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MEMORANDUM

TO: Bill Malkasian / Mike Theo
Wisconsin Realtors Association

FROM: Mike Wittenwyler / Gene Schaeffer
LaFollette Godfrey & Kahn

DATE: July 17, 2003

SUBJECT: FCC Do-Not-Call Regulations

At your request, we have prepared this memorandum to provide an initial overview of the recently announced Federal Communications Commission (“FCC”) regulations adopting a national do-not-call registry. The FCC regulations, as you know, follow the Federal Trade Commission (“FTC”) actions earlier this year establishing a federal do-not-call registry. In short, Realtors in Wisconsin and anyone else that has client or potential client contact by telephone are now regulated by two federal agencies and one state agency. There is, needless to say, a significant potential for confusion and inadvertent violations of the laws and the complementary regulations.

It is important to note, at the outset, that the FCC regulations were two weeks ago, July 3, 2003, and many questions remain on how these new regulations will be implemented and interpreted. While the FTC and FCC are committed to developing a joint “Memorandum of Understanding,” the document is not yet available. Without the benefit of this memorandum or any other advisory materials, many questions simply cannot be answered.

At this point, however, we have examined the effect the FCC regulations will have on the Wisconsin do-not-call law and regulations and telemarketing activity in Wisconsin. Unlike the FTC regulations, the FCC regulations apply to *both interstate* (state-to-state) and *intrastate* (within one state) calls. However, in regulating *intrastate* calls, the FCC regulations do *not* preempt any state do-not-call laws that are more restrictive than the FCC regulations. *See* FCC Report and Order (July 3, 2003), ¶ 82. Accordingly, since Wisconsin’s do-not-call law is almost certainly more restrictive than federal law, the new FCC regulations are not likely to change any statutory do-not-call provisions, administrative regulations or telemarketing practices for

intrastate calls within Wisconsin.¹ But if either the Wisconsin do-not-call statute or regulations are modified or amended in a manner that makes the rules *less* restrictive than the new FCC regulations, then the FCC's regulations would preempt Wisconsin law. The FCC regulations, that is, establish a minimum level of do-not-call regulation in each state and, currently, Wisconsin's do-not-call regulations meet or exceed those minimum standards.

FTC REGULATIONS

While separate and distinct, the new FCC regulations are intertwined with the FTC order released in December 2002 amending its existing Telemarketing Sales Rule and establishing a federal do-not-call registry. (For a complete discussion of the FTC's do-not-call regulations and their effect on state law, *see* "FTC and State 'Do Not Call' Laws," *WRA Legal Update* (March 2003).) In addition to establishing a national do-not-call registry, the FTC regulations restrict call abandonment, crack down on unauthorized billing, and require telemarketers to transmit caller identification information. *See generally* 16 CFR § 310.

Like the Wisconsin do-not-call law, the FTC regulations create a do-not-call registry on which consumers nationwide may place their names, and entities that conduct telemarketing then may not call those people, unless the activity is excepted. Exceptions from the FTC regulations include:

- Telemarketers may call people on the registry who have given their express written permission to be called;
- Telemarketers may call people with whom they have an "established business relationship,"² as long as that person has not asked to be put on the entity's specific do-not-call list; and,
- Calls initiated by the consumer, most business-to-business calls, and calls that are part of a transaction that involve a face-to-face sales transaction.

See generally 16 CFR § 310.

Consumer sign-up has already begun for the national FTC registry, and the federal do-not-call restrictions are effective starting October 1, 2003. The FTC regulations do *not* apply, however, to intrastate telemarketing and do *not* preempt state laws. Instead, the scope of the FTC regulations is limited to interstate telemarketing activities into states that have not adopted their own do-not-call laws. Accordingly, Wisconsin Realtors who make calls only within the state

¹ The FCC regulations do contain other rules – in addition to the do-not-call regulations – that may affect other telemarketing practices in Wisconsin. *See infra* pp. 3-4.

