

Federal Communications Commission



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

December 24, 2008

VIA CERTIFIED MAIL AND REGULAR MAIL
RETURN RECEIPT REQUESTED

Contact America
Attn: John P. Hoy, President
7777 Gerard Ave, Suite 201
Lajolla, CA 02037

RE: File No. EB-08-TC-6546

Dear Mr. Hoy:

This is an official **CITATION**, issued pursuant to section 503(b)(5) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b)(5), for violations of the Act and the Federal Communications Commission's rules that govern telephone solicitations and unsolicited advertisements.¹ As explained below, you may appeal this citation. In addition, future violations of the Act or Commission's rules in this regard may subject you and your company to monetary forfeitures.²

Attached are consumer complaints regarding autodialed, prerecorded³, or artificial voice messages that your company, acting under your direction, has delivered to an emergency telephone line, a telephone line of a guest or patient room at a health care facility, or a telephone number assigned to a paging service, cellular telephone service or any service for which the called party is charged for the call. These complaints indicate that you and your company have violated section 227(b)(1)(A) of the Act and section 64.1200(a)(1) of the Commission's rules. *See* 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

¹ 47 U.S.C. § 227; 47 C.F.R. § 64.1200. A copy of these provisions is enclosed for your convenience. Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991 and is most commonly known as the TCPA. The TCPA and the Commission's parallel rules restrict a variety of practices that are associated with telephone solicitation and use of the telephone network to deliver unsolicited advertisements, including prerecorded messages to residential telephone lines.

² We have attached one complaint at issue in this citation. Within the complaint is the telephone number 301-882-9945, which your business utilized during the time period at issue.

³ In cases where the complaint form indicates that the type of call is "P", the consumer has selected "prerecorded" as the type of call.

Federal Communications Commission

Under Section 227(b)(1)(A) of the Act and section 64.1200(a)(1) of the Commission's rules, it is unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to initiate calls using an automatic telephone dialing system⁴ or an artificial or prerecorded voice to (1) any emergency telephone line, (2) the telephone line of any guest or patient room at a health care facility, or (3) any telephone number assigned to a paging service, cellular telephone service or any service for which the called party is charged for the call.⁵ The provisions provide exceptions when the call is made (1) for emergency purposes, or (2) with the prior express consent of the called party.⁶

Additionally, attached are consumer complaints regarding telemarketing calls that your company, or an entity acting on behalf of your company, made to telephone lines that are contained in the National Do-Not-Call Registry. These complaints indicate that your company, acting under your direction, has violated the Commission's rules regarding telephone solicitations. *See* 47 C.F.R. § 64.1200(c)(2).

Section 64.1200(c)(2) of the Commission's rules generally prohibits the delivery of telephone solicitations to residential telephone numbers that are contained in the National Do-Not-Call Registry except in certain limited situations. Under the Communications Act and the Commission's rules, a "telephone solicitation" is "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person."⁷ Calls made by or on behalf of tax-exempt nonprofit groups are not considered to be telephone solicitations. Similarly, calls that are made to a person who either has provided prior express invitation or permission to call⁸ or has an established business relationship⁹ with the caller are not considered to be telephone solicitations.

⁴ The term "automatic telephone dialing system" means "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers." 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).

⁵ 47 U.S.C. § 227(b)(1)(A)(i) - (iii); 47 C.F.R. § 64.1200(a)(1)(i) - (iii).

⁶ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

⁷ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(12).

⁸ Prior express invitation or permission to call a number contained on the National Do-Not-Call Registry must be evidenced by a signed, written agreement between a consumer and seller. The agreement must include both the consumer's consent to be called by the particular seller and the telephone number to which such calls may be placed. 47 C.F.R. § 64.1200(c)(2)(ii).

⁹ An "established business relationship" means "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(4). The established business relationship exception does not apply when a telephone subscriber has made a company-specific do-not-call request. A company-specific do-not-call request terminates an established business relationship for telemarketing purposes even if the requester continues to do business with the company. 47 C.F.R. § 64.1200(f)(4)(i); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752,

Federal Communications Commission

Finally, the rules permit telephone solicitations to a consumer whose number is listed on the National Do-Not-Call Registry if that consumer has a personal relationship with the individual making the calls.¹⁰

Accordingly, under the Commission's rules, it is unlawful to deliver a telephone solicitation to a residential telephone line on the National Do-Not-Call Registry unless: (1) the call is made by or on behalf of a tax-exempt nonprofit group; (2) the call is made by a person who has a personal relationship with the called party; (3) the called party has provided signed, written consent for the call to be made; or (4) the called party has made a purchase from, or had a transaction with, the caller within the 18 months immediately preceding the call or has made an inquiry or application regarding the caller's products or services within the three months immediately preceding the call, and the called party has not specifically asked the caller to stop all telemarketing calls.

