

NO-CALL LISTS FOR TELEMARETERS: A LEGISLATIVE ANALYSIS OF STATE REGULATION

by

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I. INTRODUCTION

Telemarketing is method of marketing goods and services to consumers using telephone solicitation. The industry hires telephone solicitors who call private residences and attempt to sell the goods and/or services of particular businesses. Charitable organizations and public agencies also use telemarketing to solicit donations. Both Congress and most states have attempted to regulate the industry in some way to protect consumer privacy and to prevent fraud.

Congress provided the original impetus for legislation in this field. Federal regulation of the field began in the early 90s. This legislation envisioned a national database of consumers who did not wish to be called by telemarketers. While the national database has not materialized, other provisions of the federal regulatory scheme, such as restrictions on automatic dialing equipment, have been adopted by the states. Even though national efforts to protect consumers from abuse of telemarketers have been slow, the states have begun an aggressive legislative program to protect consumer privacy.

The states have acted to regulate the telemarketing industry in response to the extent of consumer dissatisfaction with telephone solicitation (97% of Americans surveyed said they disliked unsolicited telemarketing calls¹). A particularly effective response has been the enactment of "no-call" list statutes by the states. These no-call lists are compiled when consumers, who do not wish to be called by telemarketers, are given a website, address or the telephone number of a public agency that has the authority to place the consumer's telephone number on the no-call list. If the consumer's telephone number is placed on this list, telemarketers are not permitted to solicit business by calling that telephone number. This no-call list can be purchased by telemarketers who are accountable for any calls made to consumers on the no-call list.

The state statutory schemes enacting no-call lists were built on the original Congressional legislation that began to regulate the telemarketing industry in 1991. Both Congress and the states were cognizant of abuses by telemarketers. State investigations of the extensive invasion of consumer privacy and massive instances of consumer fraud were beginning to reveal what that federal investigations had already uncovered.

II. RECOGNIZING THE NEED FOR LEGISLATION

In 1991 Congress investigated the telemarketing industry and found that telephone solicitations to sell goods and services to consumers in their home was pervasive.² Congress found that over 30,000 businesses use more than 300,000 telephone solicitors to call more than 18,000,000 Americans every day.³ These calls generated more than \$435,000,000.000 in sales in 1990, four times the sales generated in 1984.⁴ Because of the extensive growth of this industry, Congress decided to act.

Congress initially focused on consumer privacy and public safety in enacting legislation to regulate the telemarketing industry. This focus was generated by evidence that consumers were subjected to sales calls with increasing frequency.⁵ The unrestricted use of telemarketing was becoming an intrusive invasion of consumer privacy.⁶ These calls were also tying up telephone lines and presenting a risk to health and safety because the calls were interfering with important calls to intervention agencies in the case of medical or other emergencies.⁷

In 1994 Congress began to examine public policy concerns about the growing level of fraud in the telemarketing industry. Recently, a national consumer group determined that telemarketers were swindling consumers out of more than \$40 billion dollars a year.⁸ Alarming, more than half of the people on telemarketers call lists are senior citizens.⁹ Senior citizens are often on the call lists because they are a particularly vulnerable target of telemarketers based on the cultural rules of their generation that encourage them to be polite, and discourage them from saying no.¹⁰

Congress responded to these concerns by enacting broad legislation to regulate fraud in the telemarketing industry. These provisions have served as the basis for national regulation in the field, and have also supported the states' authority to

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Address abuses of their citizens. In the national legislation, Congress introduced certain key regulatory elements that provide the infrastructure to effectively regulate the telemarketing industry.

III. INTRODUCING THE CONCEPTS

The Federal Consumer Protection Act (FCPA) responded to the evidence of consumer outrage by enacting three key pillars that support the regulation of telephone solicitation. First, the FCPA legislated prohibitions on automated telephone dialing equipment that prohibited telemarketers from using such equipment to call residential telephone lines to deliver prerecorded messages unless the consumer had consented to the call.¹¹ These provisions enabled the consumer to identify sales callers and the companies they represented. Further, the restrictions on this type of equipment allowed the consumer to terminate the call to keep the telephone lines clear for other important calls.

Restrictions on the use of automatic dialing equipment prevented telemarketers from virtually holding consumer telephone lines captive. Further, the restrictions on this equipment enabled the consumer to question a live caller to determine the identity of the salesperson calling, the identify of the company they represented and to ask questions about the goods and services offered for sale. The enactment of these restrictions returned control of the telephone lines to the consumer.

Secondly, the FCPA authorized the Federal Communications Commission to enact regulations that protected the privacy rights of consumers by encouraging the establishment of a single national database of telephone numbers of residential subscribers who objected to receiving telephone solicitations.¹² The regulations enacted under the FCPA required common carriers to inform subscribers of the opportunity to list their telephone number on a national database.¹³ Unfortunately, the efforts to create a national database of telephone numbers of consumers who did not wish to receive telemarketing solicitations have not proved successful. Consumers did not widely respond to this method of creating a no-call list. However, the Act made it clear that the states were not preempted from legislating in this area as well.¹⁴

These federal provisions led to significant developments in the state regulation of this field. Not only did the federal legislation introduce the concept of a no-call list, but the legislation also introduced a method for creating a database as well. While few states adopted this method, the states did adapt the database concept to their needs. Several states have created state databases and have been very successful in publicizing the databases to consumers.

