

CRS Report for Congress

Received through the CRS Web

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

Updated July 8, 2003

Angie A. Welborn
Legislative Attorney
American Law Division

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

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, but there was little or no federal oversight of these lists. Regulations recently promulgated by the Federal Trade Commission and the Federal Communications Commission create a nationwide do-not-call registry and require telemarketers to begin using the do-not-call lists later this year. In addition to the new national list, thirty-six states have enacted laws that create some type of state-wide do-not-call registry.

This report will discuss current federal regulation of the telemarketing industry, including the new regulations promulgated by the Federal Trade Commission and the Federal Communications Commission, as well as state laws creating do-not-call registries. Recent federal legislation, including H.R. 395 and H.R. 526, will also be discussed. This report will be updated as events warrant.

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.

Contents

Legal Framework	1
Telephone Consumer Protection Act of 1991	1
Telemarketing and Consumer Fraud and Abuse Prevention Act	2
National Do-Not-Call Registry	2
Federal Trade Commission Rules	2
Federal Communications Commission Rules	4
Pending Legal Challenges	5
States Laws Establishing Do-Not-Call Registries	6
Recent Federal Legislation	7
Do-Not-Call Implementation Act	7
Telemarketing Relief Act of 2003	7

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

Legal Framework

There are two major statutes that address telemarketing at the federal level. The Telephone Consumer Protection Act, which is enforced by the Federal Communications Commission (FCC), and the Telemarketing Consumer Fraud and Abuse Prevention Act, which is enforced by the Federal Trade Commission (FTC).

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.”¹ 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.”² However, the FCC initially 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. Under recent revisions to the rules promulgated under pursuant to the Telephone Consumer Protection Act, the FCC promulgated regulations to establish a nation wide do-not-call registry consistent with regulations recently promulgated by the Federal Trade Commission.

The FCC’s initial rules required 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.”³ The rules also established 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.⁴ Do-not-call requests were to be honored for 10 years from the time the

¹ 47 U.S.C. 227(c)(1).

² 47 U.S.C. 227(c)(3).

³ 47 CFR 64.1200(e)(2).

⁴ Id.

request was made.⁵ Recent revisions to the FCC’s rules create a national do-not-call registry to be coordinated with the Federal Trade Commission’s recently established registry.

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.”⁶ 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.”⁷

In response to this directive, the FTC promulgated the Telemarketing Sales Rule.⁸ 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.”⁹ 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.¹⁰

National Do-Not-Call Registry

Both the FCC and the 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.¹¹ However, recently promulgated regulations by the FTC, and complementary revisions of the FCC’s rules, do establish a national do-not-call registry.

Federal Trade Commission Rules. As discussed above, the Federal Trade Commission, acting under the authority of the Telemarketing and Consumer Fraud

⁵ Id.

⁶ 15 U.S.C. 6102(a)(1).

⁷ 15 U.S.C. 6102(a)(3)(A).

⁸ 16 CFR Part 310.

⁹ See prior versions of 16 CFR 310.4(b)(1)(ii).

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

¹¹ 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.

and Abuse Protection Act, issued a final rule amending the Telemarketing Sales Rule to create a national do-not-call registry late last year.¹² While many provisions of the new rule became effective March 31, 2003,¹³ the establishment and implementation of the do-not-call registry was delayed pending the approval of funding by Congress.¹⁴ Funding for the do-not-call registry was included in the Consolidated Appropriations Resolution,¹⁵ and the FTC released a time line for registration and implementation in March. Consumers were able to begin registering for the do-not-call list at the end of June, and as of October it will be illegal for telemarketers to call numbers listed on the registry.¹⁶

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.¹⁷ 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.

Under the new rule, it is 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.¹⁸ However, under certain circumstances telemarketers will be allowed to call consumers who have asked to have their names included on the do-not-call registry. For example, 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.¹⁹ Other exempt calls include calls in which the sale of goods or services is not completed, and many

¹² 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.

¹³ 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).

¹⁴ H.J.Res. 2, Division B, Title V.

¹⁵ Pub. L. 108-7.

¹⁶ [www.ftc.gov/bcp/online/edcams/donotcall/index.html].

¹⁷ 68 FR 16238 (April 3, 2003).

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

¹⁹ 16 CFR 310.4(b)(1)(iii)(B)(ii).

calls that are initiated by the consumer.²⁰ 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.²¹

In addition to the exceptions noted above, 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.²²

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,²³ and will be required to purge their lists every three months to remove any telephone numbers that have been added to the registry.

Federal Communications Commission Rules. 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]”²⁴ 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.”²⁵ The Commission also sought comment on whether it

²⁰ 16 CFR 310.6.

²¹ 16 CFR 310.6(a).

²² 16 CFR 310.4(b)(3).

²³ 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).

²⁴ 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.

