

**DMA Alert**  
**10 Steps to Making a Sale**  
**Under the FTC's New Telemarketing Sales Rule**  
Including Q&A Section

For DMA's TSR compliance flow chart, please visit our Web site at:  
[www.the-dma.org/guidelines/tsr.pdf](http://www.the-dma.org/guidelines/tsr.pdf)

**Who is not covered by the Rule?**

- Most business-to-business calls,
- Common carriers, airlines, some financial institutions, and insurance companies to the extent regulated under state law,
- Intrastate calls,
- Non-profits, and third-party marketers calling on their behalf, are not subject to the Rule's new national Do-Not-Call (DNC) registry. However, third-party marketers calling on behalf of non profits are required to honor in-house suppress requests.

**Who is covered by the Rule?**

- Any plan, program, or campaign to sell goods or services through interstate calls,
- Inbound & outbound telemarketing calls,
- Sellers that provide or arrange to provide goods/services to consumers in exchange for payment, and
- Third-party call centers making calls on behalf of exempt entities such as marketers calling on behalf of airlines, insurance companies or financial institutions.

**Preparatory Steps**

**Step 1: Make sure consumers are receiving your calls only between 8 A.M. and 9 P.M. in the consumers' time zone.**

Also, be sure to check state laws because some states have more restrictive requirements.

**State Laws with Day/Time Restrictions**

	<b>Monday-Friday</b>	<b>Saturday</b>	<b>Sunday</b>
<b>AL &amp; LA</b>	8am to 8 pm	8am to 8pm	No calls on Sundays & Holidays
<b>KY</b>	10am to 9pm	10am to 9pm	10am to 9pm
<b>MA</b>	8am to 8pm	8am to 8pm	8am to 8pm
<b>CT, MI, MN, NM</b>	9am to 9pm	9am to 9pm	9am to 9pm
<b>TX</b>	9am to 9pm	9am to 9pm	12pm to 9pm

**Step 2: Honor in-house suppress requests.**

Scrub your lists of telephone numbers of consumers (both prospects and customers) who have asked you not to contact them. This applies to marketers and non-profits and third-parties calling on their behalf.

**Step 3: Honor the national Do-Not-Call (DNC) registry.**

Scrub your lists of any prospects' phone numbers that are on the FTC's Do-Not-Call registry.

**How will the FTC's Do-Not-Call (DNC) registry work?**

**Registration:**

Consumers will be able to begin signing up for the registry this summer. The FTC expects that the registry will be operational, and companies in compliance in fall 2003. AT&T has been awarded the contract to administer the registry.

Consumers will be allowed to sign up via the Internet or by telephone. If they sign-up on the Internet then they will be e-mailed a confirmation notice. If they register by phone then they must call from the phone number they wish to be added to the national DNC registry. It is our understanding that the national DNC registry will only include telephone numbers and not addresses, names or other identifying information.

**Established Business Relationship (EBR) Exemption:**

Marketers may still call customers who are on the registry if they are calling them:

- *Within 18 months* of their last purchase, transaction, shipment, end of subscription/membership, or
- *Within 3 months* of their last inquiry or application.

*Section 310.2 (n) pp. 242-243.*

**Scenario A:** Customer A is registered on the national DNC registry and is a magazine subscriber for one of your publications. The last magazine was delivered to Customer A on March 1, 2003. You may continue to call Customer A until September 1, 2004. If, however, Customer A asks at any time to be placed on your company's DNC list then you must honor the customer's request and remove him/her from any future telephone marketing campaigns.

**Scenario B:** On March 1, 2003, Consumer B places a call to your company inquiring about a specific product or service. You may continue to call Consumer B until June 1, 2003. If, however, Consumer B asks at any time to be placed on your company's DNC list then you must honor the consumer's request and remove him/her from any future telephone marketing campaigns.

You cannot contact prospects who are on the national DNC registry unless you receive the consumer's signed permission to do so.

*Section 31.4(b)(1)(iii)(B) p. 252.*

**Step 4: Check state laws for any additional teleservices requirements such as calling hours (as noted earlier), state DNC registries, state registration, etc.**

To review which states currently have DNC laws, visit our Web site at: <http://www.the-dma.org/government/donotcallists.shtml> and for more information about teleservices, visit our Web site's Telemarketing Resource Center at: <http://www.the-dma.org/government/telesourcecenter.shtml>.

