Michigan Realtor®
March 2020

COLD CALLS – FEDERAL AND STATE REQUIREMENTS

Traditionally, many Realtors® have used cold calling as a marketing strategy. Telemarketing, that is, the marketing of goods and services to potential customers over the telephone, has been subject to federal regulation since 1991. Increasingly, telemarketing is being done using automated calls (*i.e.*, dialed by a computer) and/or prerecorded messages (*i.e.*, robocalls). That phenomenon has led to further regulation under both federal and Michigan law.

A. The Telephone Consumer Protection Act

The federal Telephone Consumer Protection Act, also known as the TCPA, was adopted by Congress in 1991 in response to consumer complaints about telemarketer and debt collector phone calls. Since 1991, however, the TCPA has undergone many changes, mainly due to the onset of automated calls, robocalls and text messages sent to cell phones.

Initially, one of the things accomplished under the TCPA was to stop the annoying late night/early morning sales and debt collector calls by prohibiting such calls to residences between the hours of 9:00 p.m. and 8:00 a.m.. In addition, the TCPA required businesses with employees or agents who make sales calls to maintain a company "do not call" list of consumers who specifically asked to not be called by that particular company.

These new laws provided some parameters. However, consumers still complained. In particular, consumers were unhappy that they were required to make a separate "do not call" request with each individual telemarketer. So, in 2003, the TCPA rules were revised to establish a *national* "**do not call**" registry. Under this nationwide registry, consumers can register their phone numbers at www.donotcall.gov or by calling 1-888-382-1222. Consumers can register residential land lines and cell phone numbers. Once a number is added to the "do not call" registry,

it remains on the list until: (1) the consumer removes it himself/herself; (2) the number is disconnected; or (3) the number is reassigned. With very few exceptions (such as debt collectors, charities, political callers and survey takers), no one can initiate a telephone solicitation to a residential telephone number who has registered that number on the national "do not call" list. As a result, businesses who make sales calls must register with the Federal Trade Commission, download the "do not call" registry and remove those numbers listed in the registry from their calling lists. It is illegal to use the national registry for any purpose other than preventing calls to numbers on the registry.

One exception to the "do not call" law, that has received a fair amount of attention, is the "existing business relationship" exception. Under this exception, a real estate broker or other business may place live telemarketing calls (but not automated calls or robocalls) to a consumer with whom it has an "established business relationship." There are two kinds of "established business relationships." One is based on a consumer's purchase or lease of a business's goods or services within the 18 months preceding a telemarketing call. The 18-month period runs from the date of the last payment, transaction, or shipment between the consumer and the business. A business can call these past clients or customers regardless of whether or not they are on the national "do not call" registry. The other type of "established business relationship" is based on a consumer's inquiry regarding a company's goods or services and exists for three months starting from the date of that inquiry. This exception enables businesses to return calls to interested prospects for a limited period of time even if their telephone numbers are on the national "do not call" registry. However, with either of these relationships, if the consumer asks that a business stop calling him or her, the business must honor that request.

Robocalls, prerecorded or autodialed calls, including text messages, are prohibited unless the call recipient has given his or her prior written consent. When obtaining prior written consent, a telemarketer must disclose to the individual that giving permission will allow the telemarketer to make autodialed robocalls and/or text messages and that providing consent is not a condition of any purchase. Both disclosures must be clearly displayed at the time the telemarketer seeks written consent. In addition, among other technical constraints, robocallers must provide an interactive "opt-out" mechanism during each robocall which allows the consumer to immediately advise the caller to "stop calling" and must state clearly, at the beginning of the message, the identity of the business or individual that is responsible for initiating the call.

The TCPA may be enforced in at least three different ways. First, every one of the 50 states has the right to sue offenders of the TCPA on behalf of their citizens. Second, anyone may file a complaint with the Federal Communications Commission, which has the power to assess penalties against violations of the TCPA. And, finally, any individual may sue any offending telemarketer in federal or state court for money damages. A consumer can recover up to $500 in damages for each violation. And, if a court determines that the telemarketer willfully or knowingly violated the TCPA, a consumer can recover up to $1,500 per violation. Most recently, the Federal Communications Commission was authorized to impose civil penalties of up to $10,000 per call for robocalls which intentionally violate the TCPA. Obviously, running afoul of the TCPA can have serious monetary consequences.

There is, however, a way that companies can protect themselves from simple mistakes which result in TCPA violations. Specifically, there is a "safe harbor" created under the TCPA whereby a telemarketer will not be subject to penalties or sanctions for erroneously calling a

consumer who is on the national "do not call" registry. In order to invoke the protections of the "safe harbor," the company must:

- establish and implement written procedures to honor the "do not call" requests of consumers.
- train its personnel in those procedures.
- maintain a company-specific "do not call" list.
- use and maintain records which document a process for preventing calls to any and all "do not call" lists which, at a minimum, involves the use of the national registry downloaded within 30 days of the date any call is made.
- monitor and enforce compliance with its established "do not call" procedures.

In addition, obviously, the call must have been made by mistake. By establishing and maintaining these conditions, companies can protect themselves against thousands of dollars of potential penalties under federal law.

B. Michigan Telemarketing Laws

The Michigan Legislature adopted the federal "do not call" registry as its own official registry and all of the requirements and restrictions that go with that registry. In addition, Michigan established a 'code of conduct" for Michigan telemarketers through its adoption of the Michigan Home Solicitation Sales Act, also known as the MHSSA.

Similar to the TCPA, the MHSSA prohibits telephone solicitations to a consumer on the national "do not call" registry or to a consumer who has requested that he or she not receive calls from that company. Companies cannot make false or misleading statements in order to induce the purchase of their goods or services. And, at the beginning of a sales call, the caller must state their name and the name of the business on whose behalf the call is made. The Michigan law extends

the "no calls" timeframe by one hour from 9:00 p.m. to 9:00 a.m. and makes it a misdemeanor to violate this prohibition. In addition, with few exceptions, the MHSSA prohibits *all* calls using a recorded message. Fortunately, one of the exceptions is "[a] sale of services by a real estate broker or salesperson licensed by the department of consumer and industry services." (To be clear, real estate licensees are not exempt from the MHSSA in its entirety; they are only exempt from the prohibition against all calls using a recorded message.) Damages available under the MHSSA include the greater of actual damages or $250.00 and reasonable attorney fees.

C. Conclusion

Firms who have agents that do telemarketing should reacquaint themselves with the national do not call registry and the other "do not call" regulations. There are exceptions under these rules for consumers with whom a caller has an existing business relationship. Even then, however, if the existing customer requests no further calls, the firm must honor that request. The damages for ignoring the "do not call" requirements can quickly add up, and violations can result in the imposition of significant penalties.

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