

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



Division of Marketing Practices

February 4, 2010

Jean L. Kiddoo  
Bingham McCutchen LLP  
2020 K Street, N.W.  
Washington, DC 20006-1806

**Request for Advisory Opinion:  
Prerecorded Message to Customers Regarding  
Availability of Free Services for a Limited Time Period**

Dear Ms. Kiddoo:

You have requested an informal staff opinion that telephone calls which deliver prerecorded messages to existing customers of your client, RCN, a cable and open video services provider, do not meet the definition of “telemarketing” in the Telemarketing Sales Rule, 16 C.F.R. § 310.2(cc). The telephone calls at issue deliver prerecorded messages that notify RCN customers of the existence and availability of a specific programming channel, and the fact that the channel will be available for free for a certain time period.

RCN provides cable and open video services in Boston, Chicago, Lehigh Valley and suburban Philadelphia, Pennsylvania, New York City, and Washington, D.C. RCN expanded its foreign language offerings in 2008, and now offers channels that provide programming in 15 different languages. RCN has used telephone calls delivering prerecorded messages (“robocalls”) to notify its customers about the existence of programming offerings or changes to channel line-ups. RCN has found that the use of foreign language speakers to conduct live-calls to subscribers to inform them of RCN’s offerings is “cost prohibitive” because of the large number of different language channels offered by RCN and the relatively few international customers in each language.

RCN would like to place telephone calls delivering prerecorded messages to notify current subscribers about its expanded foreign-language channels. The messages would notify the subscribers that a specific foreign-language network that is not available on the subscribers’ current tiers of service is available for viewing temporarily at no additional charge. As an example, your letter describes the following proposed telephone calls:

[A] robocall in Japanese would be sent to RCN’s Chicago customers to inform them that the TV Japan network is available on Channel 504 without cost for the next 30 days. This type of robocall does not provide any information about how to subscribe to the channel after the 30-day period or the price of the channel, or

in any way “induce them to purchase any goods or services,” but instead simply informs and educates the existing customer about the current availability of a programming service and the time period during which the customer may freely access the channel. The customer is then able to enjoy the free programming without obligation, payment or any further requirements whatsoever. Information about how to continue receiving the channel after the free preview ends would not be provided in the robocall message and would only be available when the programming is watched by the subscriber.

The staff of the Federal Trade Commission has concluded that the telephone calls described in your letter are calls made in connection with “telemarketing” within the meaning of the TSR because the calls are part of a campaign to induce the sale of services to the recipients of the calls. Consequently, 16 C.F.R. § 310.4(b)(1)(v)(A) prohibits outbound telephone calls to deliver such messages unless the seller has obtained from the recipient of the call an express agreement, in writing, that evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of that seller and includes such person’s telephone number and signature.

The Telemarketing and Consumer Fraud and Abuse Prevention Act defines “telemarketing,” in relevant part, as “a plan, program, or campaign which is conducted to induce purchases of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call.” 15 U.S.C. § 6106(4). The Commission has adopted a virtually identical definition in the TSR. *Id.* § 310.2(cc); *Prohibition of Deceptive and Abusive Telemarketing Acts, Final Rule*, 60 Fed. Reg. 43,842, 43,844 (1995). Consequently, “telemarketing” under the statute and its implementing regulations is not limited to activities in which a sale or offer for sale is communicated during a telephone call. In rejecting an argument that “telemarketing” does not include telephone calls designed to setup a meeting at which sales may take place, the Commission observed:

[T]he definition of “telemarketing” does not require that the purchase be made during the telephone conversation. The definition simply states that the call be “conducted to induce the purchase of goods or services.” The inducement could be made during the telephone call, or it could be in the form of setting up a subsequent face-to-face meeting at which an additional sales presentation could take place.

*Telemarketing Sales Rule, Final Rule*, 68 Fed. Reg. 4579, 4655-56 (2003).<sup>1</sup> Consistent with this interpretation of the term “telemarketing,” the Commission has brought enforcement actions against telemarketers who delivered prerecorded messages that are not designed to make sales over the telephone, but to induce consumers to purchase goods or services by other means, such as sales events at retail stores.<sup>2</sup>

Although the Commission has observed that “telemarketing” does not include “informational messages,” it has stressed that the TSR *does* cover messages that combine an informational message with direct or indirect solicitation. *See Telemarketing Sales Rule, Final Rule Amendments*, 73 Fed. Reg. at 51173 (2008); *Telemarketing Sales Rule*, 71 Fed. Reg. 58725, n.107 (2006). Examples of messages that provide information but are also part of a campaign to induce sales include invitations to special retail sales and events, ticket offers for musical events, and announcements of local promotions. 73 Fed. Reg. at 51,173 n.113.

We conclude that the proposed prerecorded messages announcing temporary access to RCN channels, followed by subsequent communications concerning how RCN subscribers may purchase continued access to these channels, are part of a plan, program or campaign to induce sales and are not purely informational. Therefore, even though details regarding price and how RCN subscribers can purchase access to the channels described in the messages are conveyed through the programming, rather than through the prerecorded messages, the telephone calls fall within the statutory and regulatory language defining “telemarketing.” A person who initiates such calls is doing so “in connection with telemarketing,” 16 C.F.R. § 310.2(bb), and, therefore, is a “telemarketer” subject to the restrictions on the delivery of prerecorded messages in 16 C.F.R. § 310.4(b)(1)(v)(A). The TSR also prohibits a seller from causing a telemarketer to engage in initiating telephone calls to deliver such messages.

As noted above, 16 C.F.R. § 310.4(b)(1)(v)(A) permits telemarketers and sellers to make outbound telephone calls to deliver prerecorded messages if the seller has obtained from the recipient of the call an express agreement that evidences the willingness of the recipient to receive calls that deliver prerecorded messages by or on behalf of a specific seller. Such an authorization is not valid if the seller requires, directly or indirectly, that the agreement be

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<sup>1</sup> *See also* 68 Fed. Reg. at 4587 (2003) (“Thus, a sales call using a prerecorded message may be ‘telemarketing’ if it is part of a plan, program, or campaign for the purpose of inducing the purchase of goods or services or inducing a donation to a charitable organization, is conducted by use of one or more telephones, and involves more than one interstate call.”)

<sup>2</sup> *See, e.g., United States v. Voice-Mail Broadcasting Corp.*, Civ. No. 2:08-cv-00521 (C.D. Cal., filed Jan. 15, 2004) (prerecorded messages promoting retail sales); *United States v. The Broadcast Team*, Civ. No. 6:05-cv-01920 (M.D. Fla., filed Dec. 29, 2005) (prerecorded messages promoting attendance at conferences).

Jean L. Kiddoo  
Bingham McCutchen LLP  
Request for Advisory Opinion

February 4, 2010  
Page 4

executed as a condition of purchasing any good or service, including services such as those that RCN provides to subscribers. *Id.* § 310.4(b)(1)(v)(A)(ii).

Please be advised that this opinion is based exclusively on the information furnished in your letter. In addition, please be advised 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 TSR. Staff opinions concerning the TSR are routinely posted on the FTC website at <http://www.ftc.gov/bcp/telemarketing/staffopinions.shtm>.

Very truly yours,



Lois Greisman  
Associate Director  
Division of Marketing Practices