**Step 5: Meet the new caller identification requirements.**

Effective January 29, 2004, every outbound call must transmit the phone number of the seller, service bureau or customer service number that will be answered during normal business hours. You must also include the name of the seller or service bureau wherever technology is available. And under no circumstance are you to block transmission of caller identification.

*Section 310.4(a)(7) p. 251.*

**Step 6: Learn the new requirements for abandoned calls –**

**those calls that are not immediately transferred to live representatives.**

Effective October 1, 2003, you must connect all calls to live representatives within 2 seconds of the consumer's completed greeting. If you do not do so then the call is considered abandoned and is a violation of the TSR. Even those calls that are answered by a live representative after 2 seconds of the consumer's completed greeting would still be considered an abandoned call and a violation of the Rule.

*Section 310.4 (b)(iv) p. 252.*

The Rule does provide a "safe harbor" for abandoned calls that occur as a result of using technology such as predictive dialers. *Section 310.4(b)(4) pp. 253-254.* To meet the safe harbor requirements you must:

Effective October 1, 2003:

- Allow 15 seconds or 4 rings before disconnecting the unanswered call,
- Play a pre-recorded message that includes your company name and phone number,
- Set abandoned rates not to exceed 3% per day per calling campaign, and
- Retain appropriate records.

## Calling Consumers

### **Step 7: For each telemarketing transaction, you must provide promptly to the consumer:**

- Identity of the seller,
- That the purpose of the call is to sell goods or services, and
- The nature of the goods or services that you are selling.

*Section 310.4 (4)(d) p. 254.*

If at this point, or at any other time during the call, the consumer asks to be placed on your company's DNC list then you should honor the consumer's request. You should add the consumer to your company's DNC list, refrain from calling the consumer during any future marketing campaign, and promptly and politely end the call.

### **Step 8: Determine which disclosures, authorizations or taping requirements you need under the following circumstances. All of the following requirements are effective March 31, 2003:**

**A. Novel payments:** Do you accept novel payments – those payments other than by credit or debit card such as checks or money orders? If so, in order to accept a novel payment from a consumer then you must receive the customer's verifiable authorization by either:

- Getting the customer's written signed permission,
- Tape recording the customer's authorization, or
- Providing written confirmation of the transaction to the customer prior to receiving payment.

*Section 310.3(a)(3) pp. 247-248.*

**B. Negative option plans:** Are you engaged in any type of negative option, continuity or advanced consent marketing plan? If so, then you are required to notify customers:

- That their accounts will be charged unless they take affirmative action to avoid the charge,
- The date the charge will be submitted for payment, and
- The specific steps they can take to avoid the charge.

*Section 310.3 (a)(vii) p. 246.*

In addition you must meet the following requirements if you incorporate any of these elements into your negative option, continuity or advanced consent marketing plans.

- **If you use pre-acquired account information and do not offer a free-to-pay conversion program, you must:**
  - Identify with specificity the customer account that will be charged, and
  - Obtain the consent from the consumer to charge such account.

*Section 310.4(a)6(ii)(A-B) p. 251.*

- **If you use pre-acquired account information and do offer a free-to-pay conversion program, you must:**
  - Obtain from the customer the last 4 digits of the account that will be charged,
  - Obtain consent from the consumer to charge such account, and
  - Record the entire transaction.

*Section 310.4(a)(6)(I)(A-C) pp. 250-251.*

The FTC discusses in its commentary on the Rule that it is not merely the material terms that are provided to the consumer, but also the context and manner in which the offer is presented that is vital to determining the consumer's consent to the transaction. Therefore, you should record the entire transaction. It would not be sufficient to just tape the closing sale confirmation. (p.115.)

