

Report for Congress

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

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Summary

Until recently, companies that engaged in telephone solicitation or telemarketing were required to maintain a list of consumers who ask not to be called. There were no federal regulations concerning how the company specific do not call lists were to be maintained and for how long, and no federal agency oversaw the maintenance of the company-specific do not call lists. However, regulations recently promulgated by the Federal Trade Commission create a nationwide do not call registry and require telemarketers to begin using the lists later this year. In addition to the new national list, more than twenty states have enacted laws that create state-wide do not call registries.

This report will discuss current federal regulation of the telemarketing industry, including the new regulations promulgated by the Federal Trade Commission, as well as state laws creating do not call registries.¹ Recent federal legislation, including H.R. 395 and H.R. 526, as well as recent activities by 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 regulations related to the establishment of do not call lists. The original rules required persons or businesses that engage in telephone solicitations to maintain do not call lists, but did not require the establishment or maintenance of a central nation-wide do not call registry.² The Federal Trade Commission recently promulgated new rules to establish a national registry, while the Federal Communications Commission is reviewing its current rules.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

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).

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 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 original Telemarketing Sales Rule, it was 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 Amendments recently promulgated by the Federal Trade Commission include this original prohibition, and also make it an abusive telemarketing act or practice 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.¹⁵

⁶ 47 CFR 64.1200(e)(2).

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 See prior versions of 16 CFR 310.4(b)(1)(ii).

¹⁵ 16 CFR 310.4(b)(1)(iii)(A) and (B). See *infra* regarding the implementation of the amended Telemarketing Sales Rule.

Under certain circumstances telemarketers will be allowed to call consumers who have asked to have their names included on the do not call registry. 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.¹⁶ Other exempt calls include calls in which the sale of goods or services is not completed, and many calls that are initiated by the consumer.¹⁷ Telemarketers calling to solicit charitable contributions will not be required to comply with provisions related to the national registry, but they will be required to keep company-specific lists and honor consumer requests with regard to such lists.¹⁸ The rule also 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.¹⁹

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,²⁰ and will be required to purge their lists every three months to remove any telephone numbers that have been added to the registry.

The FTC is primarily responsible for enforcing the rule, though actions may also be brought by state attorneys general and private individuals.²¹

States Laws Establishing Do Not Call Registries

More than twenty states have enacted or considered laws to establish state-wide do not call registries.²² The state registries are similar to the lists that telemarketers

¹⁶ 16 CFR 310.4(b)(1)(iii)(B)(ii).

¹⁷ 16 CFR 310.6.

¹⁸ 16 CFR 310.6(a).

¹⁹ 16 CFR 310.4(b)(3).

²⁰ On April 3, 2003, the Federal Trade Commission released a revised notice of proposed rulemaking regarding the imposition of fees on telemarketers using the national registry. See 68 FR 16238 (April 3, 2003).

²¹ 15 U.S.C. 6103 and 6104.

²² 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

(continued...)

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.²³

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.

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.²⁴

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

²² (...continued)

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.

²³ 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>].

²⁴ See P.L. 107-56, § 1011.

consumers of the establishment of the lists.”²⁵ Under the legislation, the FTC would have been able to 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.²⁶ Consumers would have notified the Commission of their desire to be included on the list for their state.²⁷ 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.”²⁸

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.²⁹ 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.”³⁰

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 maintained by the solicitor.³¹ 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.³² 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.³³ 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

²⁵ 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.

²⁶ S. 1881, 107th Cong., § 3(b) and (c) (2001).

²⁷ S. 1881, 107th Cong., § 3(d)(1) (2001).

²⁸ S. 1881, 107th Cong., § 3(e) (2001).

²⁹ S. 1881, 107th Cong., § 4(a) (2001).

³⁰ S. 1881, 107th Cong., § 4(b) (2001).

³¹ 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.

³² S. 1881, 107th Cong., § 7(a) (2001). Section 5 of the Federal Trade Commission Act is codified at 15 U.S.C. 45.

³³ S. 1881, 107th Cong., § 7(b) (2001).

\$500 in damages for each violation, whichever is greater.³⁴ Damages could have been tripled where the court found that the defendant solicitor “willfully or knowingly” violated the provisions set forth in the legislation.³⁵

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.”³⁶ 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.³⁷

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]³⁸ that they do not want to receive telephone calls for marketing purposes.”³⁹ The rules would have prohibited the making of any telephone call for telemarketing purposes to a telephone number included on the list.⁴⁰ 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.⁴¹ 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.⁴²

108th Congress

Do-Not-Call Implementation Act. Following the FTC’s issuance of the final amendments to the Telemarketing Sales Rule discussed above, the

³⁴ S. 1881, 107th Cong., § 7(b)(1)(B) (2001).

³⁵ S. 1881, 107th Cong., § 7(b)(2) (2001).

³⁶ H.R. 232, 107th Cong., § 2 (2001).

³⁷ *Id.*

³⁸ 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.

³⁹ H.R. 3911, 107th Cong., § 2.

⁴⁰ *Id.*

⁴¹ H.R. 3911, 107th Cong., § 4.