As early as 1994, Congress also enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA) to protect consumers from deceptive or abusive acts by telemarketers.¹⁵ The TCFAPA directed the Federal Trade Commission (FTC) to regulate the hours when unsolicited phone calls could be made to consumers and required telemarketers to identify themselves and the purpose of their call.¹⁶ The state authorities were given broad authority to investigate and bring private actions to protect consumers from abuses under the act.¹⁷

The provisions of TCFPA added another key element to the successful implementation of no-call provisions. These provisions complemented the restrictions on automatic dialing equipment by requiring telemarketers to orally identify themselves at the beginning of the call, to state the purpose of the call, and to describe the goods and/or services offered.¹⁸ Several states built on these identification requirements to create a registration system for telemarketers that enabled the state authorities to review and monitor the sales presentation of the telemarketer. These systems not only insured a more complete presentation that informed consumers of their rights, but also gave the state and the consumer a method for identifying telemarketers who were abusing consumer privacy and instigating consumer fraud and deception.

IV. BUILDING THE INFRASTRUCTURE

A. Automated Dialing Equipment

The states responded both to federal encouragement and consumer pressure by enacting several key provisions that served as infrastructure for the implementation of no-call lists. The first of these provisions was the regulation of automatic dialing equipment. As an illustrative example, the state of Arizona makes it an unlawful practice to make a telephone call to any residential telephone using an artificial or prerecorded voice to deliver a message unless the call is for emergency purposes or the party called consented to the call.¹⁹ Further, the use of automatic terminal equipment that generates random or sequential numbers is prohibited unless it excludes calls to emergency numbers, guest rooms of health care facilities, paging services or telephone numbers on a no-call list.²⁰

States have chosen to prohibit automatic dialing equipment and prerecorded messages to insure that telephone lines are free when the party receiving the call terminates the call. Further, restrictions on these devices give the consumer an opportunity to determine the identity of the caller and ask questions about the product or service offered for sale. Those states that have enacted no-call lists and an automatic dialing equipment are noted on Table 1 of this paper.

Restrictions on the use of automatic dialing equipment are needed if no-call lists are going to be successful. No-call lists statutes permit consumers, who are on a no-call list, to complain to a public agency when the consumer has received a call from a telemarketer. If the telemarketer is required to make live calls to the consumer, the consumer can more readily ascertain the identity of a telephone solicitor. This information will be necessary in order to process complaints and file suits to enforce the no-call provisions.

B. Licensure or Registration of Salespersons

A second key provision that supports telemarketing legislation is the registration or licensing of telemarketers. As an illustrative example, the State of Florida requires a commercial telephone seller to obtain a license before doing business in the state.²¹ The licensure requirements include the submission of an application that contains important identifying information such as name, date of birth, social security number, home address of the applicant, and the name of each business and occupation the applicant has engaged in during the past three years.²² The application asks for the information about previous arrests, convictions, and indictments for felonies, any civil or criminal offense involving fraud, and any offense involving failure to secure a license as a salesperson.²³ Similar information about companies that have employed the applicant, salespersons the applicant has employed, and any parent or affiliated entity is required.

Florida sets a stiff fee of \$1,500 for the occupational license.²⁴ As further insurance of compliance, a copy of the salesperson's presentation or script, a bond, a letter of credit, or certificate of deposit is required.²⁵ The statute makes it unlawful to employ an unlicensed salesperson, to fail to maintain a license, and to advertise falsely that the seller is licensed. These provisions are enforced by criminal remedies or stiff civil penalties. In civil actions brought by the consumer, attorney's fees and costs are authorized elements of recovery.²⁶ Those states that have enacted no-call lists and registration or licensure requirements for telephone solicitors are noted on Table 1 of this paper.

These provisions support no-call lists by creating a tracking mechanism. If telemarketers violate the list by calling consumers who are registered on the list, the violators can be tracked and enforcement action can be taken. In the event, the salesperson is not registered or licensed in the state, these statutes establish the mechanisms, and set the penalties for violating licensing requirements.

C. Other Key Disclosures

Appropriate disclosure requirements are needed supports for no-call legislation. In the Florida Telemarketing Act, the telemarketer must identify herself or himself within the first 30 seconds of the call and identify the company he represents.²⁷ Further, the state, like many others, treats telephone solicitation like in home sales and requires the salesperson to inform the consumer about his/her cancellation rights.²⁸ The state insists that these disclosures be made in a "clear and intelligible manner."²⁹

Disclosure requirements enable the consumer and the state authorities to enforce the provisions of a no-call list. The requirements allow the consumer to determine the identify of the salesperson who is calling and to determine whether to proceed with the call. If the consumer is on a no-call list and the call is being made in violation of the terms of the list, the disclosure requirements provide the information needed to file a complaint with the state authorities. The disclosure requirements also enable the state authorities to enforce their registration requirements if the salesperson calling has not complied with these requirements. Further, the creation or extension of cancellation rights are essential if the consumer is going to be protected from fraud and deceptive trade practices.

