

Report for Congress

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Regulation of the Telemarketing Industry: State and National Do Not Call Registries

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Summary

Under current federal law, companies that engage in telephone solicitation or telemarketing must maintain a list of consumers who ask not to be called. While there are regulations concerning how such lists are to be maintained and for how long, no federal agency currently oversees the maintenance of the company-specific do not call lists. However, pending congressional approval of funding, the Federal Trade Commission may soon begin registering consumers for inclusion on the Commission's nationwide do not call registry. In addition to the federal regulations, more than twenty states have laws that create state-wide do not call registries that are periodically updated and must be utilized by telemarketers doing business in the state.

This report will discuss current federal regulation of the telephone solicitation industry as well as state laws creating do not call registries.¹ Recent federal legislation, including H.R. 395 (reported January 29, 2003), as well as recent activities by the Federal Trade Commission and the Federal Communications Commission, will also be discussed. This report will be updated as events warrant.

¹ For additional information on federal telemarketing laws and what consumers can do to prevent unwanted telemarketing calls, see CRS Report RL30763, *Telemarketing: Dealing With Unwanted Telemarketing Calls*, by James R. Riehl.

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Regulation of the Telemarketing Industry: State and National Do Not Call Registries

Current Federal Law

Both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) have promulgated rules that require persons or businesses that engage in telephone solicitations to maintain do not call lists.² The current rules do not require the establishment or maintenance of a central nation-wide do not call list.³

Telephone Consumer Protection Act of 1991. The Telephone Consumer Protection Act of 1991 directed the Federal Communications Commission to initiate a rulemaking proceeding “concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”⁴ The Commission was to develop regulations to implement “the methods and procedures that the Commission determines are most effective and efficient” to accomplish the purposes of the Act.

Under the Act, the FCC could have established a “single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”⁵ However, the FCC chose to require businesses and persons engaged in the telephone solicitation industry to maintain individual do not call lists, rather than establishing a single national list.

The FCC’s current rules require persons who initiate any telephone solicitation to a residential telephone number to institute procedures for “maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity.”⁶ The rules also establish minimum standards for maintenance of such lists, including the establishment of a written policy which is to be available

² The Federal Trade Commission and the Federal Communications Commission have jurisdiction over different types of entities. For example, the Federal Trade Commission’s regulations do not apply to common carriers, while the Federal Communications Commission would have jurisdiction over common carriers such as telephone companies. *See* 15 U.S.C. 45(a)(2); 47 U.S.C. 151 *et seq.*

³ *See infra* regarding recent regulatory actions by the Federal Trade Commission and a notice of proposed rulemaking from the Federal Communications Commission regarding nationwide do not call registries.

⁴ 47 U.S.C. 227(c)(1).

⁵ 47 U.S.C. 227(c)(3).

⁶ 47 CFR 64.1200(e)(2).

on demand, the training of personnel engaged in telephone solicitation, the recording of do not call requests, and disclosure of the identity of the telephone solicitor.⁷ Do not call requests must be honored for 10 years from the time the request is made.⁸

Calls made to a person with whom the caller has an established business relationship, as well as calls made by or on behalf of a tax-exempt non-profit organization, are exempt from the rules.⁹ In addition to enforcement by the FCC, actions for violations of the Act and subsequent rules may be brought by state attorneys general.¹⁰

Telemarketing and Consumer Fraud and Abuse Prevention Act. The Telemarketing and Consumer Fraud and Abuse Prevention Act directed the Federal Trade Commission to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”¹¹ The FTC was instructed to include in the rules “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.”¹²

Telemarketing Sales Rule. In response to this directive, the FTC promulgated the Telemarketing Sales Rule.¹³ Under the Telemarketing Sales Rule, it is an abusive telemarketing act or practice for a seller to cause a telemarketer to initiate “an outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services or being offered.”¹⁴

The rule includes a safe harbor from liability whereby sellers or telemarketers will not be held liable for violations that result from error if they have complied with certain requirements set forth in the rule. They may take advantage of the safe harbor by establishing procedures, training personnel in those procedures, and maintaining a list of persons who have asked not to be called.¹⁵

Certain acts and practices are exempt from the rule, including calls between a telemarketer and any business, unless the calls involve the retail sale of nondurable

⁷ *Id.*

⁸ *Id.*

⁹ 47 CFR 64.1200(f)(3).

