"Do-Not-Call Implementation Act": Comment on the Inadequacies of the Act Itself and the Fee Requirements

In order to better understand the amendments that the Federal Trade Commission proposed NPRM proposed by the FTC I did some research on the initial act. While I agree with the policy behind the act and the fees associated with the act itself, I discovered what I believe were a number of problems with the original act that are not completely rectified by the proposed amendments. The "Do-Not-Call Implementation Act," as passed into public law on March 11, 2003, contains three major provisions: (1) a provision granting authority to the FTC to "promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the 'do-not-call' registry" and instituting time periods for collection and use of the fees, (2) establishment of a deadline for the FCC to publish a final rule implementing the Act and a coordination request to work with the FTC to reduce inconsistencies, and (3) mandating reporting requirements to analyze the resultant rules, rule inconsistencies, and actual use of the registry by consumers.[1]

As codified into the TCFAPA at 15 U.S.C. § 6101-6108 and implemented in the FTC's Telemarketing Sales Rules, the "Do-Not-Call Implementation Act" expands the definition of abusive practices and establishes caller identification provisions. The purpose of the TCFAPA is to protect consumers against "telemarketing deception and abuse".[2] As there is no definition of abusive practices within the text of the TCFAPA, the implementing regulations become the key to understanding the impact of the registry on businesses. Abusive telemarketing practices under the FTC's Telemarketing Sales Rules, implementing the "do not call" registry, include failure to eliminate the use of a number placed on the "do not call" registry as well as failure to transmit caller identification data to residents with that service.[3] Nowhere within the text of the Act is there an established desire to prevent businesses from blocking caller identification systems; however, the FTC took the purpose of protecting consumer privacy another step by allowing those who actually pay for the identification systems to know who was calling them.

One primary weakness of the FTC's regulation and the proposed amendments concerning fees lies in the abundant distinctions of callers as exempt or included from paying fees based on the content of the information being relayed while telemarketing. For example, while the do-not-call requirements apply to most unsolicited calls by for-profit businesses, they do not apply to calls by telemarketers, even for-profit telemarketers, who call on behalf of political or religious organizations.[4] Nor do the regulations apply to banks or to a number of other specified industries such as brokers and investment companies.[5] If the Court were to hold that commercial speech is fully protected, the restrictions would almost certainly fail because they are seemingly arbitrary and capricious by picking and choosing which entities must comply and leaving

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[1] *See generally* Do-Not-Call Implementation Act.
[2] 15 U.S.C.A. § 6101(5).
[3] 16 C.F.R. §§ 310.4(b)(ii) & (b)(iii)(B).
[4] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (codified with some differences in language at 15 U.S.C.A. §§ 6101-6108).
[5] *Id.* (*see more specifically,* 15 U.S.C.A. § 6102(d)(2)(A)).

others relatively unregulated. But even in the absence of a Supreme Court decision fully protecting commercial speech, the distinctions leave the Commission's rules vulnerable to scrutiny for applicability and also leave consumers unprotected against invasions of their privacy stemming from those entities left exempt by the Act.

Despite the recent inclusion of charitable contribution calls into the TCFAPA definition of telemarketing, the "Do-Not-Call Implementation Act" will not be applicable to charity solicitation calls. In the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001,[6] Congress expanded the scope of the definition of telemarketing that appears in the TCFAPA to include any campaign conducted to induce "a charitable contribution, donation, or gift of money or any other thing of value."[7] The FTC thus extended the reach of its disclosure provisions to cover telemarketers soliciting charitable contributions.[8] However, in the implementation of the "Do-Not-Call Implementation Act," the FTC's Telemarketing Sales Rules specifically exempted charitable contribution calls from the provisions relating to the "do not call" list.[9]

The provision providing authority for the FTC to establish, maintain and charge for a "do-not-call" registry is simplistic at best. The actual language speaks in broad terms of setting up the registry, collecting not-yet-determined fee amounts, and setting these fees aside in an account to "offset" salary and administration for the FTC implementation and enforcement personnel. The lack of detail in the law is startling. For example, critical features of the law such as how consumers are able to sign up in the registry and how the list is to be disseminated to telemarketing companies are not included in the current statutory language.

Moreover, nowhere within the text of the Act is there an independent cause of action created as a remedy for consumers who were called despite their names appearing on the registry. The only remedies available to private citizens are those already contained within the original TCFAPA[10] and FTC Telemarketing Sales Rules,[11] which were designed to protect the consumer from fraudulent and deceptive telemarketing practices rather than invasion of their privacy right after registration on the "do-not-call" list. Although the FTC-published Telemarketing Sales Rules do establish the standard of conduct for wrong-doing and the exemptions available for businesses to contact residents who have placed their names on the "do-not-call" registry, it does not establish fines or penalties. The only choice for a consumer is to file a complaint with either the attorney general of the State or directly with the FTC. However, this assumes that consumers completely comprehend the details of the legislation. For example, the law makes the assumption that an average person will know which types of telemarketers are exempt from regulations such as political or religious organizations.

