

# LAW MEMO

## Communicate, Don't Inundate

You sit down to dinner and the phone rings. It's another pesky telemarketer trying to sell you light bulbs, insurance, a new roof, long distance service, or a vacation home. Or the call might be a charitable solicitation or a pitch for season tickets.

Telemarketing is a highly effective sales tool and, because it brings such good results, consumers are inundated with calls...and have eaten way too many cold dinners. Some say telemarketing invades their privacy. Others, especially the elderly, worry about fraud.

According to the National Consumers League, American consumers lose an estimated \$40 billion annually through telemarketing fraud. A Lou Harris survey conducted for the league found that 92 percent of adults reported receiving

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fraudulent telephone offers. And the FBI estimates that there are 14,000 illegal telephone sales operations scamming consumers in the United States every day.

While many legitimate companies, including nonprofit arts organizations, use the telephone to sell goods and services, complaints about the invasive practice abound.

In response, the Direct Marketing Association ([www.the-dma.org](http://www.the-dma.org)), an industry group, publishes lists of consumers who do not wish to receive solicitation calls. It admits that registration reduces the number of unsolicited calls placed to residences but does not stop all unwanted calls.

State and federal government also has

taken action to protect consumers from abuse and deception. This issue of *Arts Law Memo* describes Missouri's new No Call law. It also summarizes two federal regulations, the Telephone Consumer Protection Act and the Telemarketing Sales Rule. Finally, it provides guidance on developing e-mail marketing lists.

### DO NOT DISTURB

Enacted during the last legislative session, the No Call law (Senate Bill No. 763) prevents some telemarketers from calling Missourians who sign up to be on a list that is maintained by the Attorney General. Consumers can register their home phone numbers by calling a toll-free phone number (1-866/662-2551) or by filing electronically on the Internet ([www.ago.state.mo.us/nocall](http://www.ago.state.mo.us/nocall)). There is no charge to register.

The Attorney General started compiling the database in late December. More than 100,000 consumers signed up during the first week.

To comply with the new law, telemarketers must purchase a copy of the No Call list, which will be published in an electronic format. The first list will be available on June 1. The Attorney General's office will provide updated versions every three months.

Telemarketers must submit a request for the list and a \$25 payment for each quarter. The application is available in both PDF and html versions on the Attorney General's website.

Under a confidentiality agreement that must be filed as part of the application, telemarketers must agree that the information will be used only to comply with the law and will not be shared. In addition to limiting calls, the new law requires telemarketers to clearly identify themselves and to spell out the terms of their offers.

The telemarketers covered by the law must stop calling those on the list by July 1 or they will face civil penalties of up to \$5,000 for each knowing violation.

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



This issue was written by Sue Greenberg, VLAA's executive director. Special thanks to Jerry Cerasale at the Direct Marketing Association, and Philippa Gamse, Cyberspeaker.

*This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.*

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### ACROSS STATE LINES

The No Call law applies to businesses outside of Missouri that place calls to residences in this state. Arts organizations that make calls to neighboring states should be aware that Kansas and Illinois have passed their own telephone marketing laws and that further legislation is pending.

### EXEMPTIONS

Critics, such as AARP, complain that too many powerful industries are exempt from the new law. They include telephone and insurance companies.

There also is an exemption that allows telemarketers to call potential customers if a face-to-face meeting is required to close the deal. That loophole exempts home improvement contractors and vacation home salesmen. Another important exemption covers companies with which the consumer already has a business relationship.

### NONPROFITS

Under Section 407.1095(3) of the new law, which defines telephone solicitation as "any voice communication over the telephone line

from a live operator, through use of automatic dialing and announcing equipment or by any other means for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services," there is a limited exemption for tax-exempt organizations.

Not covered by the law are communications made "by or on behalf of an entity pursuant to Chapter 501(c) (3) of the United States Internal Revenue Code, while such entity is engaged in fund raising to support the charitable purpose for which the entity was established (*italics added*) *provided that a bona fide member of such exempt organization makes the voice communication.*"

Rules drafted to help implement the No Call law define bona fide member in accordance with Missouri's nonprofit statute. In this arena, members are those who vote for the board of directors; they are not volunteers or "friends" of the organization who purchase annual memberships or make donations.