- C. Use of pre-acquired account information but no negative option plan:** If you do not engage in a negative option plan but use pre-acquired account information:
- You must identify with specificity the account that will be charged, and
  - Obtain consent from the consumer to charge such account.
- Section 310.4(a)(6)(ii)(A-B) p. 251.*

- D. None of the above:** If you do not engage in a negative option plan, free-to-pay program, and/or use pre-acquired account information then for all other telemarketing transactions:
- You must obtain from the consumer informed consent in order to charge the consumer for any goods or services.
- Section 310.4(a)(6) p. 250.*

The FTC discusses in its commentary on the Rule that consumers must affirmatively and unambiguously articulate their consent to be charged for a product or service. The best way to achieve this result is for consumers to state that they agree to the purchase and to provide part or all of the account they wish the charge to be made. However, the FTC leaves it up to you to decide the best way to achieve this result. (p. 111.)

**Step 9: Learn the new requirements for upsells.**

Effective March 31, 2003, if you solicit for the purchase of goods or services following an initial transaction that occurs during a single telephone call then under the Rule, you must meet new disclosure requirements. It does not matter if the upsell occurs during an inbound or outbound call, the same rules apply. The FTC treats each upsell as a separate telemarketing transaction, and creates 2 separate categories – internal and external upsells.

**Internal upsell** occurs when the customer is offered another product or service from or on behalf of the seller from the initial transaction. It does not matter if the initial or subsequent transaction is made by the same telemarketer. Under an internal upsell, you must provide any new disclosures not provided during the initial transaction.

**External upsell** occurs when the customer is offered a product or service from someone other than the seller from the initial transaction. It does not matter if the initial or subsequent transaction is made by the same telemarketer. Under an external upsell, you must provide:

- Identity of the seller,
- That the purpose of the call is to sell goods or services, and
- The nature of the goods or services that you are selling.

*Section 310.4 (4)(d) p. 254.*

If novel payments, negative option, preacquired account information, and/or free-to-pay conversion plans are used then all previous relevant disclosures must be repeated for each upsell.

**Step 10: After charging the customer's account, retain appropriate records for 24 months.**

Each telemarketer should retain the following records for 2 years from the date the record was produced:

- Different brochures, telemarketing scripts, promotional material,
- Name, address, prize award for each prize recipient,
- Name, address, product/service information for each customer,
- Telemarketing employee information, and
- All verifiable authorizations or records of express informed consent that are required by the Rule.

Records can be maintained in any format.

*Section 310.5 pp. 255-256.*

# The FTC's New Telemarketing Sales Rule Q&A's

The following is a sample of questions asked from members about how to comply with the new Telemarketing Sales Rule. This general advice is not a substitute for seeking advice from your attorney prior to any telemarketing campaign.

## **Do-Not-Call List: General**

### **1. How will the FTC manage phone number changes?**

The FTC has stated that it will hire a contractor to purge the list of disconnected and re-assigned numbers. The FTC will be issuing another proposed rulemaking to explain the mechanics of the national registry.

### **2. Do you know how long a company is required to keep samples of its telemarketing promotional material for FTC audit purposes?**

The recordkeeping requirements under the TSR (*Section 310.5*) sets forth a 24-month period to retain records.

### **3. How much time does the service bureau have to update its list once it receives its quarterly update?**

At this time, the FTC has not addressed this issue. The FTC will be issuing another proposed rulemaking to explain the mechanics of the national registry.

### **4. How large will the national list become?**

The FTC has indicated that the national list could contain 40 to 60 million consumer phone numbers.

### **5. Which states have enacted Do-Not-Call laws?**

Alabama	Connecticut	Indiana	Mass.	Oklahoma	Vermont
Alaska	Florida	Kansas	Michigan	Oregon	Wisconsin
Arkansas	Georgia	Kentucky	Minnesota	Pennsylvania	Wyoming
California	Idaho	Louisiana	Missouri	Tennessee	
Colorado	Illinois	Maine	New York	Texas	

### **And four additional state bills are expected to be signed into law soon:**

Mississippi    New Jersey    South Dakota    Utah

### **6. Which states have pending Do-Not-Call legislation?**

Alaska	Iowa	Nebraska	Rhode Island	Washington
Arizona	Maryland	New Hampshire	South Carolina	West Virginia
Delaware	Mississippi	North Dakota	South Dakota	
Hawaii	Montana	Ohio	Virginia	

### **7. When the FTC's Do-Not-Call list is established, what will the disposition of The DMA's list be?**

The DMA is currently evaluating the future of TPS.