¹⁰ 47 U.S.C. 227(f).

¹¹ 15 U.S.C. 6102(a)(1).

¹² 15 U.S.C. 6102(a)(3)(A).

¹³ 16 CFR Part 310.

¹⁴ 16 CFR 310.4(b)(1)(ii). For information on recent amendments to the TSR, see *infra* regarding recent regulatory actions by the Federal Trade Commission.

¹⁵ 16 CFR 310.4(b)(2).

office or cleaning supplies.¹⁶ The FTC is primarily responsible for enforcing the rule, though actions may also be brought by state attorneys general and private individuals.¹⁷

States Laws Establishing Do Not Call Registries

More than twenty states have enacted or considered laws to establish state-wide do not call registries.¹⁸ The state registries are similar to the lists that telemarketers are required to maintain under current federal laws, but they are generally maintained by a division of the state government, rather than by the telephone solicitation companies themselves. Two states - Maine and Wyoming - do not maintain lists, rather telephone solicitors are required by state law to use the list maintained by the Direct Marketing Association.¹⁹

Funding for the establishment and maintenance of the lists varies from state to state, with some states requiring consumers to pay a nominal fee to have their telephone number added to the do not call registry. The required fees vary by state. For example, in California the fee cannot exceed one dollar every three years, while in Louisiana the fee is five dollars per year. Most states also require the telemarketers to purchase the do not call list and require payment for periodic updates of the list. Generally, the laws do not allow states to charge more than is required to establish and maintain the list. Fees may be assessed on a sliding scale based upon the size of the telephone solicitation company.

Violations of the do not call laws generally lead to administrative penalties, though in some states consumers may bring private rights of action to recover damages.

¹⁶ 16 CFR 310.6(g).

¹⁷ 15 U.S.C. 6103 and 6104.

¹⁸ The states that have enacted laws establishing do not call registries include: Alabama, Code of Ala. § 8-19C-2; Alaska, Alaska Stat. § 45.50.475; Arkansas, A.C.A. § 4-99-404; California, Cal. Bus. & Prof. Code § 17590; Colorado, 2001 Colo. HB 1405, to be codified at Col. Rev. Stat. § 6-1-901; Connecticut, Conn. Gen. Stat. Ann. § 42-288a; Florida, Fla. Stat. § 501.059; Georgia, O.C.G.A. § 46-5-27; Idaho, Idaho Code § 48-1003A; Indiana, Ind. Code Ann. § 24.4.7; Kentucky, K.R.S. § 367.46955; Louisiana, 2001 La. HB 175, to be codified at La. Rev. Stat. 45:844.11; Maine, 32 M.R.S. § 4690-A; Missouri, § 407.1101 R.S.Mo.; New York, NY CLS Gen Bus § 399-z; Oregon, ORS § 464.567; Pennsylvania, H.B. 1469, Session of 2001; Tennessee, Tenn. Code Ann. § 65-4-405; Texas, Tex. Bus. & Com. Code Ann. § 43.001; Wisconsin, Wis. Stat. § 100.52; and Wyoming, Wyo. Stat. § 40-12-302.

¹⁹ The Direct Marketing Association (DMA) is a trade association for telemarketers, telephone solicitation companies, and direct mail companies. The DMA maintains a list of persons who do not wish to receive direct mail advertising or telemarketing calls. Consumers must contact the DMA to be placed on either list. For more information see [<http://www.the-dma.org>].

