



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Marketing Practices

January 6, 2004

VIA FAX AND FIRST CLASS MAIL

William E. Raney, Esq.
Copilevitz & Canter, LLC
423 W. Eighth Street
Suite 400
Kansas City, MO 64105

Dear Mr. Raney:

This letter responds to two separate requests for advisory opinions filed by your firm, dated October 29 and November 11, 2003, concerning the application of the Telemarketing Sales Rule fee provision found at 16 C.F.R. § 310.8 (“the TSR Fee Rule”).

Entities Required to Pay the Fee

In your first request, you ask which entity is required to pay the fee for access to the National Do Not Call Registry in the following two circumstances:

- 1) Company A is a large insurance company with more than 10,000 independent agents. Company A desires to provide a telemarketing campaign to its agents to promote and market its services. In connection with this campaign, Company A will provide scripts, fulfillment materials, and telephone consumer leads. Can Company A pay for access to the National Do Not Call Registry and provide “scrubbed” leads to its agents for use with this campaign for Company A’s services only?
- 2) Company B is a large real estate company with more than 10,000 franchised agents doing business only in the name of Company B. Can Company B purchase access to the registry and provide its Subscription Account Number to its agents for marketing campaigns solely in the name of Company B?

The TSR Fee Rule requires sellers to pay the fee to access the National Do Not Call Registry prior to engaging in telemarketing. Specifically, the TSR Fee Rule states: “It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee . . . for access to telephone numbers within that area code that are included in the National Do Not Call Registry . . .” 16 C.F.R. § 310.8(a). The TSR Fee Rule also prohibits independent entities from

sharing the cost of accessing the registry, as follows: “Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.” 16 C.F.R. § 310.8(c).

In the case of independent or franchised agents of a company, we believe it is appropriate, for purposes of the TSR Fee Rule, to treat such agents as if they were separate corporate affiliates, and apply the test for corporate affiliates set forth in the Statement of Basis and Purpose for the TSR Fee Rule, to determine if the independent agents must separately pay for access to the national registry. *See* 68 Fed. Reg. 45134, 45139 (July 31, 2003). Under that test, the independent agents of a company will be REQUIRED to pay a separate annual fee for access to the national registry if they meet EACH of the following two criteria: (1) The agent is separately incorporated or, for a non-corporate entity such as a partnership, is a similarly distinct legal entity; AND (2) the agent markets under a different name. Thus, if the agent of Company B is not incorporated and markets under the name of Company B, then the agent will not be considered a separate seller. Even if the agent is a separate legal entity, it will not be considered a separate seller if it markets only under the name of Company B. The same is true if that agent markets under the name “Company B, John Smith, independent agent.” If, however, a separately-incorporated agent markets under the name “John Smith’s Independent Services,” without using the name of Company B, then the agent will be considered a separate seller and will be required to pay the appropriate fee for access to the registry.

If the independent agents are considered separate sellers under the test described above, then the parent company is prohibited from sharing in any manner information obtained from the national registry with those agents, unless each agent separately registers and pays the appropriate annual fee. On the other hand, if the agents are not treated as separate sellers under the Fee Rule, then it is entirely appropriate for the parent company to pay for access to the registry and provide “scrubbed” leads to its agents. It is also appropriate in that situation for the company to purchase access to the registry and provide its Subscription Account Number to its agents for their use in scrubbing their own lists to be used for marketing campaigns in the name of the company.

Independent Telemarketer Access to the National Registry

In your second request for an advisory opinion, you ask whether a telemarketer that places calls on behalf of sellers that have properly obtained and paid for access to the national registry may, for “convenience and programming purposes,” use its own Subscription Account Number “that it has properly obtained to access the national list.”

The simple answer to your query is yes. The TSR Fee Rule Statement of Basis and Purpose states the answer as follows:

[T]he Commission agrees that allowing independent access to the national registry by telemarketers or other service providers is appropriate. As a result, telemarketers or service providers will be allowed to gain access to the national registry on their own behalf, without being limited solely to the access allowed for their seller-clients. To maintain the fairness of the fee structure, however, telemarketers and service providers will be required to pay the appropriate fee for such independent access. Moreover, covered sellers still will be required to pay the fee prior to engaging in, or causing a telemarketer to engage in, outbound telephone calls for which access to the “do-not-call” registry is required by the Amended TSR. This “covered seller pays” requirement remains in place regardless of whether the telemarketer or service provider employed by the seller independently and voluntarily pays for access to the national registry. In addition, telemarketers and service providers paying for such independent access must certify that they are accessing the national registry solely to comply with the provisions of the Amended TSR, or otherwise to prevent telephone calls to telephone numbers on the national registry. Finally, such telemarketers or service providers are not permitted to use the information they obtain from the national registry on behalf of any entity, covered seller or exempt, unless that entity has paid the appropriate fee for access to the information or, for exempt sellers, has submitted the appropriate certification to gain access to the national registry.

68 Fed. Reg. at 45137 (July 31, 2003).

Please be advised that our opinion is based on all the information furnished in your request. This opinion applies only to the extent that actual company practices conform to the material submitted for review. Please be advised further that the views expressed in this letter are those of the FTC staff. They have not been reviewed, approved, or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the opinions of the staff members charged with enforcement of the Telemarketing Sales Rule.

Sincerely,

David M. Torok
Staff Attorney