

**Before the Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington, D.C. 20584**

**Telemarketing Rulemaking Comment
FTC File No. R41101**

Comments of Competitive Enterprise Institute

March 29, 2002

1. The Competitive Enterprise Institute is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Institute is a nonprofit educational foundation. Solveig Singleton, one author of these comments, is a lawyer and senior analyst with the Competitive Enterprise Institute. The other author, Thomas Pearson, is a research analyst.

2. The Competitive Enterprise Institute has several concerns about the FTC's proposal to create a Do Not Call registry.¹ Part I outlines existing Do Not Call lists, and explores problems that might arise from yet another national list layered on top of the others. Part II describes telemarketing blocking services and devices provided by the private sector, and assesses the impact of an FTC-administered Do Not Call list on the market for these devices. Part III describes alternative actions for the FTC that would allay these concerns.

¹ All information regarding the proposed changes to the TSR are contained in the Notice of Proposed Rulemaking to amend the FTC's Telemarketing Sales Rule, 16 CFR Part 310, found at: http://www.ftc.gov/bcp/online/edcams/donotcall/pubs/NDNCR_the_rule.pdf (last retrieved March 28, 2002).

Part I. Another National “Do Not Call” List As Duplicative Regulation

A. Existing State and DMA Lists.

3. Thus far, at least twenty states have, or soon will, put in place some sort of Do Not Call registry. Some states, such as Maine, incorporate the Direct Market Association’s Telephone Preference Service into their registry, while Wyoming solely relies on that list as its registry.² The public reaction to these state lists has been strong in some states. For example, close to half of the residents of Missouri, 920,000 have signed up for the state registry in that state, though it has only been operating since July of last year. Around 370,000 have signed up for Connecticut’s list.³ Indiana’s Do Not Call registry has attracted 800,000 consumers. Idaho has under 50,000.⁴ The DMA’s Do Not Call list has over 4.5 million names.⁵ Estimates suggest that a national registry would attract around 64 million names.⁶ However, the projected popularity of such a registry is probably due to lack of awareness on the part of consumers of the DMA list or the state lists.

B. The FTC List Is Likely to Confuse Consumers and Businesses.

4. A multitude of lists at the state and federal level to confuse and frustrate consumers. Would the consumer be expected to register on one of the lists? On all of them?

² See <http://www.the-dma.org/government/donotcalllists.shtml> (last retrieved March 27, 2002)

³ See Caroline E. Meyer, “FTC Anti-Telemarketer List Would Face Heavy Demand,” *The Washington Post*, March 19, 2002, page A7.

⁴ See footnote 10 for a list of state websites that contain information regarding state Do Not Call programs.

⁵ See <http://preference.the-dma.org/products/tpssubscription.shtml> (last retrieved March 28, 2002).

⁶ *Ibid.*, footnote 8.

5. A multiplicity of lists will increase costs for companies who have to comply with state and federal registries, while already voluntarily limiting themselves through the DMA's lists. State laws implementing Do Not Call registries have mostly mirrored federal laws, such as the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAPA), in that they govern the times of day that telemarketers may call, which telemarketers may call, a list of exempt organizations, penalties for violation of telemarketing laws, etc. The state laws differ from the federal laws in that they require telemarketers to abide by the constraints of the state registry and usually charge fees to telemarketers in order for them to have access to the periodically updated lists. Some states, including Alabama, Indiana, and Louisiana do not charge residents to be placed on their Do Not Call registry; other states charge a nominal fee of \$5.00 or \$10.00. States also charge telemarketers various amounts for access to the Do Not Call lists. Georgia is the lowest with an annual fee of \$10.00, while Alabama and New York charge \$500 for annual access. Other states charge per update, usually quarterly.

6. Additionally, numerous registries will increase costs for state and federal governments, both in monetary expenditures and in man-hours, which costs will then be passed to taxpayers. Simplification for consumers, firms, and governments entails either a state system or a federal system of regulation, but not both.

