

FTC Recommends that Congress Make Significant Amendments to Right to Know Act

On September 11, 2008, the Federal Trade Commission ("FTC" or "Commission") provided testimony before the United States House of Representatives' Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection regarding H.R. 1776, legislation entitled the "Call Center Consumer's Right to Know Act" ("the Act").

The Act, if adopted, would require call center employees to disclose the physical location of the call center at the beginning of each telephone call to consumers.

SCOPE OF THE ACT

The Act covers any U.S. corporation, or its subsidiaries, that utilizes a call center to initiate calls to, or receive calls from, individuals located in the United States. "Call center" is defined as a location that provides customer-based service and sales assistance or technical assistance and expertise to individuals located in the United States via telephone, the Internet, or other telecommunications and information technology.

Entities covered by the Act shall require each employee in the call center to disclose his or her physical location at the beginning of each telephone call either initiated or received.

ADDITIONAL PROVISIONS AND PENALTIES

Corporations must annually certify to the FTC whether or not the corporation and its employees have complied with the Act. A corporation in

violation of the Act shall be subject to civil penalties prescribed by the FTC.

STATUS OF THE ACT

The Act was introduced in the House of Representatives on March 29, 2007. The House immediately transferred the Act to the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection. The subcommittee held its first hearing on the proposed legislation on September 11, 2008.

TESTIMONY PRESENTED BY THE FEDERAL TRADE COMMISSION

Lois Greisman, Associate Director of the Division of Marketing Practices, Bureau of Consumer Protection, testified on behalf of the FTC. The Commission's testimony raised four concerns with the Act:

- The Act is too broad as it covers all business entities that have telephone contact with consumers.
- The definition of "call center" is vague as to inclusion of the term "Internet."
- The annual certification requirements may be too costly a burden on the agency.
- The FTC may not be the proper agency to administer and enforce this Act.

The Act is too broad.

The Commission explained that the Act is designed to ensure consumers know when they are speaking with an overseas call center. However, the Act's disclosure obligation applies to all entities that have telephone contact with consumers, including "local

pizza parlors, flower shops, or even doctors' offices." Instead of imposing unnecessary compliance burdens upon domestic entities, the Commission recommended that the Act tailor the disclosure requirement more precisely to call centers operating outside the United States.

The definition of "call center" is vague as to inclusion of the term "Internet."

The Commission found the Act's inclusion of "Internet" in its key definition of "call center" was ambiguous. The Commission found that the reference to the Internet in the definition of call center leaves uncertainty whether it intends to include all on-line transactions, including on-line service assistance. The Commission explained that this ambiguity would create problems in both enforcement and compliance. Consequently, the Commission recommended that the Act resolve this ambiguity.

The annual certification requirement may be too costly a burden on the agency.

Section 2(b) of the Act requires that corporations provide annual certification of compliance. The Commission found that this requirement represents a potentially costly burden for *any agency* tasked with enforcing this Act. In addition, the Commission noted that the Act provides no enforcement mechanism for failure to comply with the certification requirement.

The FTC may not be the proper agency to administer and enforce this Act.

The Commission suggested that another agency might be better suited to administer and enforce this Act. The Commission deemed that jurisdictional issues might significantly complicate the FTC's enforcement of the Act's requirements. Specifically, the Commission acknowledged that it has limited or no jurisdiction over many of the entities that utilize call centers overseas, which are a key concern of this bill, such as depository institutions, airlines, and insurance companies. The Commission also stated

it would encounter significant practical, legal, and logistical problems enforcing the Act against overseas call centers, and that it would not be able to reach the exempt U.S. entities that engage the third-party overseas call centers.

The Commission also noted that its experience does not include the kinds of labor and foreign trade issues that are at the heart of this legislation. The Commission recommended that the Committee consider assigning the enforcement of the Act to an agency that would not be encumbered by similar jurisdictional challenges.

Additional Testimony by the Commission.

The Commission also discussed the agency's law enforcement experience with call centers, based primarily on its enforcement of the Telemarketing Sales Rule ("TSR") and the privacy protections provided by the National Do Not Call ("DNC") Registry. The testimony also provided a history of the Commission's telemarketing fraud law enforcement program, dating back to 1991, and of the agency's enforcement of the DNC Registry put into place in 2003 to strengthen consumers' privacy protections.

As an example of the agency's telemarketing fraud enforcement program, the testimony described "Operation Tele-PHONEY," the largest law enforcement sweep of the telemarketing industry ever conducted by the FTC. In May 2008, the FTC and other agencies announced they had brought more than 180 civil and criminal law enforcement actions targeting illegal telemarketing due to the sweep and interagency cooperation. The testimony also described how the FTC refers cases for criminal prosecution and how it pursues third parties that facilitate telemarketing fraud.

CONCLUSION

Businesses that utilize call centers will benefit from paying close attention to this legislation as it develops. This Act may lead to substantial changes in both call center procedures and compliance auditing.

Kelley Drye's Advertising Law Practice Group has significant experience with laws that govern call centers. We frequently perform customer service and call center operation compliance audits and assist companies to identify and implement best practices. Together with our Government Relations and Public Policy Practice Group, we help clients stay abreast of pending bills and help shape those bills in a manner that is more beneficial to our clients.

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