## **Do-Not-Call List: Established Business Relationship**

- 1. Does the existing business relationship (18 months for transactions and 3 months for inquiries) include a sweepstakes, a change of address or customer service inquiry?**

The Rule allows for an 18-month time limit where there has been a purchase, rental, lease or financial transaction between the consumer and the seller. The 18-month time limit for an established business relationship runs from the date of the last payment, shipment of product or transaction

In the case of inquiries and applications, the Rule allows a 3-month time limit after the date of application or inquiry. Although the FTC did not specifically address sweepstakes, we believe that this *may* fall under the “inquiry” category and allow you a 3-month window.

A change of address or customer service inquiry leads us to believe that the consumer is an existing customer and we do not believe that this would delay your window of opportunity. The 18-month window would apply from the last date of shipment, payment or transaction – not from the date of the change of address or customer service inquiry.

- 2. If a telemarketing service bureau is acting on our behalf (the seller), and calls our existing customers, do we still fall within the existing business relationship exception or would we need to place the calls ourselves without the help of a vendor?**

A telemarketing service bureau calling on your behalf would fall within the EBR exception.

- 3. What type of fine would be implicated for a violation of the new amendments?**

The fine would be \$11,000 for each violation.

- 4. We are a financial institution contacting our existing customers via outbound calling. Can we contact customers about additional products or services that no longer have an account open with us but the last account closed was within 18 months?**

Financial institutions are not subject to the TSR. However, if you have a third-party entity making the calls then they would be subject to the TSR and yes they would be allowed to contact your customers during the 18-month period of the closing date. The Rule allows for an 18-month time limit where there has been a purchase, rental, lease or financial transaction between the consumer and the seller. The 18-month time limit for an established business relationship runs from the date of the last payment, shipment of product or transaction.

- 5. We are a third party calling on behalf of banks and mortgage servicing institutions. There is an existing relationship between these financial institutions and their customer base. Our company is marketing to that file an insurance product that is supplied by a separate entity from the mortgage servicer. Does the "existing business relationship" that the mortgage servicer has with its customer base carry over to our company as a third party service provider?**

To the extent that the third party is a separate and distinct entity from the mortgage servicer then the EBR between the mortgage servicer and its customers would not extend to the third party. However, if the third party entity was calling on behalf of the mortgage servicer to offer its customers the mortgage servicer's products or services then the EBR would extend to the third party entity.

- 6. We are an outbound telemarketing service bureau that makes renewal offers on behalf of our clients to their subscribers. These calls are made within the 18-month EBR window.**

- a) Is it correct that we assume that with the scenario above that we would be exempt from the "Do Not Call" list due to this pre-existing relationship?**

Yes. This is correct.

- b) Again we will not have account information and are not doing any free-to-pay offers so will we have to track any proof of the sale?**

The TSR does set forth recordkeeping requirements under Section 310.5 p. 255.

The Rule sets a 24-month period to retain records and lists what records should be retained.

### **Do-Not-Call List: Subscriber Fees**

- 1. If we hire a telemarketing service bureau to telemarket on our behalf, who is responsible for paying the DNC subscriber fees?**

If you've already paid the fee, your outside vendor(s) will not also be required to pay it. On the other hand, if you didn't pay the fee, then your outside vendor could submit the fee on your behalf. In addition, outside vendors cannot buy one list on behalf of all of its clients. The annual fee has not been set yet. The FTC will be issuing another proposed rulemaking to explain the mechanics and fees of the national registry.

### **Do-Not-Call List: Affiliates/Subsidiaries**

- 1. In your opinion can a parent company share a particular State's Do-Not-Call list or FTC's Do-Not-Call list with its subsidiaries?**

The FTC will be issuing another proposed rulemaking to explain the mechanics of the national registry. In the meantime, we suggest you ask yourself: what is the consumer perception? For instance, do they know that the parent company and its subsidiaries are "related?" Additionally, if the parent company is sharing the list with its subsidiaries, then you would want to make sure that any company specific Do-Not-Call requests received by the parent company would also be shared with its subsidiaries and vice versa.