D. The Requirement of a Written Contract

Telemarketers who closed contracts over the phone often defrauded consumers. These telemarketers were able to persuade the consumers to consent to the purchase of the advertised goods or services over the phone without adequate information and time to consider the purchase. In order to prevent this kind of fraud, states have enacted statutes that render oral contracts negotiated over the telephone invalid. For example, the Florida statutes provide that oral contracts concluded over the telephone are not valid. Contracts must be reduced to writing and signed by the purchaser to be valid.³⁰ Further, the contract must match the essential terms of the telephone transaction, and give the name, contact information, and license number of the seller.³¹ Refunds are available to the consumer on a timely basis if the terms of the contract are not followed and the telemarketer is required to give consumers notice of these provisions.³² Those states that have enacted no-call lists and required written contracts to close sales initiated by telephone solicitation are noted in Table 1 of this paper.

These provisions governing the validity of oral contracts solicited by telephone are key to the enforcement of no-call lists. These statutes insure that such contracts are not valid and protect consumers who have been subjected to deceptive sales practices. Without these statutes, the state could not effectively interfere in the transactions between the telemarketer and the consumer who has indicated his/her desire for face-to-face transactions in lieu of telephonic sales solicitation.

IV. KEY ELEMENTS OF NO-CALL LISTS STATUTES

Seventeen states (no-call lists have been proposed in six others) have enacted statutes creating a state database of residents who wished to have their telephone number placed on a no-call list that prohibits telemarketers from making telephonic solicitations to that number. Table 1 lists the states with no-call lists and summarizes their key provisions. The statutes contain a variety of provisions, but certain provisions are generally common and are denoted on the table.

**Table 1
State No-Call Lists**

State	Agency	Key Exemptions (1) Charitable (2) Regulated Industries (3) Previous Purchasers	Penalties (1) Civil (2) Criminal	Infrastructure (1) Registration (2) Auto Dial Restrictors (3) Written Contract Required	Cite
Alabama	Public Service Commission		(1) \$2,000 each	(1), (2), (3)	Code of Ala. § 8-19C-1 (2001)
Alaska 1996	Local Tele-Communications A.G. to enforce	(1), (2), (3)	(1) Injunction and actual damages Treble damages	(2)	AS § 45.50.475
California (Proposed) Jan 2003		(3) Small business less than 5 employees if makes own calls within 50 miles radius collection of a debt	(1) \$500 - 1 st violation \$1,000 - subsequent violations	(1)	C.S.A. § 17592 (2001)
Colorado 2001	Public Service Commission	(1) Public agencies	6-1-110	(1)	C.R.S. § 6-1-902 (2001)
Connecticut 2001	Commissioner Consumer Protection		(1)	(3)	C.G.S.A. § 42-288a (2002)
Florida 2001	Department of Agriculture and Consumer Services	(1), (2)	(1) \$10,000 per violation	(1), (2), (3)	Fla. Stat. § 501.059(2001)
Georgia 1999	Public Service Commission	(1)	(1) \$2,000 per violation	(2)	O.C.G.A. § 46-5-27(2001)
Idaho 2001	Attorney General	(1), (2), (3) businesses	(1) \$500 - 1 st violation \$2,500 -2 nd violation \$5,000-3 rd violation	(1), (3)	Idaho Code § 48-1003A (2001)
Indiana 2001	Attorney General update quarterly	(1), (2)	(1)\$10,000- 1 st violation \$25,000- 2 nd violation		I.C. 24-4.7-1-1 (2001)
Kansas 2001	Telephone Reference Service	(1)	(1) Additional \$10,000 fine for elder or disabled victims	(2), (3)	K.S.A. § 50-675a (2001)
Kentucky Proposed 2001	Attorney General	(1), (2), (3)	(1), \$5000 (2) Class B – 1 st violation Class A – 2 nd	(1), (2), (3)	K.R.S. § 367.46955 (2001) 2002 Ky. HB 47
Louisiana 2002	Public Service Commission Quarterly	(1), (3)	(1) \$1,500 each \$3,000 each victim over 65		LSA-RS § 844.14 (2002)
Maine 2001	Telephone Preference		\$500 per violation Trebles for willful	(2)	M.R.S.A. § 32-14716