²⁵ *Id.*

should revisit its earlier determination not to adopt a nationwide do-not-call registry.²⁶ 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 required the Commission to issue final rules in the proceeding discussed above within 180 days of its enactment,²⁷ and to maximize consistency with the Federal Trade Commission's rules.²⁸ In this proceeding, the Commission sought comment on how it could maximize consistency with the FTC's rules, and on how "to harmonize the requirements of the Do-Not-Call Act with [the Commission's] statutory mandate in the TCPA [Telephone Consumer Protection Act]."²⁹

In accordance with the Do-Not-Call Implementation Act,³⁰ the FCC adopted revisions to its rules implementing the Telephone Consumer Protection Act on June 26, 2003.³¹ The revised rule appears to mirror the rule recently promulgated by the Federal Trade Commission to create a national do-not-call registry. The registry will be administered by the Federal Trade Commission, with enforcement coordinated between the FCC and FTC.

Pending Legal Challenges. Legal challenges to the FTC's final rule have been filed by the Direct Marketing Association³² and the American Teleservices Association.³³ 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.

²⁶ See *supra* regarding current FCC regulations.

²⁷ 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.

²⁸ 68 FR 16250 (April 3, 2003).

²⁹ *Id* at ¶ 6.

³⁰ See *infra* regarding the Do-Not-Call Implementation Act.

³¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, adopted June 26, 2003. [http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf].

³² 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.

³³ 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.

States Laws Establishing Do-Not-Call Registries

To date, thirty-six states have enacted laws to establish some type of state-wide do-not-call registry,³⁴ and several others have considered such legislation.³⁵ The state registries are similar to the new national do-not-call registry, and are generally maintained by a division of the state government. At least 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.³⁶

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, consumers in Georgia must pay \$5 to have their numbers placed on the do-not-call list for a period of two years, while consumers in Texas pay \$2.25 to have their numbers placed on the state list.³⁷ Most states also require the telemarketers to purchase the do-not-call list and require payment for periodic updates of the list. For example, telemarketers in Oregon must pay \$120 per year to obtain the state do-not-call list, while in Missouri, the charge is \$600 per year, though telemarketers can pay less if they want numbers from certain area codes.³⁸ 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.

³⁴ Prior the creation of the national do-not-call registry, many states had enacted laws creating state-wide do-not-call registries. *See e.g.*, 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; Massachusetts, ch. 265 of the Acts of 2002, to be codified at Mass. Gen. Laws § 159C; 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.

³⁵ States that are considering, or have considered, legislation aimed at creating a do-not-call registry include Delaware, District of Columbia, Hawaii, Iowa, Maryland, Michigan, Nebraska, Nevada, North Carolina, Ohio, Rhode Island, South Carolina, Washington, and West Virginia.

³⁶ 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>].

³⁷ Ga. Code Ann. §46-5-27; Tex. Bus. & Com. Code Ann. § 43.001.

³⁸ Or. Rev. Stat. § 646.574; § 407.1098 R. S. Mo.

Several states have recently enacted laws which adopt the national do-not-call registry as the state registry, or to incorporate their lists with the national list.³⁹ These and other states may be able to transfer the information from their lists to the FTC's database before the national registry is provided to telemarketers. However, the Federal Trade Commission has indicated that it may take up to eighteen months for some state lists to be incorporated with the national do-not-call registry.⁴⁰

Recent Federal Legislation

Do-Not-Call Implementation Act. Following the FTC's issuance of the final amendments to the Telemarketing Sales Rule discussed above, 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."⁴¹ 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.⁴² 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.⁴³ Each agency would also be required to issue annual reports regarding the effectiveness of the rules through fiscal year 2007.⁴⁴

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 11.⁴⁵

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

³⁹ For more information on how state lists will be coordinated with the national list, see <www.ftc.gov/bcp/online/edcams/donotcall/statelist.html>.

⁴⁰ 68 FR 4580, at 4641 (January 29, 2003).

⁴¹ H.R. 395, 108th Cong., § 2.

⁴² H.R. 395, 108th Cong., § 3. See *infra* regarding the FCC's Notice of Proposed Rulemaking initiated late last year.

⁴³ H.R. 395, 108th Cong., § 4(a).

⁴⁴ H.R. 395, 108th Cong., § 4(b).

⁴⁵ Pub. L. 108-10.

Trade Commission within 90 days of the enactment of the Act.⁴⁶ 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.⁴⁷ 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 1934.⁴⁸

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.”⁴⁹ 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.⁵⁰

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.

⁴⁶ H.R. 526, 108th Cong., § 2(a).

⁴⁷ H.R. 526, 108th Cong., § 2(b).

⁴⁸ 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 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.”

⁴⁹ H.R. 526, 108th Cong., § 2(d).

⁵⁰ H.R. 526, 108th Cong., § 3.