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M E M O R A N D U M

February 6, 2003

TO:

FROM: Gardner F. Gillespie
C. Jeffrey Tibbels

RE: **Established Business Relationship; FCC and FTC Internal Do-Not-Call List Requirements**

Recently, you requested more information regarding whether the Federal Communications Commission's ("FCC's") and Federal Trade Commission's ("FTC's") regulations require telephone solicitors to maintain their own do-not-call lists, and the potential relationship between these requirements and the established business relationship exemptions. As explained briefly below, both the FCC's and FTC's telemarketing rules require maintenance of company-specific, internally maintained do-not-call lists, and such lists do impact the established business relationship exemptions.

The FCC defines an "established business relationship" as:

> [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 an inquiry, application, purchase or transaction by the residential subscriber regarding the products or services offered by such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(4). There is no express time limit on the existence of an established business relationship. The FCC has sought comments on whether there should be such a time limit in its ongoing proceeding on telemarketing. The United States Congress is currently considering a bill which would require the FCC to "ensure

maximum consistency" between its telemarketing rules and those of the FTC (the FTC has an 18-month time limit on the established business relationship).

The FCC's regulations prohibit telephone solicitations, unless the solicitor has "instituted procedures for maintaining a list of persons who do not wish to receive solicitations made by or on behalf of that [solicitor]." 47 C.F.R. § 64.1200(e)(2). Those procedures must include, among other things: a written policy, to be supplied upon demand, for maintaining a do-not-call list; training of personnel involved in telephone solicitations; prompt identification of the identity of the solicitor; and prompt recordation of do-not-call requests. *Id.* §§ 64.1200(e)(2)(i) through (iv). A do-not-call request must be honored for 10 years following the date of the request. *Id.* § 64.1200(e)(2)(vi).

Violations of the FCC's telemarketing rules are punishable by forfeitures of up to $11,000 for each violation or each day of a continuing violation. *See* 47 C.F.R. § 180(b)(3). In addition, a state attorney general (or other official so designated) may institute a civil suit on behalf of its aggrieved residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. *See* 47 U.S.C. § 227(f)(1). If a court finds that the violations were knowing and willful, it may, in its discretion, award up to treble damages. *See id.*

For FCC compliance purposes, unless a residential customer (or solicitor) has terminated an established business relationship, or has made a do-not-call request, a solicitor may continue to make telephone solicitations under the established business relationship exemption.

The FTC's amended Telemarketing Sales Rule ("TSR") 1/ defines an "established business relationship" as:

> [A] relationship between a seller and a consumer based on: (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

1/ The amended TSR was published in the *Federal Register* on January 29, 2003, and for the most part will take effect on March 31, 2003. The FTC estimates that the FTC-maintained do-not-call list requirements will go into effect approximately seven months after the U.S. Congress allocates funds for effective implementation of the regulations.

16 C.F.R. § 310.2(n).

The FTC's amended TSR prohibits a solicitor from initiating any outbound telephone call to a person when "that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited." *Id.* § 310.4(b)(1)(iii)(A). A solicitor will not be liable for violation of the rule if it can demonstrate, as part of the solicitor's routine business practice, that it has: (i) established and implemented written procedures to comply with the rule; (ii) trained personnel to comply with the rule; (iii) internally maintains and records a list of telephone numbers the solicitor may not contact in compliance with the rule; (iv) establishes a recorded process that prevents solicitations of any telephone number on the FTC-maintained do-not-call registry; (v) monitors and enforces compliance with the amended TSR; and (vi) demonstrates that any subsequent call made in violation of the rules was made in error. 310.4(b)(3). Violations of the amended TSR are punishable by fines of up to $11,000 per violation.

For purposes of compliance with the FTC's amended TSR, assuming that a transaction took place between the seller and the residential customer within the 18 months immediately preceding the call, or the customer has inquired/applied to the seller within three months regarding a product or service, a seller may continue to make telephone solicitations to that customer under the established business relationship exemption, unless the customer has previously asked the seller not to call.

Please let us know if you have any additional questions.