

September 2006

An Affiliate's Customers Are Not Always Your Customers

In a recent action against affiliate companies, the FTC has once again shown that violations of Do Not Call (DNC) provisions can be costly. Peoples Benefit Services, Inc. (PBS), a seller of prescription drug discount cards, dental discount cards, health-related discount cards, and an online medical referral service to consumers, and its telemarketer, Malvern Marketing, LLC, d/b/a Phase One Marketing (POM) must pay a combined \$350,000 in civil penalties for violating the DNC provisions of the Telemarketing Sales Rule. This is the first case to highlight the application of the Telemarketing Sales Rule's (TSR) DNC provisions to corporate affiliates.

The FTC reported that PBS and POM violated the DNC provisions in the following ways:

- PBS did not meet its burden of proving an existing business relationship with affiliates' consumers. PBS authorized POM to call consumers on the DNC Registry on the basis of an alleged established business relationship (EBR) with PBS or its corporate affiliates. However, PBS and its corporate affiliate's businesses are so distinct that a consumer would not think they were the same.
- PBS did not pay the fee to access the numbers on the DNC registry. PBS used the Subscription Account Number of a corporate affiliate that marketed distinct products.
- Defendants called tens of thousands of consumers who had asked to be placed on the entity-specific DNC list.
- Defendants abandoned more calls than permitted by law.

This case illustrates the FTC's standard for applying the existing business relationship exemption to affiliate companies. If the consumer reasonably would expect the affiliate to be included in a company-specific Do Not Call request, given the identification of the caller and the product being advertised, then the affiliate company may take advantage of the EBR exemptions included in the TSR.

The factors to be considered in determining whether a consumer would reasonably expect an EBR to include an affiliate are the nature and type of goods or services offered and the identity of the affiliate. The greater the similarity between (1) the nature and type of goods sold by the seller and any subsidiary or affiliate, and (2) the identity between the seller and any subsidiary or affiliate, the more likely it is for the consumer to reasonably expect the affiliate to be included.

The FTC has given some specific examples in the area of affiliated entities. In one scenario, a consumer who purchased aluminum siding from "Alpha Company Siding," a subsidiary of "Alpha Corp.," would likely consider "Alpha Company Kitchen Remodeling," also a subsidiary of Alpha Corp. to be included in a Do Not Call request. The name of the seller and the subsidiary are similar, as are the types of goods or services offered – home repair and remodeling. In another example, in a situation where a consumer buys a subscription to a magazine from a magazine publisher that happens to be owned by a corporation with diverse holdings, the customer's request would include only the magazine publisher, not the corporate parent or any other corporate subsidiaries.

These types of affiliate questions are very fact specific; therefore, it is important to obtain competent legal counsel to provide guidance.