



Mail-Order Purchases/Telemarketing

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Background

Mail order advertising has its roots in the 1800s, when Richard Sears, a railroad clerk in Minnesota, found himself with an abandoned case of pocket watches. Using his list of other railroad clerks throughout the Midwest, he marketed these watches and quickly sold them. Sears recognized immediately that an entrepreneur with a list of accurate names and addresses and a stock of quality merchandise no longer needed a store. He only needed a good message delivery vehicle and first-rate customer service. And so began the company that would later become known as Sears Roebuck. With the advent of the telephone, telemarketing followed suit. Along with direct mail and telemarketing came governmental regulation.

Direct Mail

The U.S. Postal Inspection Service is the law enforcement branch of the U.S. Postal Service, empowered by federal laws and regulations to investigate and enforce over 200 federal statutes related to crimes against the U.S. Mail, the Postal Service, and its employees. Postal inspectors investigate any crime in which the U.S. Mail is used to further a scheme, whether it originated in the mail, by telephone or on the Internet. The illegal use of the U.S. Mail determines a [MAIL FRAUD](#). If [EVIDENCE](#) of a postal-related violation exists, postal inspectors may seek prosecutive or administrative action against a violator. Postal inspectors base their investigations of mail [FRAUD](#) on the number, pattern and substance of complaints received from the public.

Deceptive Mail Prevention and Enforcement Act

The Deceptive Mail Prevention and Enforcement Act of 1999 requires mailings to clearly display on rules and order forms, that no purchase is necessary to enter contest and state that a purchase does not improve the chance of winning. They must state the terms and conditions of the sweepstakes promotion, including rules and entry procedures; the sponsor or mailer of the promotion and principal place of business, or other contact address of sponsor or mailer; estimated odds of winning each prize; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time. The act imposes requirements for mail related to skill contests mailings, which must disclose the number of rounds, cost to enter each round, whether subsequent rounds will be more difficult, and the maximum cost to enter all rounds; the percentage of entrants who may solve correctly the skill contest; the identity of the judges and the method used in judging; the date the winner will be determined, as well as quantity and estimated value of each prize. The law imposes new federal standards on facsimile checks sent in any mailing. The checks must include a statement on the

check itself that it is non-negotiable and has no cash value. The law prohibits mailings that imply a connection to, approval of, or endorsement by the federal government through the misleading use of a seal, insignia, reference to the postmaster general, [CITATION](#) to a federal statute, trade or brand name, or any other term or symbol, unless the mailings carry two disclaimers. The law requires companies sending sweepstakes or skill contests to establish a system and include in their mailings a telephone number or address, which consumers could use to have themselves removed from the mailing lists of such companies. The U.S. Postal Inspection Service is responsible for investigating cases of fraud when the U.S. Mail is used as part of the scheme.

900 Telephone Number Solicitations

The 900 telephone numbers, in which the caller pays a fee per minute, have been used by legitimate entities; however, some mailings attempt to lure consumers into calling a 900 number claiming the consumer has won a sweepstakes or prize. Other 900 number solicitations offer products or services, such as credit repair or a travel package. People with bad credit who hope to receive a credit card by calling a 900 number might receive a list of banks to which they can apply for such a card. Those who are told to call because they're winners in a sweepstakes may receive nothing but a charge on a phone bill. Sometimes, a call to a 900 number requires the consumer to listen to a long recorded sales pitch, resulting in a high phone charge.

Solicitations Disguised as Invoices

Title 39, United States Code, Section 3001, makes it illegal to mail a [SOLICITATION](#) in the form of an invoice, bill, or statement of account due unless it conspicuously bears a notice on its face that it is, in fact, merely a solicitation. This disclaimer must be in very large (at least 30-point) type and must be in boldface capital letters in a color that contrasts prominently with the background against which it appears. The disclaimer must not be modified, qualified, or explained, such as with the phrase "Legal notice required by law." It must be the one prescribed in the [STATUTE](#), or alternatively, the following notice prescribed by the U.S. Postal Service: THIS IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED ABOVE UNLESS YOU ACCEPT THIS OFFER. Some solicitations disguise their true nature. Others identify themselves as solicitations, but only in the "fine print." A solicitation whose appearance does not conform to the requirements of Title 39, United States Code, Section 3001, constitutes prima facie evidence of violation of the federal False Representation Statute. Therefore, solicitations in the form of invoices, bills, or statements of account due which do not contain the large and conspicuous disclaimer required by the law will not be carried or delivered by mail if they come to the attention of the Postal Service, and will be disposed of as the Postal Service shall direct.