² An "established business relationship" means a relationship between the seller and the consumer in which the consumer has purchased, rented or leased the seller's goods or services or engaged in a financial transaction with the seller within the past 18 months. It also includes a consumer inquiry or application about a product or service made within the past three months. 16 CFR § 310.2(n).

will not be affected by the FTC regulations. If Wisconsin Realtors make calls to other states, however, the FTC regulations would apply as well as the laws of the state where the call is placed.

FCC REGULATIONS

In addition to being limited to interstate telemarketing activities, the amended FTC regulations do *not* apply to entities that are not subject by law to the FTC's jurisdiction. These excluded entities include: banks, credit unions, savings and loans, insurance companies, and airlines. To fill a perceived regulatory gap for these industries as well as to subject intrastate telephone calls to federal do-not-call regulation, the FCC released a report and order on July 3, 2003, amending the regulations it has promulgated under the Telephone Consumer Protection Act. Enacted in 1991, the Act specifically authorizes the FCC to establish a national do-not-call registry. In response to changes in the marketplace, according to the FCC, the agency has now decided (12 years later) to exercise its authority.

The July 3 FCC order adopts a national do-not-call registry that the FCC will implement in conjunction with the FTC. That is, while both agencies in theory now have "established" their own do-not-call registry, there will be but a single national registry in practice. Order, ¶ 74. The FTC will administer this national database but enforcement will be coordinated between the FCC and the FTC. The forthcoming Memorandum of Understanding will provide additional details on how the two agencies will jointly implement and enforce the national do-not-call program. *See* Order, ¶¶ 211-214.

While the FCC regulations are not identical to the FTC regulations, they are very similar.³

- Residential customers will be able to place their phone numbers (including mobile phone numbers) on the national registry but most business-to-business calls will still be permissible;
- Phone numbers will stay on the national registry for five years; and,
- Telemarketers will be restricted from calling a registered phone number unless certain exemptions apply.

³ The FCC regulations prohibit artificial or prerecorded messages or facsimile advertisements unless the recipient has given prior consent to the call. The regulations also contain prohibitions on abandoned calls, similar to the FTC regulations. *See generally* 47 CFR § 64.1200. Prohibited by the FCC regulations as well are calls using an automated telephone dialing system or an artificial or prerecorded voice made to emergency telephone lines, private rooms at health care facilities, paging services, mobile telephone services, specialized mobile radio services or any service for which the customer is charged – unless, of course, there is prior consent. 47 CFR § 64.1200(a). And the FCC regulations also include time-of-day prohibitions identical to the FTC regulations that contain requirements that telemarketers identify themselves when calling. 47 CFR § 64.1200. While a comprehensive interpretive document has not yet been released, the FCC's full report and order are available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf

The FCC exemptions include the phone numbers of people:

- With whom the caller has a personal relationship;
- Who have given their prior express permission to receive a call; and,
- Who have an “established business relationship” with the caller.⁴

While the FCC’s definition of “established business relationship” is not identical to the FTC’s, it includes purchases or transactions within the past 18 months or inquiries or applications within the past three months. *See* 47 CFR § 64.1200(f)(3). A telemarketer may not, however, call a person who has asked to be placed on the company’s own do-not-call list, regardless of whether there is a current business relationship. 47 CFR § 64.1200(f)(3)(i). The FCC regulations do provide important “safe harbors” for those who call an individual on the registry in error if the entities have set up established procedures and protocols to avoid making calls to individuals on the registry. 47 CFR § 64.1200(c).