	Service of Direct Marketing Association, Inc. Attorney General				(2001)
Minnesota 2002	Department of Commerce		\$1,000 per violation	(2)	Minn. Stat. § 325E.311 (2001)
Missouri Proposed 2001	Attorney General Quarterly		(1) \$5,000 maximum per violation		§407.1098 R.S.Mo. (2001) 2000 Mo.S.B. 763
New York 2001	Consumer Protection Board	(1), (2), (3)	(1) \$2,000 per violation	(1), (2)	NY CLS Gen Bus §399- z (2002)
Oregon Proposed 2001	Public Utility Commission	(1) (3)		(1)	ORS § 646.572 (2001) 2001 Ore. Laws 120
Pennsylvania Proposed 2002	Bureau of Consumer Protection Attorney General	(1), (3)	(1) Fine Treble damages	(1)	2002 Pa. Laws 241
Tennessee 2001	Division of Consumer Affairs		(1) \$1,000 per violation	(2)	Tenn. Code Ann. § 47-18-1526 (2001)
Texas Proposed 2002	A.G.	Isolated Occurrence	(1) \$1,000 each violation	(1), (2), (3)	Tex.Bus. & Com. Code § 43.102(2002)
Washington 2002	Utilities of Transportation Commission	(1), (2), (3) Isolated transaction less than 60% of sales using telephone solicitation Funeral services	(2) If damages are less then \$50 – misdemeanor More than \$50 – gross misdemeanor \$250 – C Felony	(1), (3)	ARCW § 19.158.110 (2002)
Wisconsin 2001	Attorney General	(3)	(1) \$100 each	(1), (2)	Wis. Stat. § 100.52 (2001)
Wyoming 2001	Attorney General National do-not-call list, Telephone Preference Service of the Direct Marketing Association		\$500 - 1 st violation \$2,500 - 2 nd violation \$5,000 -3 rd violation	(1), (2)	Wyo. Stat. § 40-12-301 (2001)

A. A Designated Agency to Maintain the Database and Enforce its Terms

Generally states have chosen the Attorney General’s Office to maintain the list and to enforce its provisions. Table 1 designates the states that have made this choice. This choice is motivated by the fact that the Consumer Protection Divisions, as also noted on Table 1, are often located in the Attorney General’s Office. The choice of this office as the administrator of the list and as the enforcer of its provisions is logical for two reasons. First, this office has had previous experience in dealing with consumer complaints. Second, this office generally has the constitutional authority to act as the state’s attorney and bring suits on behalf of the State and its citizens.

Some states have made another choice based on the lead of Congress in the FCPA.³³ Maine has chosen the entity that the FCC as designated in its regulations as the administrator of a national list as its administrator.³⁴ Other states have chosen the Public Service Commission or the local telecommunications company to maintain and notify consumers that their telephone numbers can be placed on the list. Telecommunication carriers are in the business of maintaining phone books, so this choice offers the advantage of utilizing current technology and business experience to build and maintain the no-call list, which is essentially a small telephone directory. Because the Public Service Commission regulates the telecommunications industry in most states, this public office is a logical choice for the administrator. In its administrative position, the Public Service Commission can also draw on its relationships with telecommunications companies to assign or assist the agency in the creation and maintenance of the list.

Several states have indicated that the office chosen as the administrator of the list is authorized to contract with a private business to create and maintain the list. Wyoming and Maine have even designated a private agency, the Telephone Preference Service of the Direct Marketing Association Inc., Farmingdale, New York or its successor, as the administrator of the list.³⁵ Both states have, however, chosen the Attorney General to enforce the no-call provisions of the list.³⁶ In cases where the states have designated a private agency as the administrator of the list, the Attorney General or one of its Divisions have been authorized to bring suit for violations of the terms of the no-call statutes. See, for example, the provisions of the state of Alaska that designate a local telecommunications company as the administrator of the list, but the Attorney General as the statute's enforcing authority.³⁷

While many states permit consumers, who are injured when telemarketers violate the terms of the no-call statutes, to bring private suits, the designation of a public agency as the enforcing authority is a necessary component of no-call list statutes to insure compliance with the terms of the statute. As previously discussed, the no-call list statutes are generally part of a regulatory scheme that includes restrictions on the use of automatic dialing equipment and requires registration of telemarketers doing business in the state. Public agencies have been given the authority to investigate consumer complaints about these and other deceptive trade practices statutes in their state. Further, public agencies have the authority to bring suits on behalf of the citizens of the state to stop deceptive practices and recover moneys wrongfully received as a result of fraud or deception.

In order to provide the best access to consumers, states must provide a means for updating the list to allow new subscribers to add their numbers to the no-call lists. The most efficient states permit quarterly updates. See, for example, the state of Indiana, where a new list is published in the months of April, July October and January.³⁸ Louisiana and Missouri, as indicated in Table 1, also permit their no-call list to be updated every quarter. Pennsylvania is proposing quarterly updates and Maine provides for a semiannual update. The remainder of the states listed in Table 1 permits updates to the list on an annual basis or as permitted by the agency contracted to administer the list.

B. Key Exemptions from No-Call Provisions

Unless otherwise specified in the statutes all persons and companies that utilize employees or volunteers to sell goods or services or solicit donations over the phone are subject to the no-call provisions. This means that businesses or other organizations that utilize telemarketers must have access to the no-call list so they do not make calls to the telephone numbers on the list. Most states sell the list for a fee to telemarketers. For example, Indiana sells the quarterly updated list for \$300 per year.³⁹

States have exempted a variety of businesses, organizations, industries and transactions from their no-call provisions. However, there are common groups or transactions that are generally designated as exempt. The most common exemptions, as noted on Table 1, include telemarketing campaigns by charitable or tax exempt organizations. These organizations continue to be allowed to make telephone requests for donations without regard to the numbers on the no-call lists. However, Indiana exempts these campaigns only if the charitable organization uses its own volunteers or employees to make the calls.⁴⁰ If the charitable organization employs a telemarketing agency to handle donor campaigns, the telemarketing agency would have to honor the numbers on the no-call list.