Sexually Oriented Mail Solicitations

Consumers can have their names and the names of their minor children placed on a United States Postal Department list of persons who do not want to receive unsolicited sexually oriented advertisements through the mail. Form 1500, Application for Listing and/or Prohibitory Order, is available at any local post office. Thirty days after protection begins, any mailer who sends the consumer sexually oriented advertisements may be subject to civil and criminal sanctions. Name will remain on the list for five years.

Telephone Solicitation

A telephone solicitation is a telephone call that acts as an advertisement. In some cases unlisted or non-listed numbers can be obtained from a directory assistance operator. They, along with non-published numbers, may be sold to other organizations. Some sales organizations call all numbers in numerical order for a neighborhood or area. The FCC's rules prohibit telephone solicitation calls to homes before 8 am or after 9

p.m. A person placing a telephone solicitation call must provide his or her name, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which that person or entity may be contacted. The term telephone solicitation does not include calls or messages placed with the receiver's prior consent, regarding a tax-exempt non-profit organization, or from a person or organization with which the receiver has an established business relationship. An established business relationship exists if the consumer has made an inquiry, application, purchase, or transaction regarding products or services offered by the person or entity involved.

The Telephone Consumer Protection Act

The Telephone CONSUMER PROTECTION Act of 1991 (TCPA) was enacted by Congress to reduce the nuisance and invasion of privacy caused by telemarketing and prerecorded calls. Congress ordered the FCC to make and clarify certain regulations. The TCPA imposes restrictions on the use of automatic telephone dialing systems, of artificial or prerecorded voice messages, and of telephone facsimile machines to send unsolicited advertisements. Specifically, the TCPA prohibits autodialed and prerecorded voice message calls to emergency lines, health care facilities or similar establishments, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call. The TCPA also prohibits artificial or prerecorded voice message calls to residences made without prior express consent. Telephone facsimile machines may not transmit unsolicited advertisements. Those using telephone facsimile machines or transmitting artificial or prerecorded voice messages are subject to certain identification requirements. Finally, the TCPA requires that the Commission consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations. The statute also outlines various remedies for violations of the TCPA.

Automatic Telephone Dialing Systems

Automatic telephone dialing systems, also known as autodialers, generate a lot of consumer complaints. Autodialers produce, store, and dial telephone numbers using a random or sequential number generator. Autodialers are usually used to place artificial (computerized) or prerecorded voice calls. Autodialers and any artificial or prerecorded voice messages may not be used to contact numbers assigned to any emergency telephone line, the telephone line of any guest or patient room at a hospital, health care facility, cellular telephone service, or other radio common carrier service. Calls using autodialers or artificial or prerecorded voice messages may be placed to businesses, although the FCC's rules prohibit the use of autodialers in a way that ties up two or more lines of a multi-line business at the same time.

If an autodialer is used to deliver an artificial or prerecorded voice message, that message must state, at the beginning, the identity of the business, individual, or other entity initiating the call. During or after the message, the caller must give the telephone number (other than that of the autodialer or prerecorded message player that placed the call) or address of the business, other entity, or individual that made the call. It may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. Autodialers that deliver a recorded message must release the called party's telephone line within 5 seconds of the time that the calling system receives notification that the called party's line has hung up.

Do Not Call Lists

The FCC requires a person or entity placing live telephone solicitations to maintain a record of any consumer request not to receive future telephone solicitations from that person or entity. A record of a do-not-call request must be maintained for ten years. This request should also stop calls from affiliated entities if individuals would reasonably expect them to be included, given the identification of the caller and the product being advertised. Tax-exempt non-profit organizations are not required to keep do-not-call lists. The Direct Marketing Association (DMA) sponsors the Telephone Preference Service (TPS) which maintains a

do-no-call list. DMA members are required to use this list. Registration is free and the request remains on file for 5 years. Finally, as of 2002, many states had statewide no-call lists for residents in that state.