⁴² *Id.*

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."⁴³ 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.⁴⁴ 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.⁴⁵ Each agency would also be required to issue annual reports regarding the effectiveness of the rules through fiscal year 2007.⁴⁶

H.R. 395 passed the House on February 12, 2003, and the Senate on February 13, 2003. It was presented to the President on February 27, and signed on March 11.⁴⁷

Telemarketing Relief Act of 2003. H.R. 526, the Telemarketing Relief Act of 2003 would require certain federal agencies to issue rules that are substantially similar to the Telemarketing Sales Rule promulgated by the Federal Trade Commission within 90 days of the enactment of the Act.⁴⁸ The agencies required to issue such rules are the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, and the National Credit Union Administration Board.⁴⁹ The Act would also require the Federal Communications Commission to promulgate rules similar to the Telemarketing Sales Rule which would be required to apply to "telephone solicitations" as defined under section 227(a) of the Communications Act of 1934.⁵⁰

⁴³ H.R. 395, 108th Cong., § 2.

⁴⁴ H.R. 395, 108th Cong., § 3. See *infra* regarding the FCC's Notice of Proposed Rulemaking initiated late last year.

⁴⁵ H.R. 395, 108th Cong., § 4(a).

⁴⁶ H.R. 395, 108th Cong., § 4(b).

⁴⁷ Pub. L. 108-10.

⁴⁸ H.R. 526, 108th Cong., § 2(a).

⁴⁹ H.R. 526, 108th Cong., § 2(b).

⁵⁰ As defined in 47 U.S.C. 227(a)(3), the term telephone solicitation means "the initiation of

a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term
(continued...)

The rules issued by the agencies would be required to prohibit the “making of any telephone call for telemarketing purposes to a telephone number included on the registry established and published by the Federal Trade Commission under the Telemarketing Sales Rule.”⁵¹ Exceptions to the rules would include calls made for charitable, political opinion polling or other political activities, or other nonprofit activities; calls made with the consumer’s prior written or verbal permission; calls made primarily in connection with an existing debt of the consumer or contract with the consumer that has not been paid or performed; or calls made by one business to communicate with another business.⁵²

The bill was referred to the House Committee on Energy and Commerce, in addition to the Committees on Financial Services and Agriculture, and subsequently to various subcommittees. No additional action has been taken.

Regulatory Actions Related to Telemarketing

FTC Amendments to Telemarketing Sales Rule. As discussed above, 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 late last year.⁵³ While many provisions of the new rule became effective March 31, 2003,⁵⁴ the establishment and implementation of the do not call registry was delayed pending the approval of funding by Congress.⁵⁵ Funding for the do not call registry was included in the Consolidated Appropriations Resolution,⁵⁶ and the FTC released a time line for registration and implementation in March. Consumers will be able to begin

⁵⁰ (...continued)

does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.”

⁵¹ H.R. 526, 108th Cong., § 2(d).

⁵² H.R. 526, 108th Cong., § 3.

⁵³ The FTC announced the final rule on December 18, 2002. For more information see [<http://www.ftc.gov/bcp/conline/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.

⁵⁴ In response to a request from the Direct Marketing Association, the compliance date for the call abandonment provisions of the amended rule has been extended to October 1, 2003. 68 FR 16414 (April 4, 2003).

⁵⁵ H.J.Res. 2, Division B, Title V.

⁵⁶ Pub. L. 108-7.

registering for the do not call list in July, and as of October it will be illegal for telemarketers to call numbers listed on the registry.⁵⁷

On April 3, 2003, the FTC released a revised notice of proposed rulemaking to amend the Telemarketing Sales Rule, adding a section regarding the imposition of fees on telemarketers accessing the national do not call registry. The proposed amendments would require telemarketers to pay an annual fee for access to the national registry. The proposed fee is set at \$29 per area code, with a maximum annual fee of \$7,250. Telemarketers could have access to up to five area codes for free. Public comments on the proposed amendments will be accepted until May 1, 2003.⁵⁸

FCC Notices of Proposed Rulemaking. In October 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]”.⁵⁹ Unlike the Federal Trade Commission, the FCC did not publish a proposed rule. The FCC instead sought comments on whether and how its current rules should be modified. With regard to the current do not call regulations, the FCC sought 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.”⁶⁰ The Commission also sought comment on whether it should revisit its earlier determination not to adopt a nationwide do not call registry.⁶¹ The comment period for this proceeding ended on January 31, 2003.

On April 3, 2003, the Federal Communications Commission issued a further notice of proposed rulemaking seeking comment on the Do-Not-Call Implementation Act (H.R. 395), which requires the Commission to issue final rules in the proceeding discussed above within 180 days of its enactment,⁶² and to maximize consistency with the Federal Trade Commission’s rules.⁶³ In this proceeding, the Commission seeks comment on how it can maximize consistency with the FTC’s rules, and on how “to harmonize the requirements of the Do-Not-Call Act with [the

⁵⁷ [www.ftc.gov/bcp/online/edcams/donotcall/index.html].

⁵⁸ 68 FR 16238 (April 3, 2003).

⁵⁹ 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.

⁶⁰ *Id.*

⁶¹ See *supra* regarding current FCC regulations.

⁶² The Do Not Call Implementation Act was enacted on March 11, 2003. The Commission is required to issue final rules prior to September 7, 2003.

⁶³ 68 FR 16250 (April 3, 2003).

Commission's] statutory mandate in the TCPA [Telephone Consumer Protection Act]."⁶⁴ Comments may be filed until May 5, 2003.

Pending Legal Challenges

Legal challenges to the FTC's final rule have been filed by the Direct Marketing Association⁶⁵ and the American Teleservices Association.⁶⁶ 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.

⁶⁴ Id at ¶ 6.

⁶⁵ 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. The court denied the Direct Marketing Association's motion for a preliminary injunction on March 26, 2003.

⁶⁶ 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.