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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, 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. Legal challenges to the do-not-call registry, including the decision by the United States District Court for the Western District of Oklahoma finding that the FTC lacked authority to establish the registry and the recent decision by the Tenth Circuit Court of Appeals regarding the constitutionality of the list, will also be discussed. Also addressed is the federal legislation (S. 1652, S. 1654, S. 1655 and H.R. 3161) aimed at overturning the Oklahoma court's decision, and other relevant legislation (H.R. 395 and H.R. 526). 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

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

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[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]

Jurisdictional Distinctions. Two sets of regulations are necessary to fully implement the do-not-call registry due to jurisdictional distinctions between the Federal Trade Commission and the Federal Communications Commission. The Federal Trade Commission, by statute, does not have jurisdiction over financial institutions or common carriers, such as telephone companies.[11] This jurisdictional limitation means that the FTC's telemarketing rules cannot be enforced against these types of institutions. The Federal Communications Commission, however, under the TCPA, has much broader jurisdiction over telephone solicitations in general. Under the Act telephone solicitations are defined to include any "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," thus, allowing the FCC to enforce its regulations against entities who make telephone solicitation calls, but may

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[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] 15 U.S.C. 46(a).

not be subject to the Federal Trade Commission's regulations due to the Commission's jurisdictional limitations.[12]

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.[13] 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 and Abuse Protection Act, issued a final rule amending the Telemarketing Sales Rule to create a national do-not-call registry late last year.[14] While many provisions of the new rule became effective March 31, 2003,[15] the establishment and implementation of the do-not-call registry was delayed pending the approval of funding by Congress.[16] Funding for the do-not-call registry was included in the Consolidated Appropriations Resolution,[17] 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.[18]

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

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[12] 47 U.S.C. 227(a)(2).

[13] 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.

[14] 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.

[15] 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).

[16] H.J.Res. 2, Division B, Title V.

[17] Pub. L. 108-7.

[18] [http://www.ftc.gov/bcp/conline/edcams/donotcall/index.html].

fees on telemarketers accessing the national do-not-call registry.[19] 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.[20] 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.[21] 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.[22] 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.[23]

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.[24]

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,[25] 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

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[19] 68 FR 16238 (April 3, 2003).

[20] 16 CFR 310.4(b)(1)(iii)(A) and (B). See infra regarding the implementation of the amended Telemarketing Sales Rule.

[21] 16 CFR 310.4(b)(1)(iii)(B)(ii).

[22] 16 CFR 310.6.

[23] 16 CFR 310.6(a).

[24] 16 CFR 310.4(b)(3).

[25] 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).

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]".[26] 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."[27] The Commission also sought comment on whether it should revisit its earlier determination not to adopt a nationwide do-not-call registry.[28] 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,[29] and to maximize consistency with the Federal Trade Commission's rules.[30] 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]."[31]

In accordance with the Do-Not-Call Implementation Act,[32] the FCC adopted revisions to its rules implementing the Telephone Consumer Protection Act on June 26, 2003.[33] 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.

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[26] 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.

[27] Id.

[28] See supra regarding current FCC regulations.

[29] 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.

[30] 68 FR 16250 (April 3, 2003).

[31] Id at ¶ 6.

[32] *See infra* regarding the Do-Not-Call Implementation Act.

[33] *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].

Legal Challenges

Immediately upon release of the FTC's final rule, legal challenges were filed by the Direct Marketing Association[34] and the American Teleservices Association.[35] The suits alleged that the FTC's rule infringed on the telemarketers rights under the First Amendment and violated the Equal Protection Clause of the United States Constitution. The plaintiffs also argued 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. Decisions were recently handed down in both cases invalidating the do-call-registry on different grounds. These cases are discussed separately *infra*.

FTC Authority to Implement Registry. On September 23, 2003, the United States District Court for the Western District of Oklahoma held that the Federal Trade Commission did not have the authority to promulgate a national do-not-call registry.[36] The court found that while Congress had expressly granted the Federal Communications Commission the authority to create a do-not-call registry,[37] such authority was not granted to the Federal Trade Commission. The FTC has the authority, pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAP), to "prohibit deceptive . . . and other abusive telemarketing acts or practices,"[38] but, according to the court, this authority did not include the creation of the do-not-call registry.