The FCC regulations also include a *private right of action* that applies to the do-not-call registry.⁵ *See* 47 U.S.C. §§ 227(b)(3) and (c)(5). It is unclear how, or even whether, this federal right of action might preempt a state law lacking such a provision. Arguably, it would only be available in states where the federal law has completely preempted a state law. Alternatively, however, a state law without a private cause of action could be partially preempted in this one area and imposed on a state. Unfortunately, guidance from the FCC may not be forthcoming:

The [FCC] declines to make any determination about the specific contours of the TCPA’s private right of action. Congress has provided consumers with a private

⁴ Affiliated companies of an entity that has an “established business relationship” with a customer, will not fall within the “established business relationship” exemption unless the customer would reasonably expect them to be included given the nature and type of goods or services offered and the identity or the affiliate. Order, ¶ 117. That is, a telemarketer must have their own established business relationship in order to call a customer and an affiliate cannot rely on another company’s relationship unless it would be “reasonably expected.”

⁵ The Telephone Consumer Protection Act (the “TCPA”) adopted by Congress provides consumers with two private rights of action for violations of TCPA rules. One provision permits a consumer to file suit in state court, if otherwise permitted by the laws or rules of that state, if the caller violates the TCPA’s prohibitions on the use of automatic dialing systems, artificial or prerecorded messages and unsolicited facsimile advertisements. The lawsuit may seek to enjoin the violation and/or recover the actual monetary loss or \$500 in damages, whichever is greater. If the court finds the caller willfully or knowingly violated the law, the court may triple the damages. *See* 47 U.S.C. § 227(b)(3).

A second provision permits a consumer to file suit in state court, if otherwise permitted by the laws or rules of that state, if the consumer has received more than one call within any 12-month period by or on behalf of the same entity in violation of the telephone solicitation regulations. The lawsuit may seek to enjoin the violation and/or recover the actual monetary loss or \$500 in damages, whichever is greater. If the court finds the caller willfully or knowingly violated the law, the court may triple the damages. The second cause of action provides a caller with an affirmative defense if the caller has established and implemented with due care, reasonable practices and procedures to effectively prevent violations. 47 U.S.C. § 227(c)(5). Neither statutory provision refers to an award or allocation of legal fees.

right of action “if otherwise permitted by the laws or rules of court of a State.” This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those courts’ rules. The Commission believes it is for Congress, not the Commission, to either clarify or limit this right of action.

Order, ¶ 206.

EFFECT ON WISCONSIN LAW AND WISCONSIN REALTORS

Unlike the FTC regulations, the FCC regulations apply to *both* interstate and intrastate telemarketing. “[W]hen Congress enacted the Telephone Consumer Protection Act, it gave the Commission jurisdiction over both interstate and intrastate telemarketing calls.” *See* FCC Press Release on the Do-Not-Call Registry (June 26, 2003) (emphasis added). “[T]he federal rules constitute a floor, and therefore, would supersede all *less* restrictive state do-not-call rules.” Order, ¶ 81 (emphasis added). However, the FCC does recognize that some states may adopt *more* restrictive do-not-call laws governing intrastate telemarketing and that federal law prohibits the FCC from preempting these more restrictive state laws. Order, ¶ 82, citing 47 U.S.C. § 227(e).

The FCC is less clear, however, on the status of more restrictive state laws limiting telemarketing practices within a state when the phone call originates in another state *See* Order, ¶ 84-85. Historically, states have enforced telemarketing laws, including do-not-call laws, within, as well as across, state lines. That is, the Wisconsin do-not-call law applies to *all* telemarketing practices within the state – including both intrastate calls as well as interstate calls made to phone numbers in Wisconsin. Now, however, some attorney generals have questioned whether the FCC’s order affects a state’s ability to regulate *all* telemarketing practices within a state.

Several questions remain on how the FCC’s preemption might occur. Who will determine whether a state law is more “restrictive” than the FCC regulations and, accordingly, whether preemption is appropriate? What is the standard for “restrictive”? Is preemption in part or complete? That is, will the federal regulations fill in gaps within state law or an entire body of law because of a missing or less restrictive state law? Will the FCC clearly preempt more restrictive state laws that regulate interstate telemarketing calls to phone numbers in Wisconsin? Answers to these and other questions may be found in the joint FTC/FCC Memorandum of Understanding yet to be released or, alternatively, found in practice as the law is enforced.