**2. Where does the Rule discuss specific requirements for the Established Business Relationship exemption to be extended to affiliates and subsidiaries?**

The EBR exemption to affiliates and subsidiaries is discussed in the commentary to the Rule under Section 310.2(n) page 39. The FTC discusses that in determining whether the EBR exemption should be extended to affiliates and subsidiaries that the seller should consider consumer expectations.

### **Novel Payments**

**1. Would a "bill me" offer, (i.e. an offer whereby once the offer is accepted, the product is sent along with a bill) constitute a "novel payment method?"**

If your "bill me" offer accepts payment from consumers other than by credit or debit card then this would constitute a novel payment. You would need to receive the consumer's express verifiable authorization. You can obtain this authorization as outlined in Section 310.3(a)(3) pp. 247-248. This can be accomplished at the same time that you're sending the bill by having the consumer sign and return the payment.

**2. Do the requirements for negative option features [310.3(a)(1)(vii)] apply to "bill me" offers? If yes, what does "before the customer pays" mean? Can we make the disclosures in a follow-up direct mail piece before the customer writes the check?**

Yes, the negative option feature requirements apply to "bill me" offers if the customer's failure to take an affirmative action to reject the goods or services or to cancel the agreement is interpreted by you as acceptance of the offer. You can make the necessary disclosures in a follow-up direct mail piece but before payment is received. If you're mailing C.O.D., then the disclosures must be sent or made prior to this delivery. See Section 310.3 Footnote 1 page 245.

### **Upsells**

**1. Do upsells apply to EBR and Caller ID? If we have an EBR and we call the customer about additional products or services and they want us to debit one of their existing accounts to open the new account, must we record that conversation?**

We believe that the Caller-ID requirements would only apply to the initial call not to the upsell that was transferred to another line. You only need to record the entire transaction if calling under a free-to-pay conversion program that uses pre-acquired account information. Additionally, you must obtain from the consumer the last 4 digits of the credit or debit card in a free-to-pay conversion program.

**2. In our business, the customer contacts us for customer support or to order items based on an available catalog. Once the initial support service has been provided, we then have an opportunity to approach the customer for additional sales. What are the upsell requirements?**

In your example, an upsell has occurred and as such you would need to provide the consumer any new disclosures not initially provided. The Rule under Section 310.2(dd) p. 244 defines upsells as "soliciting the purchase of goods or services following an initial transaction during a single telephone call."

**3. Would the same upsell disclosure requirements apply during an inbound or outbound telemarketing call?**

Yes. The same requirements would apply. It does not matter if the upsell occurs during an inbound or an outbound telemarketing call.

**4. Do you need to tape record an upsell?**

No. You would not have to record the transaction but before you upsell, you must disclose the identity of the seller, that the purpose of the call is to sell goods or services and the nature of the goods or services being offered. If you are offering multiple upsells then you must disclose any new disclosures not provided during your previous disclosures. In addition, you are subject to the Rule's recordkeeping requirements under Section 310.5 page 255.

You would only have to record the transaction if you were using pre-acquired account information in a free-to-pay situation or in certain situations when using a novel payment system (not a debit or credit card transaction).

**5. Do you need to obtain from consumers the last 4 digits of their credit or debit cards during an upsell? What happens if you have multiple upsells? Do you have to obtain from consumers the last 4 digits of their account for each upsell?**

You are only required to obtain from the consumer the last 4 digits of the consumer's credit or debit card if offering a free-to-pay conversion program that uses pre-acquired account information. The FTC discusses in its commentary on the Rule on p. 106 Footnote #449 that "it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction." The FTC is silent on other methods of payment.

With regard to upsells, you must disclose the identity of the seller, that the purpose of the call is to sell goods or services and the nature of the goods or services being offered. If you are offering multiple upsells, for each upsell that contains a free-to-pay offer that uses pre-acquired account information you need to obtain from the consumer the last 4 digits of the account number and you must disclose any new disclosures not provided in the initial offer.

**6. We make free-to-pay offers as an upsell to a credit card issuing call and the upsell is charged to the newly formed credit card account. How can the last 4 digits of the account be obtained from the customer when the account number has not yet been assigned?**

The Rule does not contemplate this type of scenario. In order to eliminate potential legal exposure, we know that some attorneys have advised their clients in this type of situation to not offer the free-to-pay conversion program in order to be in technical compliance with the Rule. We are in the process of trying to get a more definitive response from the FTC.