Public agencies are often exempted from the list. This exemption is often coupled with restrictions on activities that involve public interest campaigns or surveys that solicit the expression of ideas, opinions, or votes. Solicitations of donations from volunteers for public agencies are also included as exempt activities.⁴¹ These provisions have been inserted to insure that the freedom of speech and expression of citizens are protected.

Some states exempt some businesses from the no-call list provisions. Businesses that conduct less than a certain percentage of their business by telemarketing do not have to honor the no-call provisions in these states. For example, the state of Washington exempts businesses if less than 60% of their sales in the previous year were made by telephone solicitation.⁴² Idaho uses the same percentage,⁴³ but Arkansas has raised the percentage to 75%.⁴⁴ The state of California protects small businesses by exempting them if they have less than five (5) employees, they make their own calls, and these calls are made within a fifty-mile (50) radius of the business location.⁴⁵

Most states also exempt regulated agencies from the no-call provisions. States choose several different industries but typical choices include calls from financial institutions, insurance companies, the securities industry, real estate agencies, and calls to sell prepaid or prearranged funeral plans. The telecommunications industry, including newspapers subscriptions,

magazine subscriptions, cable television subscriptions, are exempted by some states. States exclude these agencies because they are regulated by other public agencies in the state that can monitor and investigate complaints of deceptive sales practices.

Some states exempt certain transactions from the no-call provisions. These exemptions are even more varied in scope. Some of these provisions exempt on-going transactions. One of the most common of these exemptions is the provision that telemarketers may call consumers who have previously purchased good and services from the business. See, for example, the provisions of the State of New York that exempt transactions between telemarketers and their previous customers unless that customer has told the telemarketer that the customer does not wish to receive sales calls any longer.⁴⁶ Some states exempt telemarketing calls from business to business.⁴⁷ Other states broaden this provision to exempt calls if the parties have had a business relationship. For example, the state of Tennessee, exempts calls made to any person with whom the caller has a previous or exiting business relationship.⁴⁸

Other exempt transactions include single or infrequent events. Some states include isolated telemarketing calls. Texas, for example, exempts calls that are made as an isolated transaction and not as a part of pattern of repeated calls.⁴⁹ Other states exempt calls made to collect a debt or to enforce a contract. Indiana, for example, exempts telephone calls about an existing debt or contract where payment or performance has not been completed at the time of the call.⁵⁰

Another transaction exemption prohibits telemarketers from closing the sale over the telephone. For example, Texas provisions do not apply to a person soliciting sales who either does not close the sale during the telephone transaction or who arranges for the sales presentation to be made at a later face-to-face transaction.⁵¹ These provisions are based on belief that the consumer will make a clearer decision about sales solicited in his home if he/she has time to think about the sales transaction before it is closed.

C. Penalties for the Violation of No-Call Provisions

States employ both civil and criminal penalties to enforce the terms of their no-call lists. There is tremendous variation in the penalty provisions both in the severity of the civil fines and the omission or inclusion of criminal penalties. In the area of civil penalties, the provisions differ depending on whether the suit is brought by private parties or by the Attorney General of the state to protect all the citizens. The civil penalties described in Table 1 generally include only the remedies available in suits brought by the Attorney General. These remedies generally include an injunction, attorney's fees, costs, and damages. In addition, the states have set civil fines for each violation. In the classification of their civil remedies, states can be grouped into three categories.

States in the first category have created one fine for each violation to punish telemarketers that call numbers on the no-call list. Most of these fines are relatively low and do not increase with subsequent violations. Wisconsin has set the lowest civil fine at \$100 per violation,⁵² Maine has set \$500 per violation,⁵³ and Texas has set a maximum fine up to \$1,000 per violation, except in the case of a willing or knowing violation when the fine is increased to up to \$3,000.⁵⁴ New York, Alabama, and Georgia have set high single fines with \$2,000 per violation.⁵⁵ Missouri enacted the highest single fine with a maximum fine of up to \$5,000 for each violation.⁵⁶

Variations on the single fine provisions include differentials for certain types of victims and treble damages up to certain amounts. Louisiana has set a single fine of \$1,500 per violation, but has increased the fine to \$3,000 per violation if the victim is over 65 years of age.⁵⁷ Kansas adds a civil fine up to \$10,000 if the victim is elderly or disabled.⁵⁸ Alaska provides for the recovery of three times actual damages up to \$500 whichever is greater for each violation in private suits.⁵⁹

States in the second category have set civil fines in increasing amounts based on the number of the violations. Idaho, and Wyoming have set \$500 for the first violation, \$2,500 for the second violation and \$5,000 for the third and subsequent violations.⁶⁰ The increasingly amount of the fine for subsequent violations sends a stronger message to repeated violators.

The final group of states have legislated significant civil fines of \$10,000 for the first violation. These states include Florida and Indiana, which has added a \$25,000 civil fine for the second violation.⁶¹ Indiana does not provide an exemption for small businesses, but does allow them to verify a small number of telephone numbers on the database without purchasing the list for \$300. These fines are so substantial, they have generated complaints by small businesses and they have already generated litigation.