Some states permit consumers to file law suits against violators who continue to call despite the consumer being on a no-call list. Consumers can sometimes seek [PUNITIVE DAMAGES](#) if the caller willfully and knowingly violated do-not-call requirements. States themselves may initiate a civil suit in federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or FCC rules. While the FCC may not award monetary or other damages, it can give citations or fines to those violating the TCPA or other FCC rules regarding unsolicited telephone marketing calls. Consumers who file complaints with the FCC retain their private right of action.

The Federal Trade Commission

One of the most important enforcement agencies for direct marketers is the Federal Trade Commission (FTC), which enforces federal consumer protection laws passed by Congress and which has the authority to adopt regulations and rules interpreting and implementing those laws. There are rules on marketing to children online, on regulations for distance selling delivery requirements, for telemarketing, and many other subjects. Each of the states has similar powers and authority, usually under the office of the state's attorney general, the chief law enforcement officer of the state. The Federal Trade Commission (FTC) Telemarketing Sales Rule requires certain disclosures and prohibits misrepresentations. The Rule covers most types of telemarketing calls to consumers, including calls to pitch goods, services, sweepstakes, prize promotions, and investment opportunities. It also applies to calls consumers make in response to postcards or other materials received in the mail. Calling times are restricted to the hours between 8 a.m. and 9 p.m. Telemarketers must disclose that it is a sales call and for which company. It is illegal for telemarketers to misrepresent any information, including facts about goods or services, earnings potential, profitability, risk or liquidity of an investment, or the nature of a prize in a prize promotion scheme. Telemarketers must disclose the total cost of the products or services offered and all restrictions on getting or using them, and that a sale is final or non-refundable.

The FTC works to ensure that the nation's markets are efficient and free of practices which might harm consumers. To ensure the smooth operation of a free market system, the FTC enforces federal consumer protection laws that make illegal fraud, deception, and unfair business practices. The Federal Trade Commission Act allows the FTC to act in the interest of all consumers to prevent deceptive and unfair acts or practices. In interpreting the Act, the Commission has determined that, with respect to advertising, a representation, omission, or practice is deceptive if it is likely to mislead consumers and affect consumers' behavior or decisions about the product or service. In addition, an act or practice is unfair if the injury it causes, or is likely to cause, is substantial, not outweighed by other benefits, and not reasonably avoidable.

The FTC Act's prohibition on unfair or deceptive acts or practices broadly covers advertising claims, marketing and promotional activities, and sales practices in general. The Act is not limited to any particular medium. Accordingly, the Commission's role in protecting consumers from unfair or deceptive acts or practices encompasses advertising, marketing, and sales online, as well as the same activities in print, television, telephone, and radio. For certain industries or subject areas, the Commission issues rules and guides. Rules prohibit specific acts or practices that the Commission has found to be unfair or deceptive. Guides help businesses in their efforts to comply with the law by providing examples or direction on how to avoid unfair or deceptive acts or practices. Many rules and guides address claims about products or services or advertising in general and are not limited to any particular medium used to disseminate those claims or advertising. Therefore, the plain language of many rules and guides applies to claims made on the Internet. Solicitations made in print, on the telephone, radio, TV or online fall within the rule's scope.

Mail or Telephone Order Rule

Shopping by phone or mail is a convenient alternative to shopping at a store. By law, a company must ship a consumer's order within the time stated in its ads. If no time is promised, the company should ship the order within 30 days after receiving it. If the company is unable to ship within the promised time, it must provide the consumer with an option notice. This notice gives the consumer the choice of agreeing to the delay or canceling the order and receiving a prompt refund. If a company does not promise a shipping time and the consumer is applying for credit, the company has 50 days to ship after receiving the order.