The court determined that Congress' "express grant of authority to the FCC to promulgate a do-not-call registry, together with the complete silence on the subject in the TCFAP, makes plain that Congress has not given the FTC the authority that it seeks to exercise here."[39] The court rejected the FTC's argument that post-promulgation appropriations legislation granted it the authority to establish the do-not-call registry, noting that such legislation did not "unequivocally grant the FTC the authority under the TCFAP to promulgate a do-not-call registry," but rather "merely recognizes that the FTC has done so."[40]

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[34] 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.

[35] 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.

[36] *U.S. Security, et. al., v. Federal Trade Commission*, No. CIV-03-122-W (W.D. Okla. Sept. 23, 2003).

[37] *See* 47 U.S.C. 227(c)(3).

[38] 15 U.S.C. 6102(a)(1).

[39] *U.S. Security*, Slip Op. p. 12.

[40] *Id* at 14. The FTC had relied upon the Consolidated Appropriations Resolution, P.L. 108-
(continued...)

On September 24, 2003, the FTC filed a motion for a stay pending appeal of the court's order, as well as a notice of appeal. Several bills were also introduced in both the House and Senate to grant the FTC the authority the court determined it lacked to create a national do-not-call registry. On September 25, both the House and Senate passed legislation granting the FTC explicit authority to implement and enforce the do-not-call registry, effectively overturning the court's order. These bills are discussed *infra*.

The President signed H.R. 3161 on September 29, giving the FTC the authority to implement and enforce the do-not-call registry, but the registry had already been invalidated on other grounds on September 25. Despite congressional action remedying the jursdictional questions regarding the FTC's implementation of the do-not-call registry, the constitutional concerns raised by the United States District Court for the District of Colorado remain.

First Amendment Concerns. On September 25, 2003, the United States District Court for the District of Colorado issued an opinion finding that the do-not-call registry, as implemented by the FTC, violated the First Amendment to the United States Constitution.[41] The court found that "the FTC, by exempting charitable solicitors from the amended Rules' do-not-call registry, has imposed a content-based limitation on what the consumer may ban from his home."[42] The court took issue with the distinction made between calls made on behalf of charitable organizations and commercial calls, nothing that pursuant to the FTC's rules, calls from charitable organizations would "still ring through to the consumer, while commercial calls will not."[43] The court determined that "[t]he mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice, thereby entangling the government in deciding what speech consumers should hear."[44]

Based upon the determination that the do-not-call registry placed a significant burden on commercial speech, the court went on to apply the Supreme Court's

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[40] (...continued)
7, which authorized the Commission to use, as part of its funding, a certain amount derived from fees sufficient to implement and enforce the do-no-call provisions of the Telemarketing Sales Rule, and the Do-Not-Call Implementation Act (H.R. 395), P.L. 108-10, which authorized the Commission to collect fees for the implementation and enforcement of a do-not call registry.

[41] *Mainstream Marketing, et. al. v. Federal Trade Commission*, 283 F. Supp.2d 1151 (D. Colo. 2003). The Colorado court did not consider whether the FTC had the statutory authority to implement and enforce the do-not-call registry as it had already determined that the registry, as implemented, was constitutionally invalid.