Recent Federal Legislation

107th Congress

During the 107th Congress, several bills related to telemarketing were introduced. Those bills specifically addressing the establishment of a nationwide do not call registry are discussed below. None of the following bills were enacted, though the USA Patriot Act did include provisions related to telemarketing on behalf of charitable organizations.²⁰

Telemarketing Intrusive Practices Act of 2001. S. 1881, the Telemarketing Intrusive Practices Act of 2001, would have required the Federal Trade Commission (FTC) to “establish and maintain a list for each State, of consumers who request not to receive telephone sales calls; and provide notice to consumers of the establishment of the lists.”²¹ Under the legislation, the FTC would have been able contract with a state to establish and maintain the lists or may contract with a private vendor to establish and maintain the lists, if such vendor meets certain qualifications.²² Consumers would have notified the Commission of their desire to be included on the list for their state.²³ The Commission would have been required to update the lists it maintains “not less than quarterly” and would have been required to request state maintained lists annually to “ensure that the lists maintained by the Commission contain the same information contained in the no call lists maintained by individual states.”²⁴

In addition to the lists to be maintained by the FTC, telephone solicitors would have been required to maintain a list of consumers who request not to receive calls from that particular solicitor.²⁵ Telephone solicitors would have also been required to place requesting consumers on their lists and “provide the consumer with a confirmation number which shall provide confirmation of the request of the consumer to be placed on the no call list of that telephone solicitor.”²⁶

The Federal Trade Commission would have been required to make its lists available to telephone solicitors, and the solicitors would have been prohibited from making calls to consumers who are on either the Commission’s list or on the list

²⁰ See Pub. L. 107-56, § 1011.

²¹ S. 1881, 107th Cong., § 3(a) (2001). The bill would also require telephone solicitors to maintain their own lists of consumers who request not to receive calls from that particular solicitor. The solicitors would be required to provide consumers with confirmation of their request to be placed on the list. S. 1881, § 4.

²² S. 1881, 107th Cong., § 3(b) and (c) (2001).

²³ S. 1881, 107th Cong., § 3(d)(1) (2001).

²⁴ S. 1881, 107th Cong., § 3(e) (2001).

²⁵ S. 1881, 107th Cong., § 4(a) (2001).

²⁶ S. 1881, 107th Cong., § 4(b) (2001).

maintained by the solicitor.²⁷ Violations would have been pursued by the Federal Trade Commission as an unfair or deceptive trade practice under section 5 of the Federal Trade Commission Act.²⁸ Consumers would have also been allowed to bring private rights of action for violations of the do not call provisions and other prohibitions set forth in the legislation, as well as violations of the Federal Trade Commission Act.²⁹ In a private right of action, a consumer would have been able to enjoin the violation; or recover actual monetary loss resulting from the violations, or \$500 in damages for each violation, whichever is greater.³⁰ Damages could have been tripled where the court found that the defendant solicitor “willfully or knowingly” violated the provisions set forth in the legislation.³¹

Telemarketing Victims Protection Act. H.R. 232, the Telemarketing Victims Protection Act, would have directed the Federal Trade Commission to promulgate rules requiring telemarketers to “notify consumers who are called that they have the right to be placed on either the Direct Marketing Association’s do-not-call list or the appropriate State do-not-call list.”³² Telemarketers would have been required to notify either the Direct Marketing Association or the appropriate state of the consumer’s request. They would have also been required to obtain either the Association’s list or the state list on a regular basis.³³

Telemarketing Relief Act of 2002. H.R. 3911, the Telemarketing Relief Act of 2002, would have required the Federal Trade Commission to amend its rules under the Telemarketing and Consumer Fraud and Abuse Prevention Act to “to establish a list of telephone numbers of consumers who have notified the Commission or [other federal agency]³⁴ that they do not want to receive telephone calls for marketing

²⁷ S. 1881, 107th Cong., § 5(a)(1) and (2) (2001). The legislation would also prohibit telemarketers from initiating a telephone sales call in the form of an electronically transmitted facsimile or by use of an automated dialing or recorded message service. In addition, telemarketers would be prohibited from making calls between the hours of 9:00 p.m. and 9:00 a.m. and between 5:00 p.m. and 7:00 p.m., local time at the location of the consumer.

²⁸ S. 1881, 107th Cong., § 7(a) (2001). Section 5 of the Federal Trade Commission Act is codified at 15 U.S.C. 45.

²⁹ S. 1881, 107th Cong., § 7(b) (2001).

³⁰ S. 1881, 107th Cong., § 7(b)(1)(B) (2001).

³¹ S. 1881, 107th Cong., § 7(b)(2) (2001).