7. **a. During a telemarketing call, which includes an upsell, who must be disclosed as the "seller?" For example, a third party marketer hires a telemarketing firm to call a bank's credit card holders to sell a product underwritten or administered by an insurance company or club. Who is the "seller" if the third party marketer is the owner of the underwriting insurance company?**

It appears in this situation that the insurance company or club would be the seller. The definition of "seller" is found in Sec. 310.2(z) p. 244 and is defined as the one who "provides or arranges to provide goods or services to the customer in exchange for consideration."

- b. Would the same disclosure requirements apply during an outbound telemarketing call, which has the same entity relationships as in the examples in the above question?**

Yes. The same requirements would apply during an outbound telemarketing call.

### **Preacquired Account/Negative Option Plans/Free-to-Pay Conversions**

1. **What requirements must we meet if we offer a continuity program under a "free to pay" scenario and we don't use pre-acquired account information?**

If you have a negative option plan and free-to-pay conversion plan without using pre-acquired account information then you are subject to section 310.3(a)(1)(vii) page 246 and you would need to disclose to your customers that:

- Their account will be charged unless they take affirmative action to avoid the charge,
- The date the charge will be submitted for payment, and
- The specific steps that they must take to avoid the charge.

Please note that you are not required to record the transaction under this scenario.

2. **In the terms and conditions of our membership agreements, we have language that provides for our members' consent to solicitations, including but not limited to, solicitation through automatic dialing equipment and/or pre-recorded messages. The language provides that the members acknowledge their consent to be informed of such products and services even if their membership has been terminated. Does this acknowledgment by members supersede state and federal do-not-call laws?**

Under the TSR, you can call customers with whom you have an established business relationship within the last 18 months of the end of their subscription, membership or last transaction/payment/shipment and you can call consumers who have inquired or applied within the last 3 months. You may also call consumers after you have obtained their written consent to do so. This written consent would include the consumer's authorization and phone number that you may call as set forth in Section 310.4 (b) (B).

Any additional conditions of your membership agreement must comply with existing federal and state laws.

3. **Our membership club markets our ‘trial period’ as follows: “For just .99 cents, we would like to offer a 15-day membership to our club to see if you would find our services beneficial to you. Then following the 15-day membership, if we do not hear from you, you will be billed by the credit/debit card provided for the full annual membership fee.” It appears that by offering a 15-day membership for .99 cents, this would void the member having to give the last four digits of their credit card. Is this the case and would this be acceptable practice for the FTC?**

It depends on how the .99 cents fee is described or characterized to the consumer. If the fee is described as a payment then it would appear not to technically be a free-to-pay conversion program. However, we caution you that the FTC has not directly addressed a nominal charge that later converts to a full-charge offer.

4. **We are in the business of selling clubs and services, and our main offer over the phone is 30 days free. Under the new TSR, if we charged a processing fee immediately upon enrollment, but the customer still has a 30-day free trial period to review the benefits of the program, would we still need to have the consumer repeat the last four digits of the credit card? The program would automatically bill monthly if the customer does not call to cancel once the free trial period ends. Would the requirements differ between an inbound or outbound telemarketing call?**

It depends on how the processing fee and program is described or characterized to the consumer. If you, or the consumer, would view your program as a free-to-pay conversion program then you would be required to make the appropriate free-to-pay conversion disclosures. It does not matter if the offer is made during an inbound or outbound call. However, the important factor is that the consumer must pay at the start and from the same payment form.

5. **Our credit card company provides third party marketing of free-to-pay conversion products via telephone. Gramm-Leach-Bliley prohibits me from sharing credit card numbers with third party marketers so we just send them an encrypted account number. When they make a sale, the telemarketer says it will be charged to the card. They send that sale to our processor where the number is decrypted. Given that we are a credit card company and play under special rules, does the Rule apply, requiring the customer to give some part of their card number?**

Yes. Under the TSR, you are required to obtain from the consumer the last 4 digits of the consumer’s credit or debit card, if you are offering a free-to-pay conversion program and are using pre-acquired account information. If it is impossible to obtain the last 4 digits, this business model appears to be outlawed by the TSR as written.