7. The Competitive Enterprise Institute sees state Do Not Call registries as an alternative to a federal registry. However, too much redundancy in the public sector becomes cumbersome and will often mean more, not fewer, problems for consumers and telemarketers. For this reason we would urge that either the state-based system remain in place or that a federal registry preempt the state registries, but both should not exist

simultaneously. As the state registries appear to be working and other private-sector alternatives are developing (we discuss these further in Part III of these comments), there does not appear to be a great need for a federal list.

C. The Problem of Proportionate Penalties.

8. Telemarketing firms have a market incentive to use opt-out lists voluntarily, because businesses are unlikely to make a sale to a customer angered by an unwanted phone call. However, given the reality that the phone numbers on any Do Not Call list cannot be instantaneously communicated to all potential callers, it is likely that even a well-meaning business will occasionally call a consumer who has put his name on a Do Not Call list. The question is, what then?
9. An unwanted commercial telephone call is an annoyance. But it is little more than that. It does no real or lasting harm to the individual who receives it. And it is an important marketing tool for many charities, businesses, and political ventures. It is therefore neither appropriate, nor necessary, to exact strict penalties for inadvertantly calling someone on such a list. It is a fundamental principle of our legal system that the penalty for an offense should be proportional to the harm the offense does. Even the common law courts, once influenced by the zeal of English landowners setting cruel traps for poachers, now hesitate to approve homeowners who rig booby-trapped shotguns to shatter the kneecaps of burglars.
10. Because inadvertently misdirected telemarketing calls do no harm, imposing substantial penalties for making such calls (particularly a single such call) is

regulatory overkill. It will over-deter telemarketing, particularly among businesses that are newcomers to the compliance process and the market. Imagine how little progress Sprint and MCI might have made in making inroads AT&T's market share, if they had not been free to interrupt consumers during the dinner hour.

11. Thus far, the proposed regulatory regime that would accompany the FTC's proposed Do Not Call list has not recognized the problem of disproportionate punishment. Violators of the proposed Do Not Call provisions in the TSR may face up to \$11,000 in fines per violation.⁷ A violation is usually defined as a single call to someone whose number is on the state Do Not Call list. On top of this, Do Not Call lists developed so far by many states would add further disproportionate penalties. Penalties for violation of state Do Not Call laws range from up to \$1,500.00 in Louisiana to up to \$25,000 maximum per violation with increasing penalties for repeat offenders. (Indiana, Oregon, Missouri, and Idaho are the states with the strictest enforcement of their Do Not Call laws⁸).

⁷ See Caroline E. Meyer, "FTC Moving To Restrict Telemarketers" *The Washington Post*, January 22, 2002, page E1.

⁸ The current list of states with Do Not Call registries is as follows: Alabama (<http://www.psc.state.al.us/nocall/No-Call%20Web%20info1.htm>); Alaska (http://www.law.state.ak.us/consumer/tele_stop.html); Arkansas (<http://www.donotcall.org>); Connecticut (<http://www.state.ct.us/dcp/nocall.htm>); Florida (<http://www.800helpfla.com/~cs/nosales.html>); Georgia (<https://www.ganocall.com/>); Idaho (<https://www2.state.id.us/ag/>); Indiana (<https://www.ai.org/attorneygeneral/telephoneprivacy/>); Kentucky (<http://www.law.state.ky.us/nocall/>); Louisiana (<http://host.ntg.com/donotcall/DNCProgram.htm>); Missouri (<http://www.ago.state.mo.us/nocalllaw.htm>); New York (<https://www.nynocall.com/index.html>); Oregon (<http://www.ornocall.com/index.htm>); Tennessee (<http://www2.state.tn.us/tra/nocall.htm>); Texas (<http://www.texasnocall.com>). Each state in this list has part of its website dedicated to its Do Not Call program. Most include the basic information and some have links to enabling legislation as well as enforcement updates.

12. Except in the case of the most deliberate violators, this seems grossly unfair. A single phone call could wipe out a fledging business, political campaign, or charity.