Few Missouri nonprofit arts

organizations are membership based. Typically, the board of directors simply perpetuates itself.

In an effort to close the No Call statute's various loopholes, Attorney General Jay Nixon predicts that it will be revisited this year. If state officials hear from enough nonprofits, the "bona fide member" requirement could be changed.

### COMPLIANCE & GOODWILL

Your organization's reputation and stature in the community are its most valuable assets. So full compliance with the telemarketing laws will foster goodwill. In other words, if an individual asks not to be called, the ethical practice would be not to call that individual.

### A CALLING TIP

The effectiveness of telemarketing campaigns is related to the demeanor and knowledge of the caller, whether in-house or professional. One recommended practice is to begin the call by asking the prospective patron if it is a convenient time to talk.

## Two Federal Rules Govern Telemarketing

There are two somewhat overlapping federal laws that regulate telemarketing to residences. They are the Telephone Consumer Protection Act of 1991, which is regulated by the Federal Communications Commission (FCC), and the 1994 Telemarketing and Consumer Fraud Abuse Prevention Act, which is regulated by the Federal Trade Commission. The regulations implementing the latter are known as the Telemarketing Sales Rule.

The **Telephone Consumer Protection Act (TCPA)** focuses on the use of telephone lines. It requires telemarketers to take consumers off their lists on request. It also requires them to maintain a written policy for maintaining do not call lists.

Calls by or on behalf of tax-exempt organizations are not required to comply with the do not call list requirements. Also exempted are calls with whom the caller has an established business relationship.

In addition, the TCPA restricts the use of FAX machines and puts some limits on recorded messages and automatic dialing devices.

The **Telemarketing Sales Rule** is designed to minimize scams. It governs businesses that use either

inbound or outbound interstate telephone calls to sell goods or services.

Like the TCPA, it requires telemarketers to honor a consumer's requests not to be called again.

Charitable organizations are exempt from Telemarketing Sales Rule when they are soliciting charitable donations. But the rules do apply to commercial transactions (such as selling subscriptions). In most cases, they also apply to for-profit telemarketing companies making calls on behalf of nonprofit organizations.

Under the Telemarketing Sales Rule, telemarketers are required to make clear and conspicuous oral disclosures including: the seller's identity; that the purpose of the call is to sell; the nature of the goods and services offered; and that no payment or purchase is necessary to win if a prize promotion is offered. For transactions, the cost of the goods or services offered and any policy of not making refunds or exchanges also must be disclosed.

Both laws restrict calling hours. With some exceptions, telemarketers can only make calls to residences between 8:00 a.m. and 9:00 p.m.

## E-mail marketing: is it outreach or is it spam?

A little publicized provision of the new No Call law addresses commercial e-mail communication. It prohibits a person or entity conducting business in Missouri from sending or causing commercial e-mail to be sent without including a toll-free telephone number or valid return e-mail address that the recipient may use to notify the sender not to send further e-mail advertising.

The junk e-mail problem touches on several ethical concerns. They include the protection of commercial speech under the First Amendment, the practicality of regulating the free flow of information on the Internet and privacy rights.

### THE BENEFITS OF E-MAIL

E-mail is an increasingly powerful medium for exchanging information and is probably the primary explanation for the Internet's success. Numerous surveys have documented the exponential growth in the number of e-mail users and the importance that it plays in their lives, both at work and at home.

For nonprofit arts organizations, e-mail can complement traditional direct mail, telemarketing and advertising. And it offers unparalleled, low-cost opportunities for building relationships with current and potential audiences, volunteers and donors.

### SPAM IS AN INTRUSION

While sending unsolicited commercial e-mail is easy and relatively inexpensive, loss of goodwill and legal uncertainty are not worth any cost. Simply stated, don't be a spammer.

According to Internet folklore, the term spam was derived from a Monty Python sketch set in a cafe where the menu consists almost exclusively of Spam, the canned luncheon meat. On the Internet, spam is regarded as an electronic nuisance. Most Internet Services Providers (ISP) have a policy that forbids spam.