- 6. Is it a violation of the Rule if we receive unencrypted credit card information from a client, but do not resell or share the information with any other parties? Must we receive the account information as indicated above in an encrypted manner from the client?**

The amended TSR considers it an abusive telemarketing practice to disclose or receive, for consideration, unencrypted consumer account numbers for use in telemarketing. The exception to that prohibition is that you can receive unencrypted account information only to process payment for a transaction.

- 7. We offer a free-to-pay conversion program and use pre-acquired account information. Do we need to ask customers to provide us with the last four digits of their credit cards or can we tell them the account numbers and just have them repeat back to us the last four digits of their credit cards?**

This is problematic. The FTC discusses in its commentary on the Rule on p. 106 Footnote #449 that “it is the very act of pulling out a wallet and providing an account number that consumers generally equate with consenting to make a purchase, and that this is the most reliable means of ensuring that a consumer has indeed consented to a transaction.” The FTC is silent on other methods of payment. Of course, most consumers cannot “pull[ ] out a wallet and provid[e] a [mortgage] account number.”

- 8. What are the tape recording requirements under a free-to-pay conversion program that uses pre-acquired account information? Do we have to ask the consumer for permission to record the conversation?**

Under the Rule, you are required to record the entire telemarketing transaction. The Commission discusses in its commentary on the Rule on pp. 114-115 that “not only the material terms provided the consumer, but also the context and manner in which the offer is presented are vital to determining the consumer’s consent.” Whether or not you need to obtain permission from the consumer is subject to numerous wiretap laws at the federal and state levels. In the states that require two party consent, you would have to ask the consumer’s permission before beginning to tape the call i.e. at the beginning of the call.

### **Abandoned Calls**

- 1. Do the “safe harbor” requirements for abandoned calls apply only if you use predictive dialers or can it apply if you use live representatives?**

Live representatives hanging up on consumers is a violation of the TSR. There is only a “safe harbor” for marketers using technology such as predictive dialers. All calls made by predictive dialers or similar technology that are not answered by a live representative within 2 seconds of the called party’s completed greeting are considered abandoned calls, but the FTC allows for an error rate/abandoned rate of 3% of calls per day in a marketing campaign. All calls not answered by a live representative within the 2-second period must be followed by a tape-recorded message providing the company who is calling and a number the consumer can call back during normal business hours. By providing the tape-recorded message you will fall under the FTC’s “safe harbor.” However, you still cannot exceed a 3% abandoned rate per day in a marketing campaign. [Note: companies have until October 1, 2003 to meet the abandoned call requirements and associated safe harbor provisions.]

- 2. With regard to the FTC's 2-second rule requirement of playing a recording when there is no "live" operator, would a call STILL be considered abandoned even with the tape recording?**

Yes. All calls that are not answered by a live representative within 2 seconds of the called party's completed greeting are considered abandoned calls. The FTC allows for an error rate/abandoned rate of 3% of calls per day in a marketing campaign. All calls not answered by a live representative within the 2-second period must be followed by a tape-recorded message providing who is calling and a number the consumer can call back during normal business hours. By providing the tape-recorded message you will fall under the FTC's "safe harbor." However, you still cannot exceed a 3% abandoned rate per day in a marketing campaign.

- 3. In regard to playing a tape recording of the company's name and phone number when a sales rep is not available within 2 seconds, it was stated that playing this message will not violate the TCPA because there is no sales pitch. Does this mean that I can now start to play this message with my company's name and phone number immediately for cold/outside lists since I would not be "selling" anything?**

No. The pre-recorded message provision only applies to companies that wish to meet all of the safe harbor requirements for abandoned calls.

- 4. How do you calculate the 3% abandoned rate? As an example, a company makes 10,000 calls per day. The 10,000 calls are broken down and called in different list segments. Would you calculate the abandon rate on the 10,000 total or each little piece individually?**

First, for calculation purposes, you should not break the calls into segments. Second, you should calculate the number of calls that are answered by live consumers per day in a marketing campaign. For instance if you make 10,000 calls a day but only 1,000 calls are answered by live consumers then you could not abandon more than 30 calls or 3% of the 1,000 calls.