The reporting requirements contained in the Act will lead to a bureaucratic nightmare. The law requires that the government collect statistics such as use by consumers, fees collected from subscribers, and effects of administrative agency

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[6] Ian Heath Gershengorn, *Telemarketing Restrictions and the First Amendment*, 20 Comm. Law. 3, 5 (2002) (*See* Pub. L. No. 107-56 (2001)).
[7] *Id.* (*See* USA PATRIOT Act, § 1011(b)(3)).
[8] 15 U.S.C.A. § 6102(a)(3)(D).
[9] 16 C.F.R. § 310.6(a); *Id.* § 310.4(b)(1)(iii)(B).
[10] *See generally* 15 U.S.C.A. §§ 6103 & 6104.
[11] 16 C.F.R. § 310.7.

regulation inconsistencies on consumers.[12] This monitoring may be prohibitively expensive and lead to the imposition of large fees on businesses which are required to purchase these lists. There are not suggested guidelines within the Act establishing how inconsistencies affecting consumers will be gauged. Will the agencies poll consumers to gather information regarding the Act's impact, leading to an increase in call volume to consumers? The reporting requirements are not detailed and seem like an unrealistic goal and costly waste as currently written.

Furthermore, the "Do Not Call" list can be nullified through a consumer's every day actions. When someone orders a product or service from a corporation, that corporation (and any of its subsidiaries or partners) then has the right to solicit that customer through telemarketing. With the large number of conglomerate companies across the US, a customer who purchased a new dishwasher can be solicited by the same company's credit card division. Therefore, consumers' actions can have a big impact on the effectiveness of the "do-not-call" list. Any solicitation for goods or services by a consumer on the registry will invalidate the value of the Act. When a consumer who previously went to the trouble to subscribe to the "do-not-call" list makes any purchase of goods, or fills out solicitations over the internet or direct orders goods over the telephone, they are openly soliciting that particular company or organization. By providing one's phone number to the company or organization and purchasing goods or services, the consumer is truly giving that company free reign to employ telemarketing methods in the future for a period of time as that consumer has established a "business relationship" with the company. The design flaw of the "Do-Not-Call Implementation Act" can be tackled in one of two general ways: (1) by working within the format of the existing law to remedy the exceptions and administrative headaches, or (2) by establishing methods outside of the framework of the law to combat the large volume of telemarketing call consumers receive.

The first priority for eliminating flaws within the context of the current law is to eliminate the exemptions that were created. The FTC, as an administrative agency, does not have jurisdiction over all businesses and organizations that employ telemarketing techniques. Therefore, the best place for the "Do-Not-Call Implementation Act" to be codified may not have been within existing FTC law regarding telemarketing fraud and abuse. The law should either be stand-alone or codified as an individual section within TCFAPA rather than interspersed throughout the text of existing law. Additionally, in order to claim jurisdiction over agencies not normally covered by the TCFAPA, a provision must be included that would give the FTC jurisdiction over the act of telemarketing employed by banks, brokers, and other organizations previously exempted in the "do not call" registry provisions. Further, to avoid the appearance of being arbitrary, any exemptions of businesses based on the content of their messages rather than the telemarketing operations employed must be distinguished. If the exemptions are eliminated and the FTC can claim jurisdiction over all businesses and organizations utilizing telemarketing, the "do not call" registry may truly live up to its name. The act as passed and the amendments to the act do not resolve these issues.

Second, the bureaucratic reporting requirements should also be eliminated from the text of the current Act. The reporting requirements should not be included as a part of the act with annual reports due to Congressional committees. If such reports are

[12] Do-Not-Call Implementation Act, Pub. L. No. 108-10, §§ 4(a) & (b), 117 Stat. 557 (2003).

required in the future, those requirements can be included in a separate study of the success of the Act. The need for additional paperwork and statistical analysis of the use of the registry does not outweigh the actual trouble of putting the reports together and wasting valuable committee time in evaluating them. The reported successes of state-run "do not call" lists provide a reasonable assumption that a national registry will be widely used by consumers as the state lists will be incorporated into the national and will no longer operate as stand-alone lists. As the initial outlay of federal funds was already appropriated for the purpose of establishing, implementing and enforcing the "do not call" list, there is little sense to impose a reporting requirement describing consumer use, fee collection, or subscriber registration. Reporting requirements of this type should be considered when deciding to legislate a provision out of law rather than at the inception of the law.

Third, the Act should centralize the implementation of the rules into a single governmental agency. By allowing each agency (FTC, FCC, and SEC, among others) to issue implementation rules and guidelines for their respective jurisdictional areas, the Act is proliferating the continuation of inconsistencies in substance and in the speed of implementation. The costs and paperwork in implementing the "do not call" list would be significant in such a scenario as well. The text of the Act must either dictate one rule-making agency that will be responsible for implementing the Act for all telemarketing calls, not just those covered by the FTC or FCC.

Finally, the Act should set aside moneys to educate the public regarding the newly established registry. As currently written, the law can be confusing with regard to which telemarketing calls are exempt from the law and which are prohibited from calling a consumer once he or she places his or her name on the list. The proposed amendments that are meant to clarify the terms by which fees are assessed are still difficult to comprehend and leave too many potentially affected groups in a nebulous web of exemptions and inclusions. In addition, the public must be informed on how to report telemarketers who break the rules, as the law will not work if violators are not reported and then prosecuted. Moreover, consumers must be made aware that all telemarketing calls, such as political or religious calls, will not be eliminated by the "do not call" list or enforcement officials will be overrun with calls from angry consumers who still receive calls from various charities or churches. The amendments while definitely helpful in assessing fees