[20] FCC Rule, § 64.1200(a)(2)–(3).

[21] FTC Rule, § 310.7(b).

[22] FCC Order, ¶ 81.

[23] FCC Order, ¶ 84. ("We therefore believe that any state regulation that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.")

to both intrastate and interstate calls.[24] The TCPA reserves from federal preemption more restrictive state laws that address intrastate calls; however the TCPA does not expressly state that other state laws are preempted.[25] On the grounds that Congress had failed to state expressly that other state laws *are* preempted, one court found that Minnesota's law on the use of automatic dialing equipment was not preempted by the TCPA.[26] It remains to be seen whether some states will seek to enforce their laws and force the issue of preemption to the courts.

Some Basic Propositions

- Companies that are subject to both federal rules, e.g., telemarketing companies, must comply with the stricter rule. Companies that are subject only to the FCC Rule, e.g., banks and broadcasters, need only comply with the FCC Rule. These are no companies that are subject only to the FTC Rule.
- The FTC and the FCC rules, either singly or together, represent a federal "floor," which effectively renders moot less restrictive state laws in situations where the federal rules apply.
- The FCC Rule does not preempt intrastate calls that are subject to a more restrictive state regulation.[27]
- According to the FCC, the FCC Rule "almost certainly" preempts inconsistent laws applicable to interstate calls, but the FCC will decide the precise extent of preemption on a case by case basis.[28]

Some Hypotheticals

1. Safe Harbor for "Abandoned Calls." "Abandoned calls" are answered by a "live" consumer, i.e., not a recorded message, but a "live" telemarketer does not come on the line within two seconds. They are caused by the frequent use of computerized dialing systems that make several calls simultaneously. Both the FCC Rule and the FTC Rule provide a 3 percent safe harbor, i.e., the maximum percentage of calls that a telemarketer may abandon within a specified period. However, the agencies' rules are inconsistent with regard to the relevant period. The FTC Rule is more restrictive because telemarketers must meet the 3 percent standard each day for every calling campaign. The FCC Rule permits the safe harbor calculation to be made over a thirty-day period. The FTC Rule applies to all interstate calls except those made by non-profit organizations and certain industries that are exempt from FTC jurisdiction, such as banks and common carriers. Accordingly, banks and common carriers can take advantage of the more permissive safe harbor calculation, but telemarketing companies cannot.

What about state law? California, for example, has considered adopting a 1 percent abandoned call safe harbor.[29] If the state did adopt such a stricter standard, telemarketing calls within California would have to comply. What about calls into California from out of state? It is likely that

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[24] State Attorneys General Statement, 8–11.

[25] 47 U.S.C. § 227(e)(1).

[26] Van Bergen v. Minnesota, 59 F.3d 1541, 1547 (8th Cir. 1995). In *Van Bergen*, the plaintiff claimed that state law was preempted by the TCPA. The court found that there was no express preemption and companies could comply with both federal and state law.

[27] FCC Order, ¶ 82.

[28] FCC Order, ¶ 84.

[29] The California Assembly has given authority to the Public Utilities Commission to establish abandoned call limitations. CAL. PUB. UTIL. CODE § 2875.5. The Commission has decided to retain the 3% threshold for now. Public Utilities Commission Order, D.03-03-038 (Mar. 17, 2003).

the FCC would claim federal preemption of the state law, since programming predictive dialers to meet different abandoned call thresholds in different parts of the country would lead to "burdensome compliance costs." [30]

2. "Telemarketing Purposes" Disclosure. The FCC Rule requires that a recorded message include a statement that the call is for "telemarketing purposes," a requirement not included in the FTC Rule. Since the FCC Rule applies to virtually all companies in the United States, as well as both intrastate and interstate calls, all these entities must comply, at least in theory. However, the FTC has primary responsibility for policing telemarketing companies, and the FCC has primary responsibility for policing companies exempt from the FTC Rule. Thus, banks that call consumers directly—and as a practical matter must pay more attention to the FCC rule—are presumably under a greater risk for failing to comply with the stricter FCC provision.

3. Calling Hours. Both the FTC Rule and the FCC Rule restrict telemarketing calls to the hours between 8:00 A.M. and 9:00 P.M.[31] However, several states have more limited calling hours. Such state laws apply to intrastate calls and to any calls into the state. A telemarketer needs to decide what law applies. As in our previous examples, it is clear that telemarketing companies must comply with the stricter state calling hour restrictions for intrastate calls. But what about interstate calls? Again, the FTC Rule would have no preemptive effect, but does the FCC Rule preempt the state's more restrictive call hour limitation? The answer apparently depends upon whether the different calling hour restriction would "frustrate the federal scheme." [32] State calling hour restrictions frustrate the federal scheme in the sense that it is easer for companies to comply with a uniform rule than with dozens of different calling hour restrictions. At the very least, different calling hour restrictions are confusing. Telemarketing companies must train their staffs and implement a compliance program to ensure that calls are made within certain time periods. Avoiding confusion was an FCC rationale for adopting the FTC Rule's calling hour restrictions.[33] There may be technological difficulties as well. On the other hand, the FCC might take the position that calling hour restrictions are examples of state laws where lack of uniformity is not unduly burdensome. The question can be resolved by filing a petition with the FCC.[34] The frequency of these petitions and the time of response to them remain to be seen.

Toward Greater Uniformity

This quick survey of telemarketing laws should make clear that there is a need for the states, the FCC, and the FTC to move toward greater uniformity. States are understandably reluctant to give up on their prerogatives to enforce their own laws, but the additional protection given to consumers by state laws is usually marginal. The benefits to consumers from greater overall compliance with a uniform rule probably outweigh the benefits of slightly more restrictive state laws.

In addition, the FTC and the FCC should take steps to make their rules identical wherever possible. In some cases, e.g., jurisdiction over certain industries and intrastate calls, the FCC has statutory authority and the FTC does not. Except for differences in scope of coverage, however, there is no good policy reason for the rules to be different. It is clear that the FTC and FCC's efforts

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[30] FCC Order, ¶ 83.

[31] FTC Rule, § 310.4(c); FCC Rule, § 64.1200(c)(1).

[32] FCC Order, ¶ 84.

[33] FCC Order, ¶ 210.

[34] *Id.* ¶ 84.

to regulate telemarketing have struck a responsive chord with the public: consumers welcome curbs on the intrusiveness of telemarketing. On the other hand, the new rules have imposed a major burden on this industry and have substantially limited its ability to operate. It seems only fair that the agencies should take steps to reduce the compliance burden, too.