Entities making telephone solicitations must honor do-not-call registrations starting no later than 31 days after a number is placed on the National Do-Not-Call Registry.¹¹ To accomplish this, section 64.1200(c)(2)(i)(D) requires entities making telephone solicitations to use a version of the National Do-Not-Call Registry obtained no more than 31 days before any telephone solicitation is made, and to document this process. Do-not-call registrations must be honored indefinitely, or until either the consumer cancels the registration or the database administrator removes the telephone number from the National Do-Not-Call Registry.¹² An entity that does not claim one of the exemptions set forth above is not liable for calling a telephone number on the National Do-Not-Call Registry only if it is able to demonstrate that it has fully complied with the Commission's standards governing use of the National Do-Not-Call Registry as set out in section 64.1200(c)(2)(i)(A)-(E) of the rules, and that the particular telephone solicitation call was the result of error.

If, after receipt of this citation, you or your company violate the Communications Act or the Commission's rules in any manner described herein, the Commission may impose monetary forfeitures not to exceed \$11,000 for each such violation or each day of a continuing violation occurring before September 2, 2008, and \$16,000 for each such violation or each day of a continuing violation occurring on or after September 2, 2008.¹³

8766 n.47, 8770 n.63 (1992); *see also* H.R. Rep. 102-317, 1st Sess., 102nd Cong. at 15 (1991); *Charvat v. Dispatch Consumer Services, Inc.*, 95 Ohio St. 3d 505, 769 N.E.2d 829 (2002).

¹⁰ 47 C.F.R. § 64.1200(c)(2)(iii). A "personal relationship" exists if the recipient of the call is a "family member, friend, or acquaintance of the telemarketer making the call." 47 C.F.R. § 64.1200(f)(14).

¹¹ The 31-day requirement applies to telephone solicitations made on or after January 1, 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004). Previously, the Commission's rules provided that do-not-call registrations had to be honored within 3 months. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14040, para. 38 (2003). The 3-month provision applied to telephone solicitations made before January 1, 2005.

¹² 47 C.F.R. § 64.1200(c)(2).

¹³ *See* 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000) (forfeiture maximum set at \$11,000 for violators who are not common carriers or other entities specifically designated in section 503 of the Act); *Amendment of Section 1.80(b) of*

Federal Communications Commission

You may respond to this citation within 30 days from the date of this letter either through (1) a personal interview at the Commission's Field Office nearest to your place of business, or (2) a written statement. You may use this response to appeal this citation. For example, you may claim that you can document that you had an established business relationship with the called party at the time of the call or that you are a tax-exempt nonprofit organization. In addition, your response should specify the actions that you are taking to ensure that you do not violate the Commission's rules governing prerecorded messages, as described above.

You may schedule a personal interview at the nearest Commission field office. These offices are located in: Atlanta, GA; Boston, MA; Chicago, IL; Columbia, MD; Dallas, TX; Denver, CO; Detroit, MI; Kansas City, MO; Los Angeles, CA; New Orleans, LA; New York, NY; Philadelphia, PA; San Diego, CA; San Francisco, CA; Seattle, WA; and Tampa, FL. Please call Al McCloud at 202-418-2499 if you wish to schedule a personal interview. You should schedule any interview to take place within 30 days of the date of this letter. You should send any written statement within 30 days of the date of this letter to:

Kurt A. Schroeder
Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445-12th Street, S.W.
Rm. 4-C222
Washington, D.C. 20554

Reference EB-08-TC-6546 when corresponding with the Commission.

Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least 5 days advance notice; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format): 202-418-0531 (voice), 202-418-7365 (tty).

the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation, 19 FCC Rcd 10945 (2004) (amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000); *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, FCC 08-154, rel. June 13, 2008 (amendment of section 1.80(b) to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000, effective September 2, 2008).

Federal Communications Commission

Under the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(3), we are informing you that the Commission's staff will use all relevant material information before it, including information that you disclose in your interview or written statement, to determine what, if any, enforcement action is required to ensure your compliance with the Communications Act and the Commission's rules.

The knowing and willful making of any false statement, or the concealment of any material fact, in reply to this citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kurt A. Schroeder
Deputy Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

Enclosures