Part III. The Impact of the Proposed Regulation On Private-Sector Services

13. Entrepreneurs have developed services and technologies that help consumer's escape or evade telemarketing calls. In addition, several services enable telemarketers to manage their lists to keep them from running afoul of state and federal laws or the guidelines set by industry groups.⁹ The Competitive Enterprise Institute is concerned that the FTC's proposed Do Not Call registry will supplant the growing private market for services and devices that is emerging to enable telephone consumers to avoid unwanted calls from telemarketers.

A. The Market for Blocking Services and Devices.

14. Telephone companies offer services to give customers more control over what the calls they receive. For example, SBC Communications, which operates several regional phone companies, including Ameritech, Southwestern Bell and Pacific Bell offers a service called Privacy Manager. Privacy Manager allows customers to program their telephones to screen calls that appear as "private," "out of area," or are otherwise unidentified by a caller id device. After the call is identified, usually by having the caller respond to a series of prompts, the consumer then has a number of options, including: (1) accepting the call; (2) rejecting the call; (3) Sending the call to voice mail or an answering device; (4) playing a "solicitor's rejection" that requests a telemarketer to add

⁹ The provisions and requirements of some of these laws at the state and federal levels will be discussed in section II.

that the consumer to its Do Not Call list. SBC's Privacy manager costs \$4.00 a month and requires a \$4.75 installation fee.¹⁰

15. *As propounded, the FTC's proposed regulations would destroy the market for this service. The FTC has proposed disallowing companies from blocking caller ID services—precisely the practice that Privacy Manager relies on to block calls.*

16. Another private-sector creation is the "TeleZapper." It retails for just under \$50.00, and is the most popular of the telemarketer-thwarting devices that have appeared on the market in the last few years. Made by Royal Appliance Mfg. Co., it works by emitting a certain tone, when you or your answering machine answer your telephone, that signals to the predictive dialing computer that your number has been disconnected. The predictive dialer, a computer that connects you to a telemarketer, is thereby "tricked" into eliminating your number from its database. This device also blocks other groups that use predictive dialers to make calls, such as charities and polling companies. However, some consumers see these calls as irritating as those from telemarketers, and thus will desire to remove themselves from these groups' databases as well.¹¹

17. Two other types of telemarketer-thwarting technology, Command Communications' "PrivateTIME" and the "PhoneButler," sold on QVC, rely on telemarketing requirements under the Telephone Consumer Protection Act (TCPA) of 1991. The TCPA, among other things, compels telemarketers to abide by consumer requests to be placed on their Do Not Call list for a period of ten years. PrivateTIME works like SBC's Privacy Manager, in that it can be programmed to ask telemarketers to add that name and number to their Do Not Call lists. Callers who enter a certain code,

¹⁰ See, for instance, http://www.pacbell.com/Products_Services/Business/pmuserguide/0,1217,,00.html (last retrieved March 26, 2002).

¹¹ See <http://www.telezapper.com> (last retrieved March 26, 2002).

determined in advance by the owner of the device and distributed at his discretion, may circumvent this feature, thus allowing calls from known callers through. PrivateTIME can be turned on and off at the touch of a button, and retails for around \$80.00.¹²

18. PhoneButler is a much simpler device and is used solely at the owner's prerogative. When a telemarketer calls, the consumer pushes the star (*) key on his telephone and a British-accented voice says, "*Pardon me, this is the Phone Butler, and I have been directed to inform you that this household must respectfully decline your inquiry. Kindly place this number on your do-not-call list. Good Day.*" At just under \$30, it is attractively priced.¹³

19. The development of these products and services shows, first, that there is no "market failure" in methods that consumers can use to protect themselves from unwanted callers. Second, it raises a thorny issue for the FTC. What will the FTC's proposed regulations do to the operation of existing devices and services? *It would be ironic indeed if the market that enables consumers to protect themselves from telemarketing failed because it had been supplanted by unnecessarily burdensome federal regulation.* A robust private market exists to protect the privacy rights of consumers who do not value the services of telemarketers. A national Do Not Call registry may stunt this budding industry and dictate a one-size-fits-all solution to a problem that is already producing plethora of helpful and inventive responses.

