



## TCPA Counseling & Litigation / Education ADVISORY ■

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### Lead Generator and Its Executives and Owners Found Liable for Violating Telemarketing Sales Rule

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On September 1, 2023, a federal court in the Northern District of Illinois ruled that Day Pacer; its predecessor, EduTrek; and three individuals—its former president, a managing member, and a partial owner and manager—violated the Telemarketing Sales Rule (TSR) by placing millions of calls to telephone numbers on the National Do Not Call (DNC) Registry and by providing substantial assistance to a partner while knowing that the partner was calling telephone numbers on the DNC registry. In its opinion in *Federal Trade Commission v. Day Pacer LLC, et al.*, the court said the defendants violated the TSR over 4 million times.

The Federal Trade Commission (FTC), which brought the lawsuit, is now entitled to substantial relief and penalties from the defendants. The FTC asked the court to issue an injunction and impose a penalty of \$28 million, which was Day Pacer's and EduTrek's gross revenue during the years they violated the TSR—from 2014 through 2019. Notably, the maximum statutory penalty for the 4 million TSR violations would be more than \$100 billion.

The TSR was implemented to prohibit deceptive or abusive telemarketing acts or practices. It is a violation of the TSR to initiate outbound telephone calls to telephone numbers that are on the DNC without the express consent of the consumer or an established business relationship with the consumer. It is also a violation of the TSR to provide substantial assistance or support to any telemarketer when that person knows or consciously avoids knowing that the telemarketer is violating the TSR. During the relevant time in the *Day Pacer* case, the maximum statutory recovery for each violation was between \$16,000 and \$42,530, depending on when the violation occurred. The obligations set forth in the TSR are in addition to those required by the Telephone Consumer Protection Act.

Day Pacer, which formerly did business as EduTrek, sold consumer leads to educational partners. The defendants purchased consumer data from websites where people entered their contact information, including their telephone numbers. Many of these websites contained job postings and were advertised as job search sites. The defendants gave the phone numbers to dialer companies and paid the companies to dial the phone numbers. If someone answered the call, the dialer company would transfer the call to Day Pacer's call center, which was staffed with college search advisers. If a consumer expressed interest in educational opportunities, Day Pacer sold that contact information to one or more educational institutions. Day Pacer also contracted with other telemarketing companies, many of which were outside the United States, such as in India and the Philippines, to place outbound telephone calls to

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consumers, determine potential eligibility for enrollment in post-secondary education, and transfer the calls to Day Pacer for further telemarketing.

Between March 2014 and June 2019, the defendants made at least 3,669,914 calls to phone numbers on the DNC registry. The defendants did not subscribe to the DNC registry and did not scrub their calling lists against the DNC numbers. The defendants admitted that they instructed their college search advisers to overcome the objections of consumers who told the college search advisers that they were not interested in speaking about educational opportunities or were displeased about being called.

Between March 2014 and June 2019, Day Pacer's partners transferred to the defendants 498,597 calls that were the products of outbound telephone calls to telephone numbers on the DNC registry. These partners also made an additional 39 million calls to telephone numbers on the DNC registry, which did not result in transfers to the defendants. The defendants assumed that their partners did not scrub the numbers against the DNC registry.

The defendants received complaints from consumers and from website operators from whom they purchased phone numbers that they were initiating calls to phone numbers on the DNC registry. The defendants also received complaints from schools that they were initiating calls to consumers without collecting the proper express written authorization to be contacted. At least one major lead purchaser refused to work with Day Pacer because it was concerned that Day Pacer's consumer data sources did not properly collect the consumers' consent to be contacted. The defendants also received complaints and were threatened with lawsuits from consumers on the DNC registry who were called by Day Pacer's partners. None of these complaints caused the defendants to stop dialing numbers on the DNC registry.

The FTC claimed the defendants violated the TSR by initiating millions of calls to numbers on the DNC registry and by assisting its partners' violations. The defendants did not dispute that these calls occurred and that they did not try to comply with the TSR. Instead, they claimed they did not violate the TSR because (1) the TSR is unconstitutional; (2) they did not offer to sell the called parties any goods or services; and (3) the called parties consented to have their data sent to educational institutions. The court rejected all three arguments.

First, the court ruled the FTC did have the authority to bring an enforcement action under the TSR and that its lawsuit was not barred by the applicable statute of limitations. The court also concluded that the TSR did not violate any First Amendment rights as argued by the defendants.

Second, the defendants argued their calls did not include sales pitches and were only informational. The court, however, found the calls were telemarketing calls, in part, because the defendants admitted their business model was designed to generate consumer leads to be sold to educational institutions. The court also rejected the defendants' arguments that they did not engage in telemarketing because they did not use telephones but rather Voice over Internet Protocols. The defendants also claimed that while they knew they had to comply with the TCPA, they did not know they had to comply with the TSR. This argument was also rejected by the court.

Third, the court rejected the defendants' arguments that they only called consumers who had provided their consents to be called because the defendants were unable to provide evidence of the requisite consents. Addressing some of the evidence, the court noted the consumers had entered their contact information on websites for jobs, not education. The fact that consumers consented to have their calls transferred from the dialing vendors also failed to establish consent because "by that point, the train had left the station." The court found that the defendants violated the TSR by making calls to customers on the DNC registry without valid consent.

The court also ruled that the defendants violated the TSR by assisting and facilitating its partners to make telephone calls to consumers who were on the DNC registry. It noted the defendants paid their partners to make calls and transfer leads to them. Further, the defendants continued to work with their partners after receiving complaints from schools, consumers, and compliance companies and that at least one of its partners was calling consumers on the DNC registry without consent.

Finally, the court found that each of the three individuals was liable for the TSR violations. One was the president of Day Pacer; one was the managing member of both EduTrek and Day Pacer; and one was the corporate manager of EduTrek and Day Pacer.

The only remaining question for the court to decide is what relief the court should award the FTC. The court indicated that it was inclined to grant an injunction and impose civil penalties of \$28 million but wanted further information before awarding that relief.

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