The Wisconsin do-not-call law and administrative rule governing intrastate calls and telemarketing practices within Wisconsin are clearly more restrictive than the FCC rules regarding intrastate calls.⁶ “The main area of difference between the state and federal do-not-call programs,” according to the FCC, “relates to the exemptions created from the respective do-not-call regulations.” Order, ¶ 79. “A few states have enacted laws that are more restrictive than the

⁶ In addition to the do-not-call provisions in the FCC regulations, telemarketers should be aware that the FCC rules on abandoned calls and automated telephone dialing equipment will now apply to intrastate as well as interstate telemarketing activities.

federal regulations by not recognizing federal exemptions such as the established business relationship.” *Id.*

Wisconsin law does not recognize the federal “established business relationship” exemption, of course, and the utility of the “current client” exception contained in the state statute and the rule is severely limited. Accordingly, the Wisconsin do-not-call registry should be considered more restrictive than the FCC regulations. The FCC and FTC rules both provide 18-month and three-month look-back provisions in the “established business relationship” exclusion that are not allowed under Wisconsin law. These look-back provisions are less restrictive than the current client exception under the Wisconsin do-not-call program. As you are well aware, all of the exceptions under state law are interpreted extremely narrowly by the Department of Agriculture, Trade and Consumer Protection (“DATCP”). Accordingly, if a Realtor in Wisconsin is complying with the Wisconsin law, that Realtor almost certainly is complying with most requirements of federal law regarding intrastate calls.

Realtors should be aware, however, that there is one instance where Wisconsin law may be less restrictive than the FCC rule. Federal law allows telemarketers to call an individual who has provided written consent while Wisconsin law allows telemarketers to call people who have made an affirmative request to be called. There is no requirement under Wisconsin law that the request be in writing, though DATCP has indicated a preference for written consent. (We have counseled clients to obtain consent in writing.)

Preemption by federal law also could occur if specific exemptions were added to the Wisconsin law for certain entities or industries. The FCC views specific exemptions as less restrictive since those exceptions are not included in the federal law. Order, ¶ 79. In that situation, the FCC regulations would act to eliminate the specific exemption in state law by trumping the specific state exemption. For instance, if state law provided an exemption for real estate professionals, the FCC regulations would be more restrictive – because they contain no exemptions for specific industries – and, accordingly, preempt state law.

An additional area of concern with preemption is the availability of a private cause of action under the FCC’s do-not-call regulation (regardless of whether state law provides such a cause of action). Once the national FCC/FTC registry goes into effect on October 1, 2003, state lists must contain the phone numbers of all the national registrants from that state. That is, these phone-numbers on the national registry will be included in the state registry. *See* Order, ¶ 77. If preemption can occur in part, an argument could be made that the private cause of action is available against a telemarketer who has called a registered do-not-call phone number as long as no exception – under either the Wisconsin or FCC regulations – is available.

CONCLUSION

In summary:

- Wisconsin's do-not-call law and regulations remain in effect;
- Any Wisconsin Realtor telemarketing in other states should be aware of any applicable state laws as well as FTC and FCC regulations;
- The FTC's do-not-call regulations will apply only to Wisconsin Realtors who make interstate phone calls – calls outside of Wisconsin;
- If Wisconsin Realtors are in compliance with Wisconsin law, they almost certainly will be in compliance with FCC regulations as well;
- Any changes to the state do-not-call law that *lessen* their impact may well allow the FCC regulations to preempt Wisconsin law;
- In addition to the FCC's do-not-call regulations, other FCC rules on telemarketing now apply to certain intrastate telemarketing activities that Realtors may or may not be engaged in;
- Additional research needs to be done on the scope and applicability of preemption to determine how private cause of action and damages (and other provisions) will apply to violations of the Wisconsin and FCC do-not-call regulations; and,
- A lawsuit filed against the FTC is pending in federal court in Colorado and seeks to prevent implementation of the federal do-not-call registry.

Please let us know, as always, if you have any further questions or need any additional information.

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