

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20554**

IN THE MATTER OF PROPOSED	§	FTC FILE NO.
TELEMARKETING RULEMAKING	§	R 411001
PUBLISHED AT 67 FR 4492	§	

**TEXAS OFFICE OF
PUBLIC UTILITY COUNSEL COMMENTS**

The Office of Public Utility Counsel (“OPC”) makes the following comments to the proposed telemarketing sales rule (“TSR”) ¹ amendments:

**I.
General Statement**

OPC is a state agency established by the Texas Legislature to represent the interests of residential and small commercial consumers of telephone service. OPC supports the proposed rule amendments. As telephone subscribers, consumers want the right to be left alone in their homes. Unwanted calls are an invasion of that right. The rules further that public interest in protecting subscribers’ privacy and come within the spirit of the law passed by the Congress.² OPC particularly supports the Do Not Call (“DNC”) rule that would set up a national registry for consumers to utilize when they do not want their privacy invaded by unwanted telemarketing calls. Most of OPC’s comments will be responding to the questions posed by the Federal Trade Commission’s (“FTC”) in its notice of proposed rulemaking. The comments set out in paragraph II will be arranged by the questions the FTC asked in its notice. In paragraph III, OPC will be making an additional comment relating to predictive dialers.

**II.
Comments To FTC Questions**

A. Do Not Call Rule

1. (5.e) Is the restriction on selling, purchasing or using the “do-not-call” registry for any purposes except compliance with the §§ 310.4 (b)(1)(iii) adequate to protect consumers? Will this provision create burdens on industry that are difficult to anticipate or quantify? What restrictions, if any, should be placed on a person’s ability to use or sell a “do-not-call” database to other persons who may use it other than for the purposes of complying with the Rule?

¹ Proposed amendments to 16 CFR Part 310, published at 67 FR 4492-444545.

² 15 U.S.C.A. Sec. 6101-6108(West 1998), as amended by the USA Patriot Act of 2001, Pub. L. 107-56 (Oct. 25, 2001).

Restricting the selling, purchasing or using the DNC registry for any purpose except for compliance with the rule should be sufficient if a confidentiality agreement is entered into between the telemarketer and the FTC. The confidentiality agreement should clearly establish the restriction and provide that violation of the confidentiality agreement would be a violation of the rule. The confidentiality agreement should also include the consumers as third-party beneficiaries. This would ensure consumers would be able to bring private causes of action for violation of the confidentiality agreement. The agreement should be a form contract that is posted on the FTC website and available for public distribution.

This DNC national registry should not create burdens on the industry. At the January 11, 2000 FTC public forum, Mr. Sherman representing the Direct Marketing Association stated, “I was told that running—running a prospect list across a do-not-call list is not a burdensome expense.”³ The use of computer software programs, once created, would cost little to maintain.

No one but the FTC, or its authorized agent, and other public agencies should have access to the national registry. Interagency agreements should be entered into with any public agency involving the transfer of data from the national registry. The agreement should spell out that the information is confidential and that can only be used in aggregate form in any reports or studies performed by or on behalf of the agency. The FTC should also allow use of the national registry for enforcement actions.

2. (5.d) How long should a telephone number remain on the central “do-not-call” registry? Should telephone numbers that have been included on the registry be deleted once they become reassigned to new consumers? Is it feasible for the Commission to accomplish this? If so, how? If not, should there be a “safe harbor” provision for telemarketers who call these reassigned numbers?

A telephone number should remain on the central DNC registry for five years. The consumer should also pay no fee to be placed on the registry. Excluding reassigned numbers from the DNC registry may not be administratively feasible for the FTC. A five-year period is a reasonable time period for the telemarketer to be banned from calling the subscriber. A reassigned number will be on the registry for less than five years.

3. (5.e) Who should be permitted to request that a telephone number be placed on the “do-not-call” registry? Should permission be limited to the line subscriber or should requests from the line subscriber’s spouse be permitted? Should third parties be permitted to collect and forward requests to be put on the ‘do-not call’ registry? What procedures, if any, would be appropriate or necessary to verify in these situations that the line subscriber intends to be included on the “do-not-call” registry?

Only the subscriber, his/her spouse, or his/her guardian should be permitted to request that a telephone number be placed on the DNC registry. Guardians should be included within those allowed to place a subscriber’s number on the DNC registry. Subscribers who are in need of a

³ Telemarketing Sales Rule “Do-Not-Call” Forum Matter No. P994414 (FTC January 11, 2000), Pp. 96.

guardian have been determined not able to make informed decisions. Allowing the guardian to place the subscriber's number in the DNC registry will insure the best interest of the ward is met.

Third parties should not be allowed to collect and forward requests of subscribers to be placed on the DNC registry. This could lead to abuses where subscribers would be charged for that service. Public interest groups could handout preaddressed postcards to the public that the subscriber could fill out and send to the FTC. Moreover, the FTC raises a good point in its question of verification of a subscriber's request to be placed on the DNC registry forwarded by a third party. It would seem that a subscriber's signature would have to be on the third-party, forwarded request. A signed postcard seems to be the most efficient means for third parties to assist the subscriber.

4. (5.g) Should consumers be able to verify that their numbers have been placed on the "do-not-call" registry? If so, what form should that verification take?