³² H.R. 232, 107th Cong., § 2 (2001).

³³ *Id.*

³⁴ Four other federal agencies would have also been required to amend their rules in a similar manner. These agencies include, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Board of Governors of the Federal Reserve System, and the Federal Communications Commission. Rules promulgated by the FCC would have applied to providers of telephone exchange services or telephone toll services. H.R. 3911, 107th Cong., § 3.

purposes.”³⁵ The rules would have prohibited the making of any telephone call for telemarketing purposes to a telephone number included on the list.³⁶ Exceptions to the rule would have applied to charitable, political opinion polling, or other nonprofit activities; calls from persons with whom the consumer has an existing relationship; debt collection activities; and business to business communications.³⁷ The FTC would have been required to specify the manner by which consumers were to notify the Commission of their desire to be placed on the do not call list, and the legislation would have required the FTC make the list available to the public.³⁸

108th Congress

Do-Not-Call Implementation Act. Following the FTC’s issuance of the final amendments to the Telemarketing Sales Rule discussed below, the Commission’s authority to promulgate regulations imposing fees on telemarketers for use of the do not call list was at issue. Representatives Tauzin and Dingell introduced H.R. 395 to authorize the Commission to promulgate regulations “establishing fees sufficient to implement and enforce the provisions relating to the ‘do-not-call’ registry of the Telemarketing Sales Rule.”³⁹ The Commission would be authorized to collect fees for fiscal years 2003 through 2007.

The bill would also require the Federal Communications Commission to issue a final rule in its current rulemaking proceeding under the Telephone Consumer Protection Act not later than 180 days after the enactment of this Act.⁴⁰ Following the promulgation of the FCC’s rules, both the FCC and the FTC would be required to issue a report to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation analyzing the telemarketing rules promulgated by each agency; noting any inconsistencies between the rules; and making proposals to remedy such inconsistencies.⁴¹ Each agency would also be required to issue annual reports regarding the effectiveness of the rules through fiscal year 2007.⁴²

H.R. 395 was considered by the House Committee on Energy and Commerce and ordered to be reported on January 29, 2003.

³⁵ H.R. 3911, 107th Cong., § 2.

³⁶ *Id.*

³⁷ H.R. 3911, 107th Cong., § 4.

³⁸ *Id.*

³⁹ H.R. 395, 108th Cong., § 2.

⁴⁰ H.R. 395, 108th Cong., § 3. *See infra* regarding the FCC’s Notice of Proposed Rulemaking initiated late last year.

⁴¹ H.R. 395, 108th Cong., § 4(a).

⁴² H.R. 395, 108th Cong., § 4(b).

Regulatory Actions Related to Telemarketing

FTC Final Amendment to Telemarketing Sales Rule. While none of the bills discussed above were enacted, the Federal Trade Commission, acting under the authority of the Telemarketing and Consumer Fraud and Abuse Protection Act, issued a final rule amending the Telemarketing Sales Rule to create a national do not call registry.⁴³ While many provisions of the new rule take effect March 31, 2003, the establishment and implementation of the do not call registry will not begin until funding is approved by Congress.⁴⁴ After funding is approved, the FTC estimates that it will take approximately four months to establish the registry, with enforcement beginning three months following implementation.

Under the new rule, it is an abusive telemarketing act or practice for a telemarketer to initiate any outbound telephone call to a person who has placed his or her name and/or telephone number on the do not call registry maintained by the Commission.⁴⁵ Telemarketers will be allowed to place calls to persons from whom they have obtained “the express agreement, in writing, of such person to place calls to that person,” and to persons with whom they have an established business relationship.⁴⁶ Consumers will not be required to pay to have their numbers placed on the registry, and a consumer’s number will remain on the registry for five years, or until the consumer asks to have his or her number removed or changes phone numbers. Telemarketers will be required to pay for access to the registry,⁴⁷ and will be required to purge their lists every three months to remove any telephone numbers that have been added to the registry.