[42] *Mainstream Marketing* at 1163. For more information on the First Amendment protections offered to commercial speech, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

[43] *Id.*

[44] *Id.*

Central Hudson test to determine whether the registry was constitutionally invalid.[45] In applying the *Central Hudson* test, the court found that "the interest in preventing abusive telemarketing practices [was] sufficiently substantial to justify a restriction on commercial speech."[46] However, the court found that the do-not-call registry did not "materially advance" this interest as required under *Central Hudson* because "the registry creates a burden on one type of speech based solely on its content, without a logical, coherent . . . reason supporting the disparate treatment of different categories of speech."[47]

On February 17, 2004, the United States Court of Appeals for the Tenth Circuit reversed the lower court's decision and held that the do-not-call registry "is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech."[48] Unlike the district court, the court of appeals did not find that the distinction between commercial telemarketing calls and those on behalf of charities made the list constitutionally invalid. In fact, the court used the limited applicability of the list as a justification for upholding the regulations. The court found that in applying the regulations only to commercial telemarketing calls the Commission had narrowly tailored its restrictions on speech to address the government's stated interests in protecting privacy and protecting consumers from fraudulent and abusive solicitations.[49]

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,[50] and several others have considered such legislation.[51] The state

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[45] *See Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). For more information on *Central Hudson*, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment* and CRS Report RL31239, *Prohibiting Television Advertising of Alcoholic Beverages: A Constitutional Analysis*, by Henry Cohen.

[46] *Mainstream Marketing* at 1164.

[47] *Id* at 1168.

[48] *Mainstream Marketing Services v. Federal Trade Commission*, No. 03-1429 (10th Cir. Feb. 17, 2004). The Tenth Circuit's opinion can be found at [http://www.ftc.gov/os/2004/02/040217dncappealopinion.pdf] In addition to the First Amendment concerns, the court also addressed the issue of the FTC's statutory authority to promulgate regulations creating a national do-not-call registry and found that the Commission had the authority to do so based on the broad statutory authority granted in the Telemarketing Fraud and Abuse Prevention Act. *Mainstream Marketing Services*, Slip Op. at 47 - 49.

[49] *Mainstream Marketing Services*, Slip Op. at 20 - 21.

[50] Prior to 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. & (continued...)

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.[52]

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 do 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.[53] 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.[54] 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.

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[50] (...continued)
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. The opinion of the United States District Court for the District of Colorado did not address state do-not-call registries, but could presumably be used to invalidate such registries on similar grounds if upheld.

[51] 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.

[52] 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].

[53] Ga. Code Ann. §46-5-27; Tex. Bus. & Com. Code Ann. § 43.001.

[54] 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.[55] These an 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.[56]

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."[57] 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.[58] 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.[59] Each agency would also be required to issue annual reports regarding the effectiveness of the rules through fiscal year 2007.[60]

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.[61]

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

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

[56] 68 FR 4580, at 4641 (January 29, 2003).

[57] H.R. 395, 108th Cong., § 2.

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

[59] H.R. 395, 108th Cong., § 4(a).

[60] H.R. 395, 108th Cong., § 4(b).

[61] Pub. L. 108-10.

Trade Commission within 90 days of the enactment of the Act.[62] 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.[63] 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.[64]

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."[65] 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.[66]

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.

Legislation Introduced in Response to Court Order. On September 24, at least four bills were introduced in response to the order issued by the United States District Court for the Western District of Oklahoma finding that the FTC lacked the authority to establish a do-not-call registry. S. 1652, S. 1654, S. 1655, and H.R. 3161 all expressly grant the FTC the authority to implement and enforce a national do-not-call registry under the Telemarketing and Consumer Fraud and Abuse Prevention Act,[67] and ratify the do-not-call provision of the Commission's Telemarketing Sales Rule (TSR).[68] S. 1661, introduced on September 25, would also give the FTC the authority to implement a list of consumers who request not to receive telephone sales calls.

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[62] H.R. 526, 108th Cong., § 2(a).

[63] H.R. 526, 108th Cong., § 2(b).

[64] 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."

[65] H.R. 526, 108th Cong., § 2(d).

[66] H.R. 526, 108th Cong., § 3.

[67] 15 U.S.C. 6102(a)(3)(A).

[68] 16 C.F.R. 310.4(b)(1)(iii).

On September 25, both the House and Senate passed H.R. 3161 to grant the FTC the authority to implement and enforce the do-not-call registry and ratify the do-not-call provision of the TSR. The President signed the bill on September 29.[69]

[69] P.L. 108-82.