The FTC should notify consumers in writing that the FTC has received the consumer's request and that his/her number will be placed in the national registry. In that notification, the FTC should also inform the consumer of the approximate time it will take for the consumer's request to be activated as to the telemarketers. The notice should additionally include a FTC number for the consumer to contact should he/she continue to receive unwanted telemarket calls. The notice could be done by postcard or by e-mail.

5. (5.h) Should the "do-not-call" registry allow consumers to specify the days or time of day that they are willing to accept telemarketing calls? What are the costs and benefits of allowing such selective opt-out/opt-in?

Consumers should be given the option of specifying the days or time of day they are willing to accept telemarketing if feasibly possible. Calls around a family's dinnertime are particularly bothersome. Consumers should be able to choose to be contacted, but not at the family's dinnertime.

6. (5.i) Should the "do-not-call" registry be structured so that requests not to receive telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions.

There should only be one national DNC registry for both the telemarketer's sale of goods and services and the telemarketer's solicitation of charitable contributions. If the FTC determines that two registries should be developed, then the subscriber should be notified that the charities are not tax exempt when asked whether the subscriber wants to be on the DNC registry involving charitable solicitations.

7. (6) What should be the interplay between the national "do-not-call" registry and centralized state "do-not-call" requirements? Would state requirements still be needed to reach intrastate telemarketing? Would the state requirements be pre-empted only to the extent that the national "do-not-call" registry would provide more protection to

consumers? Will the nation do-not-call registry have greater reach than state requirements with numerous exceptions?

The FTC should pre-empt state DNC requirements to the extent they are less extensive in their consumer protections. States should be allowed to provide greater protections to their citizens. OPC views the protections provided the consumer in the DNC rule to be the minimal level of consumer protection against unwanted invasions of their privacy.

B. Outbound Telephone Calls

1. (7.b) Should calls made by a customer directly to a telemarketer be treated differently from calls transferred to a telemarketer by another person? If so, what differences in treatment by the Rule are appropriate? If not, why not?

Calls made by a customer directly to a telemarketer should not be treated differently from calls transferred to a telemarketer by another person. Consumers should be provided the same information required for the outbound telephone call by a telemarketer who has made unsolicited contact with the consumer. That information and the attendant requirements may be even more necessary for a consumer who contacted the referring telemarketer. The consumer may place undue trust on the contacted telemarketer. She/he may assume the telemarketer she/he is transferred to is associated with the contacted telemarketer.

C. Deceptive Telemarketing Acts or Practices

1. (2) Under the Rule, if a seller will bill charges to a consumer's account at the end of a free trial period unless the consumer takes affirmative action to prevent that charge, that fact must be disclosed as a material restriction, limitation, or condition under Sec. 310.3(a)(1)(ii). Does this provision adequately protect consumers against unanticipated and unauthorized charges associated with free trial offers? If not, what additional protections are needed? What benefits does this provision provide to consumers, sellers or telemarketers? What costs does this requirement impose on affected businesses?

OPC would rather see the “no action means consent to purchase” involving free trial offers of goods or services be prohibited. While the FTC has provided for telemarketer disclosure that the seller of the marketed services or goods does not allow refunds, the FTC has not provided for telemarketer disclosure of a consumer's right to cancel and receive a refund. The telemarketer restriction in the proposed rule, as amended by OPC's recommendation, should not be costly. Any costs are far outweighed by providing the consumer this important information. In a competitive market the most important consumer tool is knowledge in order to make informed consumer choices. The required information is essential for the consumer to make an informed decision as to the risks of his/her purchase decision, including any conditions or restrictions to the refund.

D. Use of Prisoners as Telemarketers

1. (13.b) Are there alternatives to banning prison-based telemarketing that would provide adequate protection to the public against misuse of personal information and abusive telemarketing by prisoner-telemarketers? For example, are any monitoring systems available that would prevent abuses by prison-based telemarketers? If so, would the cost of these systems be prohibitively high for telemarketers? Would a disclosure requirement (i.e. disclosure to the consumer that the caller is a prisoner) provide adequate protection for consumers? Would a ban provide sufficient protection?

Consumers should be protected against prison-based telemarketers. Simply disclosing to the consumer that the caller is a prisoner is not enough. Children often answer the telephone and they will not be aware of the implications that the telemarketer is a prisoner. An absolute ban is the only means to protect consumers against intrusion of their privacy by prisoners.

III Predictive Dialers

OPC is concerned about hang-ups by a telemarketer caused by the telemarketer's use of predictive dialers. The FTC noted the concerns of consumers who pick up their phones only to find it was a hang-up. The hang-up caused by predictive dialers is disturbing to consumers causing them unnecessary worry.⁴ OPC is particularly concerned about the elderly and disabled who go to great physical exertion to get to the phone only to find that the caller has hung up. To avoid this harassment, OPC recommends that all predictive dialers have a recorded message for the consumer. This would alleviate consumer concerns that the hang-up may have been a family emergency.

Dated: April 15, 2002

Respectfully submitted,

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⁴ See Notice of Proposed Rulemaking, Telemarketing Sales Rule 67FR 4492, 4522-4522.