



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

Division of Marketing Practices

July 22, 2004

VIA FAX AND FIRST CLASS MAIL

Brian D. Dautch
Director of Government Affairs
The Council for Marketing & Opinion Research
6931 Arlington Road, Suite 308
Bethesda, MD 20814

Dear Mr. Dautch:

This letter responds to your request for a staff advisory opinion filed on April 26, 2004, on behalf of the Council for Marketing & Opinion Research (“CMOR”). In your letter, you ask various questions concerning access to the National Do Not Call Registry by members of the market or opinion research industry. In summary, your questions concern: (1) the exempt status of survey research firms from the Do Not Call provisions of the Telemarketing Sales Rule (“TSR”), 16 C.F.R. § 310.4(b)(1)(iii); (2) whether exempt firms may access the National Registry; and (3) the effect such access may have on the exempt status of such firms. This letter will answer each of your questions in turn.

As an initial matter, you ask the FTC to reconfirm that the “survey research industry as a whole consists of organizations that are Exempt Organizations (“EOs”) from the Do Not Call list.” That is true as a general proposition. Specifically, the Do Not Call provisions of the TSR apply to “sellers” and “telemarketers” engaged in “telemarketing,” as those terms are defined in the Rule. “Telemarketing” is defined, in part, as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution. . . .” 16 C.F.R. § 310.2(cc). As a result, survey research firms calling consumers for the sole purpose of conducting a survey are not engaged in “telemarketing.” Therefore, such firms are not required to comply with the Do Not Call provisions of the TSR or access the National Do Not Call Registry. On the other hand, callers purporting to take a “survey,” but also calling to induce the purchase of goods or services, are engaged in telemarketing and must comply with the TSR, including the Do Not Call provisions.

Your second question concerns whether exempt organizations may access the National Registry. Specifically, you ask for confirmation of the following statement:

Survey research organizations may choose to obtain a Subscription Account Number (“SAN”), for the purpose of satisfying data vendors who insist that market and opinion researchers have a SAN. Many data vendors and end users demand this information from our organizations before they will sell our organizations any information, or contract for services.

Exempt organizations are allowed to access the National Registry voluntarily in order to avoid calling consumers who do not want to receive telemarketing calls. However, all organizations accessing the National Registry must certify, under penalty of law, that they are gaining access solely to comply with the provisions of the TSR “or to otherwise prevent telephone calls to telephone numbers on the registry.” 16 C.F.R. § 310.8(e). As a result, the answer to your query depends on the type of information that survey research organizations obtain from data vendors. If survey research organizations want to avoid calling consumers with registered telephone numbers, and they obtain a “scrubbed” list of contacts from the data vendor, *i.e.*, a list that excludes registered telephone numbers, then the survey research organizations must obtain a SAN prior to being provided that scrubbed list.

On the other hand, data vendors have no basis under FTC rules to require exempt organizations to obtain a SAN prior to selling telephone lists to those organizations unless those organizations, based on their own requirements, ask for lists that are “scrubbed” of numbers included in the National Registry. In other words, if an exempt organization wants to call consumers whose numbers are included in the National Registry, the organization is not prohibited by law from doing so.¹ Data vendors or list providers should understand that not all companies that call consumers are required to access the National Do Not Call Registry. As discussed above, bona fide survey research firms not engaged in “telemarketing,” as defined by the TSR, are exempt entities not required to access the registry. So are firms that call consumers solely to induce charitable contributions, or for political fund raising.² In addition, firms that call only persons with whom they have an established business relationship as defined by the TSR, 16 C.F.R. § 310.2(n), or from whom they have obtained express written agreement to call, 16 C.F.R. § 310.4(b)(1)(iii)(B)(i), also do not have to access the National Registry. Thus, data vendors may sell “unscrubbed” lists to exempt organizations without requiring those organizations to obtain a SAN. Data vendors, of course, may choose to sell only lists that are “scrubbed” of numbers in the National Registry. In that case, an exempt organization that wants to obtain an “unscrubbed” list likely will seek to employ a data vendor that does not impose such restrictions.

The third part of your request for a staff advisory opinion concerns a number of issues involving the effect accessing the National Registry by an exempt organization may have on the exempt status of such entities. For purposes of this portion of this advisory opinion, we will assume that the exempt organization is properly accessing the National Registry, *i.e.*, solely to prevent telephone calls to telephone numbers on the Registry.

¹ In fact, those organizations that want “un-scrubbed” lists may not obtain a SAN, given the need to complete the certification. As the certification makes clear, the only permissible purpose to access the registry is to prevent calls to consumers who have registered.

² On the other hand, for-profit telemarketers calling to solicit charitable contributions are required to comply with the company-specific do not call provisions of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A), not the National Registry requirements.

You ask whether exempt organizations that obtain a SAN may access the National Registry at their discretion, “as infrequently as they wish,” without such access having an effect on their exempt status. That is correct. Exempt organizations are, by definition, not required by law to abide by the Do Not Call regulations. When they access the National Registry, they can do so only for the purpose of preventing telephone calls to telephone numbers on the registry. However, if they decide to access the registry to prevent calls to registered consumers only at certain times of year, or only on behalf of some exempt clients but not others, they are free to do so. Accessing the National Registry will not require them to continually do so in the future, or on behalf of all clients with which they do business. The choice is entirely up to the exempt organization.

On the other hand, you ask whether an exempt organization may obtain a SAN but choose never to access the National Registry. If an exempt organization purchases a scrubbed list, it has accessed the registry indirectly, and must obtain a SAN. It need not ever access the registry directly. If the organization purchases an unscrubbed list, it would appear to have no reason to obtain a SAN in the first place, other than, possibly, to placate the demands of a data vendor. As discussed above, that is an improper use of the National Registry, and any such demand by a data vendor is unsupported by the TSR. Rather than obtaining a SAN in such a case, an exempt organization may instead want to search for another data vendor that will provide the requested information without demanding a SAN.

You also ask if an exempt organization that accesses the National Registry “accidentally calls someone on the Registry,” whether such accidental call will subject the exempt entity to potential enforcement actions or fines by the FTC. As discussed above, an exempt organization is not required to access the National Registry. The FTC has allowed exempt organizations that choose to prevent calls to consumers with registered telephone numbers to access the registry for that purpose. Assuming that an exempt organization’s access was for a proper purpose, that access will not make the exempt organization liable for an “accidental” call made to a registered number. The same is true if the exempt organization is accessing the registry on behalf of an exempt client, and the client accidentally calls a registered number.

Please be advised that this opinion is based exclusively 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