Two states have legislated criminal penalties for the violation of no-call list statutes. Kentucky has legislated that the violation of their no-call list is a misdemeanor.⁶² When coupled with the single incident violation fine of up to \$1,000, Kentucky has created a formidable enforcement scheme for securing compliance with its no-call statutes. Washington provides that the offense is a misdemeanor if the damages are less than \$50; a gross misdemeanor is the damages are more than \$50; and a class C felony is the damages are \$250 or more.⁶³

V. LEGISLATIVE APPROACHS IN BUILDING THE PROVISIONS

The states have chosen three primary means of building statutory schemes for no-call lists. These three methods include stand-alone no-call statutes, no-call statutes integrated into registration or licensure provisions, and no-call statutes integrated into home solicitation sales or other consumer protection statutes.

Some states have simply created a stand-alone no-call list statute(s). These statutes may be included in or follow the telemarketing acts, but generally the provisions are contained within stand-alone legislation. Within this statute or series of statutes, the states have included (1) provisions designating the agency to administer the list and enforce its provisions; (2) provisions defining the telemarketing transaction that are covered in the statute; (3) a list of those transactions or parties who are exempted from its provisions; and (4) the penalties and remedies provided to enforce the terms of the no-call provisions. A clear majority of the states has chosen this method of legislation. States with stand alone no-call list statutes include all the states not listed below with alternative provisions.

The stand-alone statutes have the advantage of clarity. They are easy to find in indexes and all the provisions are written into one statute or a series of statutes that are contiguous. Some statutes, however, had made their statute(s) too brief. In doing so, the remedies, exemptions, and even coverage, may not have been clearly delineated. See for example the statute of the Maine, which is particularly brief.⁶⁴

Other states have integrated their no-call list provisions into extensive statutory schemes legislating the registration or licensure of telemarketers. These states have integrated the no-call list provisions by placing them within the provisions requiring telemarketers to be registered or licensed by the state. Idaho, Oregon, and Pennsylvania have used this method of drafting no-call list statutes.

This method of integration is perhaps the most efficient. The registration statutes are key elements of the identification and monitoring of telephonic sellers, but registration statutes sometimes have different penalties and exempt different persons or companies than those exempted from the no-call lists. Integrating registration with no-call restrictions creates a uniform set of penalties for violations of the provisions and a consistent list of those parties and businesses that are covered by registration and the no-call provisions.

A third method of building statutory schemes is to place no-calls lists into the provisions regulating consumer protection and deceptive trade practices. Alaska, Florida, Kansas, Tennessee, Washington, and Wyoming employ this method of building no-call list provisions. A variation on this theme is the treatment of telemarketing calls to consumers in their homes as in home solicitations. Wyoming and California have included telemarketing in the statutes defining home sales. These states tend to provide higher penalties, including criminal penalties, for the violation of the no-call list because violations are categorized as deceptive trade practices.

Whatever method the states use to write the statutes, clarity and efficiency are extremely important elements of the statutory scheme. States must provide consistency between the registration statutes and the no-call list statutes in defining coverage and exemptions. While the severity of the penalties may differ, it is important that the penalties are related because violations of the registration statutes affect the state's ability to identify no-call list offenders. Registration statutes can prevent some telemarketing fraud including violations of the list by monitoring and excluding telemarketing companies that employ deceptive methods or practices.

VI. ISSUES AND CHALLENGES TO THE LEGISLATION

Most of the state no-call lists have been enacted in the past two years. There has been little time to file litigation to test the provisions of the statutes. However, the drafters of the statutes anticipated the issues that would be raised and attempted to deal with these issues in the statutes. Most states have made an effort to balance a desire to protect consumer privacy with the commercial free speech of telemarketers. Further, most states have attempted to exclude those organizations and agencies that gather valuable data on public policy issues from coverage of the legislation.

Even so, at least one lawsuit has been filed. Steve Martin & Associates and AIMKO Association, a Kansas nonprofit company, filed suit in January 2002 challenging the Indiana no-call statute.⁶⁵ The small business plaintiffs alleged that the statute was unconstitutional because it interferes with the ability of the plaintiffs to sell Kirby vacuum cleaners.⁶⁶ Because the civil penalty in Indiana is so stiff, \$10,000 for the first violation, litigation is likely if the statute is vigorously enforced.

While an analysis of the issues that are likely to be raised in litigation over no-call list statutes is beyond the scope of this paper, it is logical to suggest an area of concern. The most likely area of concern will be the impact of the no-call provisions on the commercial free speech of telemarketers. The most likely plaintiffs in many of these cases will be small businesses, especially in those states where the civil penalties are high and the list is expensive to purchase. Even though the litigation has been minimal, data about the efficacy of these statutes and the vigor of their implementation is already available.

VII. EFFICACY OF THE STATUTES – ONE STATE'S EXPERIENCE

In Indiana, consumers have vigorously responded to the no-call list statutes by registering their telephone numbers. Between January 1, 2002 and February 23, 2002, 1 Million out of the 2.5 Million telephone numbers in Indiana have been registered on the Indiana no-call list.⁶⁷ In less than two months after citizens were given the opportunity to register their telephone number on the no-call list, 40% of the telephone numbers in Indiana had been registered. This is a phenomenal response rate indicating that the statute is certainly efficacious in encouraging consumers to register.