Of course, not all bulk e-mail is spam. If the information is requested or your organization has an existing relationship with the recipient, the message is probably not a breach of "netiquette."

### CREATING AN ELECTRONIC MAILING LIST

There are many ways to compile an e-mail database. The recommended method is known as opt-in. It makes use of printed or on-line registration forms. Taking this

affirmative action constitutes consent, which is the foundation of permission marketing.

The other, somewhat controversial method is known as opt-out. It gives the recipient the option of discontinuing further communication by checking a box or sending an e-mail message.

### PRIVACY POLICIES: THE BASICS

Posting a privacy policy is considered a critical step in building trust with audiences and donors. It assures them that their private information will be respected.

Generally, policies state that the organization is committed to maintaining the individual's privacy and will safeguard all personal information. Policies explain how the collected information will be used and promise that the organization will not sell or disclose the information to outside parties without consent.

The On-line Privacy Alliance ([www.privacyalliance.org](http://www.privacyalliance.org)), an international coalition of companies and associations, recommends that policies contain at least these specific elements:

- *Notice and Disclosure.* The policy should be easy to find, read and understand. It should include the organization's contact information (a phone number and e-mail address).

- *Choice/Consent.* Individuals should be given a choice regarding how their identifiable information is used when the use is unrelated to the purpose for which it was initially collected.

- *Data Security.* Organizations that create, maintain, use or disseminate individually identifiable information should take appropriate steps to assure its reliability. They also should take reasonable precautions to protect the information from loss, misuse and alteration. These precautions should be explained in the policy.

- *Data Quality and Access.* Organizations should take steps to assure that the collected information, especially account information, is accurate and complete. Individuals should be given assurance that mistakes will be corrected promptly.

There are many excellent examples of policies (e.g., Metropolitan Museum of Art, [www.metmuseum.org](http://www.metmuseum.org)) that can be tailored to meet your organization's needs.

### Online Privacy Law Anticipated

The new Congress is expected to pass a law providing basic protections for consumer online privacy. According to a recent article by Carolyn Duffy Marsan, which was posted on [infoworld.com](http://infoworld.com), the legislation will address four principles:

- *Notice.* Web site operators will be required to explicitly notify customers about personal information being gathered and how the information is used.
- *Choice.* Consumers will be able to opt-out of information collection.
- *Access.* Consumers will be able to see in information gathered about them and correct errors.
- *Integrity.* Web site operators will be required to ensure that consumer information is protected from unauthorized use.

Currently, approximately 97 percent of U.S. sites collect personal information, but only 20 percent provide notice, choice, access and integrity.

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## Resources

### MEASURING WEB SITE TRAFFIC

Some organizations use sophisticated logs to provide insights into the use of their Web sites and help improve the site's design and content. The logs give an aggregate breakdown of the numbers of visitors, whether the visitor arrived from an external link, search engine or bookmark, how long the visitor stayed and more. One provider of this analysis is Hitbox. The service is free if the subscriber places the company's banner or button on its site. Alternatively, for those who don't want to host the advertisement, it is available for a small monthly fee. For more information, visit HitBox ([get.hitbox.com](http://get.hitbox.com)).

### BOOKS & PERIODICALS

Fisher, Michael A. "The Right to Spam? Regulating Electronic E-Mail." *Columbia-VLA Journal of Law & the Arts*, Spring 2000. This scholarly article addresses restrictions on commercial speech under the First Amendment, the history of the regulation of unsolicited advertising and the various measures being used to minimize spam.

Grobman, Gary. *The Nonprofit Organization's Guide to E-Commerce*. This is a practical guide designed to help nonprofits maximize results on the Internet. It tells how to add an e-commerce component to your site and discusses legal issues, fund raising and Web site publicity. The book sells for \$19.95, plus \$3.50 for shipping and handling. Credit card orders: 717/238-3787.

Kinnard, Shannon. *Marketing with E-Mail*. This book provides a step-by-step guide through the process of creating and implementing an e-mail marketing plan that will meet your organization's specific needs.

### VLAA LIBRARY

Many books on arts law and business practices are available at the St. Louis Volunteer Lawyers and Accountants for the Arts library located within the Regional Arts Commission office, 3540 Washington, in Grand Center.