- 5. When measuring the abandon rate, is the calculation dropped calls to dials or calls routed to live telemarketing representatives? Do answering machines detected by the dialer count towards a connection?**

A call is considered "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within 2 seconds of the called party's completed greeting. Calls answered by answering machines are not included in the calculation.

- 6. Can a telemarketer route a call to a telemarketing representative at any time during or after the message? If the customer disconnects the call, does the call count towards an abandoned call?**

You can route a call to a representative during or immediately after the pre-recorded message; however, such calls would still be considered abandoned by the FTC. A call is considered "abandoned" if a person answers it and the telemarketer does not connect the call to a sales representative within 2 seconds of the called party's completed greeting. The call would not be considered abandoned if the consumer hangs up before 2 seconds after he/she completes the greeting.

- 7. Do you have to disconnect everyone that you play a recording for or can you switch them to a sales representative when one becomes available say in approximately 4 or 5 seconds?**

You can route a call to a representative during or immediately (not 4 to 5 seconds) after the pre-recorded message, regardless the call would still be considered abandoned by the FTC. DMA guidelines require that you immediately release the line once the call is abandoned.

- 8. Can the message include additional information besides the name and telephone number of the client?**

The Rule is silent on this matter. At this time, we believe that the FTC would not allow any additional information. Providing additional information might also conflict with requirements under the Telephone Consumer Protection Act.

### **Caller Identification**

- 1. If we have an EBR and we make outbound calls to existing and non-existing customers must we have our phone number listed to read the name of the bank we are calling from?**

Regardless if you're contacting customers or prospects, you must transmit your phone number and if available your company name. You are allowed to substitute the name and number of whom you are calling on behalf as long as the number you provide is answered during regular business hours. Please see Sec. 310.4(a)(7) p. 251.

- 2. We are a service bureau, calling consumers about market research surveys. Are we required to display our name or the company name on behalf of whom we are calling?**

Research surveys are not subject to the Rule; therefore, you would not be required to display caller identification.

- 3. Is the number we display with the outgoing message required to be staffed 24x7, normal business hours, or can we have it sent to a voice mail box from which someone will dial back later?**

The phone number you provide should be answered during normal business hours. Please see Sec. 310.4(a)(7) p. 251.

- 4. I currently use an auto-dialer that is connected directly to T-1 lines that cannot transmit Caller ID information; however, if I switch my system to go through a switch then I can transmit Caller ID information. Am I required to switch my set-up in order to transmit the Caller ID information?**

The Commission suggests in its commentary to the Rule on p. 124 that telemarketers using a T-1 trunk can "have their carriers assign a telephone number to the trunk for transmission to consumers' Caller ID services."

## **Miscellaneous**

### **1. How does the Rule address off shore telemarketers?**

The Rule applies to any company calling American consumers including phone companies calling from offshore. The FTC is aggressively enforcing fraudulent and deceptive offshore telemarketers. The FTC recently held a workshop on cross-border fraud to address trends and partnerships. For more information about the recent workshop, please visit the FTC online at:

<http://www.ftc.gov/opa/2003/02/crossborder.htm>.

### **2. Are insurance companies exempt from the Rule?**

Yes. Insurance companies that are regulated by state law are exempt from the Rule.

### **3. Are telemarketing companies calling on behalf of insurance companies exempt from the Rule?**

Even though the insurance company is exempt from the Rule, the telemarketing company would be considered a third party entity that does fall under FTC jurisdiction and; therefore, would have to meet the requirements of the Rule.

### **4. Could you please confirm the exact points that The DMA will be taking legal action on, and when?**

On January 29, 2003, the Direct Marketing Association (The DMA) filed a lawsuit in the U.S. District Court in Oklahoma City challenging the Federal Trade Commission's (FTC) establishment of a national do-not-call (DNC) registry and additional other amendments to the Telemarketing Sales Rule (TSR). In its lawsuit, The DMA asserts that:

- 1) The FTC's proposed government-run do-not-call registry violates First Amendment rights to advertise freely and exceeds its statutory authority;
- 2) The FTC's predictive dialer requirements exceeds its statutory authority; and
- 3) The FTC's pre-acquired requirements exceeds its statutory authority.