The Indiana Attorney General has also vigorously enforced the no-call provisions. By May 15, the Indiana Attorney General had entered into agreements with nine telemarketers for alleged violations of the state's telephone privacy list.⁶⁸ The agreements include a total of \$28,625 in penalties.⁶⁹ The Office of the Attorney General reported that it had received 2,261 complaints during the first three months of the statute's operation.⁷⁰ Of these complaints, 564 had been resolved during the first quarter of the year.⁷¹ The Indiana Attorney General, Stephen Carter, has estimated that the effect of the Indiana no-call statute has been to pre-empt more than 10 Million telemarketing calls to Indiana citizens.⁷² This data clearly indicates that the enforcement authorities in Indiana have responded to numerous alleged violations of the telephone privacy no-call list and that the list itself has had a deterrent effect on potential telemarketing abuse and invasion of consumer privacy.

VIII. CONCLUSION

One of newest legislative responses to the invasion of consumer privacy and the perpetration of consumer fraud has been the no-call list statutes. While the initial federal legislation has not been successful in creating one national database, state efforts to create a single state database of the telephone numbers of their citizens who do not wish to be called by telephone solicitors have been more successful. The consumer response in Indiana alone during the first quarter of the year indicates the depth of the consumer support for the creation of these databases.

Because the statutes have been recently enacted, they have not been generally tested in litigation yet. Certainly, concerns about the effect on these statutes on the commercial free speech of telemarketers are already being heard. Perhaps, a more potent concern is the effect severe civil fines will have on small businesses and on charitable organizations that use telemarketer to raise funds. Hopefully the states will consider these concerns and look to successful practices in sister states to effectively balance the consumer's right to privacy and the freedom from deceptive trade practices with the commercial free speech rights of telemarketers and the fair treatment expectations for small business enterprise.

Footnotes

¹ *State Do not Call Lists*, May 24, 2002, www.privacy corps.com/pages/state_donotcall.htm.

² Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, § 2 (1), 105 Stat. 2395 (codified as amended in 47 U.S.C.A. § 227). This first piece of legislation sought to regulate automated or prerecorded telephone calls that were annoying to consumers. Congress noted that the technology to filter out these calls was not universally available and decided to ban these calls unless the consumer consented to them. The Federal Communications Commission was given the authority to enact regulations to implement the act.

³ Pub. L. No. 102-243, § 2, (2) and (3).

⁴ Pub. L. No. 102-243, § 2, (4).

⁵ Pub. L. No. 102-243, § 2, (5). Congress was not insensitive to the fact that restrictions on these calls did impact the commercial freedom of speech of telemarketers and sought to establish a balance between the consumer's right to privacy and the commercial freedom of speech of businesses using telephone solicitation to make sales.

⁶ Pub. L. No. 102-243, § 2, (5).

⁷ Pub. L. No. 102-243, § 2, (6).

⁸ Pamela Yip, *Scam Artists Still Targeting Seniors*, THE TIMES, February 4, 2002, at D1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 U.S.C.A. §227 (b) 47 U.S.C.A. § 227 (b) (2002).

¹² 47 U.S.C.A. §227 (c)(3) (2002).

¹³ See 47 C.F.R. §64.1602 (2002).

¹⁴ See 47 U.S.C.A. §227 (e).

¹⁵ 15 U.S.C.A. §6101, *et. seq.* (2002).

¹⁶ 15 U.S.C.A. §6102 (a) (3). See FTC Telemarketing Sales Rule of 1995, codified at 16 C.F. R. §§ 310.3 and 310.4.

¹⁷ 15 U.S.C.A. §6103 (2002).

¹⁸ 15 U.S.C.A. §6102 (a) (3) (C). See also 16 C.F. R. §§ 310.4 (d) (1) – (4) (2002).

¹⁹ A.R.S. § 44 – 1278, B.4. (2001).

²⁰ A.R.S. § 44 – 1278, B.5. (2001).

²¹ F.S.A. §501.605.

²² F.S.A. §501.605 through §501.611 set forth the information requirements that must accompany the application for licensure.

²³ F.S.A. §501.605. This section of the statute sets forth extensive data that must be supplied by and about the salesperson, companies the salesperson has worked for, and parent or subsidiary companies of the applicant or the employer of the applicant. The statutes include both civil and criminal proceedings involving fraud or theft related offenses against the salesperson or his current or previous employer.

