

Don't Forget the Legal Stuff!

By JOSEPH SANSIRAINE

Perhaps no industry has been more regulated over the past five years than teleservices. Let's face it, the launch of the national Do Not Call registry, along with new rules governing predictive dialer use and caller ID, has forever changed teleservices as we know it. Perhaps the most amazing story, however, is not the rules themselves, but the remarkable resiliency shown by the industry in responding to them. The fact is, despite the new rules, the telephone has retained its position as a potent ingredient in the direct marketing mix.

One example of this remarkable resiliency is the growing practice of using overseas call centers for both inbound and outbound calling services. As overseas outsourcing has increased, most of the practical considerations involving it have been resolved. However, from a legal perspective, there are two key issues facing companies who choose to outsource overseas: proposed legislation impacting such outsourcing and contractual considerations regarding the overseas relationship.

The Legislative Horizon

The outsourcing of jobs from the United States has resulted in a surprising legislative backlash the same politicians who supported ever more stringent teleservices regulations with little to no regard for loss of jobs now appear to be doing everything they can to stop exporting teleservices jobs to other countries.

Twenty-seven bills in 19 states were introduced in 2004 seeking the addition of "location disclosures" and financial data privacy protection in the context of offshore call centers. Two similar bills were introduced at the federal level. Typically, these bills required a call center represen-

tative to disclose where he/she is physically located, and also required specific permission from a consumer before that consumer's private financial information was shared with an overseas entity.

Legislative activity on these issues has remained high in 2005, and the latest trend is adding in additional requirements beyond simple "location disclosures." For example, Florida Senate Bill 614 requires a call center sales representative to provide location disclosures and, in addition, calls to (or from) foreign countries must be re-routed to a domestic agent at the request of the consumer. Similarly, Minnesota House Bill 471 and West Virginia House Bill 2207 require a call center sales representative to provide location disclosures, but also give the calling (or called) consumer the right to speak to a "qualified employee" of the "company or government agency with whom the person is doing business" (i.e., the entity that hired the call center). All three bills would make it comparatively much more expensive for overseas call centers to operate.

Such legislation, however, faces a major hurdle—potential conflicts with international trade treaties entered into by the United States. Treaties to which the United States is a party are equivalent in status to federal legislation, forming part of what the Constitution calls "the supreme Law of the Land." In other words, the attempts of states to enter this arena, in the form of "anti-outsourcing" legislation, may ultimately prove futile.

Contractual Issues

The recently proposed legislation aimed at outsourcing overseas, however, seems to have had little to no effect on the prac-

tice. The focus of many companies in the U.S. is not on the "whether" but the "how" of outsourcing, and the most important element of the "how" is the contractual relationship between the parties. Although the elements of the contract will vary from company to company, certain provisions are especially important in the offshore context, including:

- transition of operations;
- responsibilities for compliance with U.S. telemarketing regulations, and indemnification provisions should compliance not be met;
- internal procedures and division of responsibilities for data collection and dissemination for compliance purposes;
- deployment of technologies for maintaining compliance (e.g., "failsafe" Do Not Call Compliance mechanisms);
- results, quality and performance benchmarks;
- training of representatives;
- procedures for auditing and inspecting the offshore operation;
- procedures, benchmarks and responsibilities for data privacy;
- procedures for reporting and generation of data in case of an investigation;
- procedures for contract cancellation and quick transfer of operations back to the United States;
- business continuity plan in case of disruption or disaster; and finally,
- dispute resolution. (It may not be a good idea to rely upon the court system of the offshore country.)

On the compliance front, offshore companies must understand that any calls into or from the United States are governed by a significant number of state and federal regulations, and these rules apply to the offshore company as well as the company on whose behalf the calls are being made. The willingness and ability of the offshore company to adequately address these regulatory and other contractual concerns will of course play a key role in whether to move forward with the offshore program. CP