B. Do Not Call As a Service to Telemarketers.

20. Do Not Call also provides a service to telemarketers, who have an incentive to avoid contacting hostile or irritated consumers. The Direct Marketing

¹² See http://www.command-comm.com/pt1000_brochure.html (last retrieved March 26, 2002).

¹³ See <http://www.phonebutler.com> (last retrieved March 26, 2002).

Association, Inc. requires its members to use the DMA's own Do Not Call list, the Telephone Preference Service (TPS), which allows consumers to prevent DMA members from soliciting them via telephone.¹⁴ An alternative to the DMA service is PrimeCTI, which uses software attached to the telemarketer's dialing computer to keep calls within the law, including blocking calls to consumers who have requested to be added to a Do Not Call list.

21. As the market for information about consumer's preferences continues to develop, services of this nature will become more refined. At present, the private-sector Do Not Call lists and services may not distinguish between different types of telemarketing. Consumers may want to receive certain types of calls—calls marketing cheaper long distance phone service, for example—but not offers for new credit cards or window siding. But present Do Not Call services are not that sophisticated. In its proposal, the FTC has asked whether to make its proposed Do Not Call list able to make some of these finer distinctions.

22. In our view, the FTC should not place itself in competition with private-sector services by offering the same kinds of sophisticated data-sorting and collecting that can be done so much more efficiently—and not at tax-payer expense—in the private sector. The government should not take on itself to foreclose opportunities open that to private-sector associations and entrepreneurs.

Part III. FTC Actions that Would Avoid Regulatory Redundancy or Supplanting Entrepreneurial Efforts.

¹⁴ See <http://preference.the-dma.org/products/tpssubscription.shtml> (last retrieved March 26, 2002) and <http://www.fcc.gov/cgb/consumerfacts/tcpa.html> (last retrieved March 26, 2002).

23. To summarize our comments so far, we have raised two major problems with the proposed FTC Do Not Call list. First, it unnecessarily duplicates lists developed by state regulators. Second, it may interfere with or destroy services and devices developed by private-sector entrepreneurs to supply the market with devices that consumers may use to protect themselves from unwanted calls, or services that telemarketers may use to learn more about consumers preferences.

24. The following regulatory alternatives would avoid both of the above problems.

- Limiting the FTC initiative to educating the public about the existing Do Not Call lists, particularly the DMA list, and other private-sector alternatives.
- Limiting the FTC initiative to establishing an additional 800 number that consumers could call to add their names to state or DMA Do Not Call lists. (Essentially, using the FTC's higher public profile to channel names to existing lists).

25. A less desirable alternative would be for the FTC to preempt state lists. This does not, however, remove the problem of the FTC *creating* a market failure in the market to develop private-sector solutions to the annoyance of telemarketing.

Conclusion

26. The FTC should revise its proposal to create a Do Not Call list to ensure that it does not create confusing and duplicative layers of federal and state regulation. More importantly, however, the FTC should recognize that given that telemarketing calls amount to an annoyance rather than a violation of consumer's rights, their regulatory response should be proportionate. Over-detering telemarketing calls could have a potentially devastating effect on new businesses trying to create a customer base. Imagine, for example, how much competition between long distance telephone

companies since the 1970's could have progressed if it had not been for those phone calls during the dinner hour from MCI and Sprint.

27. The FTC should also limit and restrict its proposal so that it does not harm the market for anti-telemarketing services developed by the private sector. Only the private sector can offer a variety of sophisticated services tailored to the almost infinite variety of business needs and consumer preferences. There is no market failure in this business... and the FTC should be careful not to create one.

Sincerely,

Solveig Singleton
Senior Analyst
Project on Technology & Innovation
Competitive Enterprise Institute
(202) 331-1010
ssingleton@cei.org

Thomas Pearson
Assistant Policy Analyst
Project on Technology & Innovation
Competitive Enterprise Institute