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- ²⁴ F.S.A. §501.605, (5) (b).
- ²⁵ F.S.A. §501.605, (2) (1) (3) requires the submission of the copy of the sales script or production of sales literature that will be used. F.S.A. §501.611 states the requirements for the production of financial security in the form of a corporate surety bond, an irrevocable letter of credit, or a certificate of deposit in a financial institution insured by the Federal Government.
- ²⁶ F.S.A. §501.623 authorizes criminal penalties and F.S.A. §501.621 permits the recovery of reasonable attorneys fees and costs.
- ²⁷ F.S.A. §501.613 governs all other disclosures that must be made by the telephone solicitor.
- ²⁸ F.S.A. §501.613, (2). Other States that treat telephone solicitation like in home sales include ---
- ²⁹ F.S.A. §501.613, (3).
- ³⁰ F.S.A. §501.615, (1). The statute provides that the contract is not final until it is reduced to writing and signed by the purchaser. Further, the written contract must match the description of the goods or service that were principally purchased in the transaction and the total price of the contract. The contract must also identify the salesperson and provide the registration number.
- ³¹ F.S.A. §501.615, (1).
- ³² F.S.A. §501.615, (1) provides for refunds within 7 days after the request is received or the goods are returned.
- ³³ 47 U.S.C.A. §227 (c)(3).
- ³⁴ 10 M.R.S. §1499 (2001).
- ³⁵ Wyo. Stat. § 40-12-301 (2001) (a) (viii); M.R.S.A. § 10-1499(2001).
- ³⁶ Wyo. Stat. § 40-12-301 (2001) (a) (v); M.R.S.A. § 10-1499(2001).
- ³⁷ AS § 45.50.475(2001). New York has created a similar arrangement by designating a local exchange telephone company as the administrator and the Consumer Protection Board as its partner to enforce the terms of the list.
- ³⁸ I.C. 24-4.7-1-1 (2001) and *Telephone Privacy*, January 14, 2002, www.IN.gov/attorneyg.telephoneprivacy/FAQs4telemarketers.htm
- ³⁹ www.IN.gov/attorneyg.telephoneprivacy/FAQs4telemarketers.htm
- ⁴⁰ I.C. 24-4.7-1-1, (3)(A)(2001).
- ⁴¹ AS § 45.50.475(g)(2001).
- ⁴² Wash. Rev. Code (ARCW)§ 19.158.020 (3)(a)(ii) (2002).
- ⁴³ I.C., §48-1003A(2001 Supplement) and I.C., §48-1005 (2001 Supplement).
- ⁴⁴ A.R.S. §44-1278 (2001).
- ⁴⁵ C.S.A. § 17592 (e) (5) (2001 Supplement).
- ⁴⁶ NY CLS Gen Bus §399-z, 1. j. (2002). Alaska exempts telemarketing calls by a person soliciting business from previous purchasers who have purchased from that salesperson or their business in the last twenty-four (24) months. AS § 45.50.475(g)(2001). The Texas provisions are very similar. *See* Tex.Bus. & Com. Code § 38.061 (2002).
- ⁴⁷ AS § 45.50.475(g)(2001).
- ⁴⁸ Tenn. Code Ann. §47-18-1526, (a) (5) (C) (2001). Florida has a similar provision codified at Fla. Stat. §501.059, (1)(c) 2. (2001).
- ⁴⁹ Tex.Bus. & Com. Code § 38.061 (2002).
- ⁵⁰ . *See* I.C. 24-4.7-1-1, (2)(2001).
- ⁵¹ Tex.Bus. & Com. Code § 38.059 (2002). Indiana has similar provisions. *See* I.C. 24-4.7-1-1, (4)(A)(2001).
- ⁵² Wis. Stat. §100.52 (2001).
- ⁵³ M.R.S.A. § 10-1499(2001).
- ⁵⁴ Tex.Bus. & Com. Code § 43.102 (2002).
- ⁵⁵ NY CLS Gen Bus §399-z, 6. a. (2002); Code of Ala. §8-19C-1(2001); O.C.G.A. § 46-5-29 (2001 Supplement).
- ⁵⁶ § 407.1107 R.S. Mo. (2001). The fines can be cumulatively added to fines for violation of the telemarketing statues at §407.1104 R.S. Mo. (2001). Kentucky has proposed a \$5,000 civil fine as well. 2002 Ky.HB 47.
- ⁵⁷ LSA-RS § 844.15 (2002).
- ⁵⁸ K.S.A. §50-677 (2001).
- ⁵⁹ AS § 45.50.531 (2001).
- ⁶⁰ Idaho Code § 48-1005A (2001); Wyo. Stat. § 40-12-304 (a) (2001).
- ⁶¹ F.S.A. §501.059 (8) (2001); I.C. 24-4.7-5-2 (2)(2001).
- ⁶² KRS. §367.46999(2001). Kentucky makes the violation of the provisions of KRS. §367.46955 (7)-(16) (2001). A Class B Misdemeanor for the first offense and a Class A Misdemeanor for the second offense.
- ⁶³ Wash. Rev. Code (ARCW) §19158.110 (2002).
- ⁶⁴ See 10 M.R.S.A. § 32-14716 (2001).
- ⁶⁵ *Telemarketing Company Files Suit Over No-Call List*, THE TIMES, p.A5, January 25, 2002.
- ⁶⁶ *Id.*
- ⁶⁷ *No-Call List Hits a Million*, THE POST-TRIBUNE, p. A11, February 23, 2002.
- ⁶⁸ *Telemarketers Enter Agreement With Office of the Attorney General*, THE CALUMETPRESS, p. 17, May 15, 2002.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*