Bureau of Consumer Protection

The FTC's Bureau of Consumer Protection protects consumers against unfair, deceptive, or [FRAUDULENT](#) practices. The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company and industry-wide investigations, administrative and federal court [LITIGATION](#), rulemaking proceedings, and consumer and business education. In addition, the Bureau contributes to the Commission's on-going efforts to inform Congress and other government entities of the impact that proposed actions could have on consumers. The Bureau of Consumer Protection is divided into six divisions and programs, each with its own areas of expertise. One of the divisions is the Division of Advertising Practices.

Within the Bureau of Consumer Protection is the Division of Advertising Practices and the Division of Enforcement. These entities are the nation's enforcers of federal truth-in-advertising laws. The FTC Act prohibits unfair or deceptive advertising in any medium. That is, advertising must tell the truth and not mislead consumers. A claim can be misleading if relevant information is left out or if the claim implies something that is not true. In addition, claims must be substantiated especially when they concern health, safety, or performance. The type of evidence may depend on the product, the claims, and what experts believe necessary. Sellers are responsible for claims they make about their products and services. Third parties such as advertising agencies or website designers and catalog marketers also may be liable for making or disseminating deceptive representations if they participate in the preparation or distribution of the advertising, or know about the deceptive claims.

Obligations of Publishers and Agencies

Advertising agencies (and more recently, website designers) are responsible for reviewing the information used to [SUBSTANTIATE](#) ad claims. These agencies may not simply rely on an advertiser's assurance that the claims are substantiated. In determining whether an ad agency should be held liable, the FTC looks at the extent of the agency's participation in the preparation of the challenged ad, and whether the agency knew or should have known that the ad included false or deceptive claims. Likewise, catalog and magazine publishers can be held responsible for material distributed. Publications may be required to provide documentation to back up assertions made in the advertisement. Repeating what the manufacturer claims about the product is not necessarily sufficient. The Division of Enforcement conducts a wide variety of law enforcement activities to protect consumers, including deceptive marketing practices. This division monitors compliance with Commission cease and desist orders and federal court injunctive orders, investigates violations of consumer protection laws, and enforces a number of trade laws, rules and guides.

FTC Litigation

Typically, FTC investigations are non-public to protect both the investigation and the companies involved. If the FTC believes that a person or company has violated the law, the agency may attempt to obtain voluntary

compliance by entering into a consent order with the company. A company that signs a consent order need not admit that it violated the law, but it must agree to stop the disputed practices outlined in an accompanying complaint. If a consent agreement cannot be reached, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge: Evidence is submitted, [TESTIMONY](#) is heard, and witnesses are examined and cross-examined. If a law violation is found, a [CEASE AND DESIST ORDER](#) may be issued. Initial decisions by administrative law judges may be appealed to the full Commission. Final decisions issued by the Commission may be appealed to the U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court. In some circumstances, the FTC can go directly to court to obtain an injunction, civil penalties or consumer [REDRESS](#). The injunction preserves the market's competitive status quo. The FTC seeks federal court injunctions in consumer protection matters typically in cases of ongoing consumer fraud.

Additional Resources

Advertising: Principles and Practice. Wells, William, Prentice Hall, 1999.

Copywriting for the Electronic Media: A Practical Guide. Meeske, Milan, Wadsworth Publishing Company, 1999.

Trust Us, We're Experts: How Industry Manipulates Science and Gambles with Your Future. Rampton, Sheldon and John Stauber, Putnam, 2000.

Organizations

Council of Better Business Bureaus (CBBB)

4200 Wilson Blvd., Suite 800
Arlington, VA 22203-1838 USA
Phone: (703) 276-0100
Fax: (703) 525-8277
URL: <http://www.bbb.org>

Direct Marketing Association

P.O. Box 9014
Farmingdale, NY 11735 USA
URL: www.the-dma.org

Federal Communications Commission

445 12th Street SW
Washington, DC 20554 USA
Phone: (888) CALL-FCC
Fax: (202) 418-0232
URL: <http://www.fcc.gov>

Federal Trade Commission

600 Pennsylvania Avenue, NW

Encyclopedia of Everyday Law: Mail-Order Purchases/Telemarketing

Washington, DC 20580 USA

Phone: (877) FTC-HELP

URL: <http://www.ftc.gov>

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