⁴³ The FTC announced the final rule on December 18, 2002. For more information see [<http://www.ftc.gov/bcp/online/edcams/donotcall/index.html>]. In addition to the creation of a national do not call registry, the rule contains provisions related to the solicitation of charitable donations, as mandated by the USA Patriot Act; new provisions on call abandonment; provisions aimed at restricting unauthorized billing by telemarketers; and a requirement that telemarketers transmit their telephone numbers, and if possible, their name to a consumer’s caller ID service.

⁴⁴ For effective dates see 68 FR 4580 (January 29, 2003).

⁴⁵ Sec. 310.4(b)(1)(iii)(B).

⁴⁶ *Id.* Telemarketers may call persons with whom they have an established business relationship for up to 18 months after the consumer’s last purchase, delivery, or payment even if the consumer’s number is on the national do not call registry. However, if the consumer asks to be placed on the company’s do not call list, the company must honor that request even if there is an established business relationship.

⁴⁷ On May 29, 2002, the Federal Trade Commission released an additional Notice of Proposed Rulemaking (NPR) related to the establishment of a nation wide do not call registry. This NPR addressed the cost of establishing a nation wide do not call registry and proposes the assessment of user fees on telemarketers and their clients for access to the nation wide registry, should one be implemented. Under the proposal, telemarketers and their clients would be charged a rate of \$12 per year for each area code of data they use. The proposal caps the maximum annual fee at \$3,000, which would be charged for using 250 area codes of data or more. Fees for telemarketers were not addressed in the final rule released December 18, 2002, but will likely be addressed at a later date. *See* 67 FR 373 (May 29, 2002).

In addition to the national registry, the new rule requires telemarketers to continue maintaining existing company-specific do not call lists and to honor consumer requests to be placed on that list. While telemarketers calling to solicit charitable contributions will not be required to comply with provisions related to the national registry, they will be required to keep company-specific lists and honor consumer requests with regard to such lists.

Pending Legal Challenges. Legal challenges to the FTC’s final rule have been filed by the Direct Marketing Association⁴⁸ and the American Teleservices Association.⁴⁹ The suits allege that the FTC’s rule infringes on the telemarketers rights under the First Amendment and violates the Equal Protection Clause of the United States Constitution. The plaintiffs also argue that the FTC exceeded its statutory authority in promulgating regulations establishing a national do not call registry and acted in an arbitrary and capricious manner in so doing.

FCC Notice of Proposed Rulemaking. In 2002, the Federal Communications Commission issued a Notice of Proposed Rulemaking seeking comment on whether its current telemarketing regulations, including those related to company-specific do not call lists, should be revised “in order to more effectively carry out Congress’s directives in the TCPA [Telephone Consumer Protection Act]”.⁵⁰ Unlike the Federal Trade Commission, the FCC did not publish a proposed rule. The FCC is instead seeking comments on whether and how its current rules should be modified. With regard to the current do not call regulations, the FCC is seeking comment on the “overall effectiveness of the company-specific do-not-call approach in providing consumers with a reasonable means to curb unwanted telephone solicitations.”⁵¹ The Commission is also seeking comment on whether it should revisit its earlier determination not to adopt a nationwide do not call registry.⁵²

⁴⁸ The Direct Marketing Association, along with U.S. Security, Chartered Benefit Services, Global Contact Services, and Infocision Management Corporation, filed suit in the United States District Court for the Western District of Oklahoma on January 29, 2003. Case No. Civ. 03-122-W.

⁴⁹ The American Teleservices Association, along with Mainstream Marketing Services and TMG Marketing, filed suit in the United States District Court for the District of Colorado on January 29, 2003. Civil Action No. 03-N-0184.

⁵⁰ 67 FR 62667 (October 8, 2002). The NPR also seeks comment on new network technologies that may allow consumers to avoid receiving unwanted telephone solicitations; the Commission’s current regulations regarding the use of autodialers by telemarketers; identification requirements; the use of artificial or prerecorded voice messages; time of day restrictions; the current prohibition on unsolicited facsimile advertisements; and the restrictions on calls to wireless telephone numbers.

⁵¹ *Id.*

⁵² *See supra* regarding current FCC regulations.

The Commission has extended the comment period until January 31, 2003, in order to provide an opportunity for comments in light of the recent action by the Federal Trade Commission.⁵³

⁵³ 67 FR 78763 (December 26, 2002).