

## **Do-Not-Call Registry Fee Extension Act of 2007**

### **Federal Trade Commission Biennial Report to Congress Reporting on Fiscal Years 2012-2013**

#### **I. Report Overview**

In February of 2008, Congress passed the Do-Not-Call Registry Fee Extension Act of 2007 (“Fee Extension Act”),<sup>1</sup> requiring this biennial report on the National Do Not Call Registry (“Registry”). In compliance with the Fee Extension Act, this Report contains a summary of the current operations of the Registry, the impact on the Registry of new telecommunication technologies, and the impact of the established business relationship exception in our enforcement efforts.

The Registry currently has over 223 million active registrations. During FY 2013, 5.8 million numbers were added to the Registry. Over 27,000 sellers, telemarketers, and exempt organizations subscribed to access the Registry, and 2,875 of those entities paid fees totaling more than \$14.1 million.

#### **II. Introduction**

The Registry has been in operation since the summer of 2003.<sup>2</sup> Consumers continue to register their telephone numbers, verify registration of numbers, and submit complaints of suspected violations at a steadily high rate. The FTC continues to look for and make improvements to the system to better serve both consumers and telemarketers while maintaining the efficient management and accuracy of the Registry.

The Fee Extension Act required the FTC, in consultation with the Federal Communications Commission (“FCC”), to first report to Congress on the Registry by December 31, 2009, and biennially thereafter. Specifically, the Fee Extension Act requires that the FTC’s report provide the following information:

- 1) the number of consumers who have placed their telephone number(s) on the Registry;
- 2) the number of persons paying fees for access to the Registry and the amount of such fees;
- 3) the impact on the Registry of
  - a) the five-year re-registration requirement;
  - b) new telecommunication technology;
  - c) number portability and abandoned telephone numbers; and

- 4) the impact of the established business relationship exception on businesses and consumers.

This biennial Report provides an overview of the operation of the Registry for FY 2012 and 2013.

### **III. Operation of the National Registry**

This past year, the Registry celebrated its tenth anniversary. During its first ten years, it has successfully served consumers as they registered their numbers and submitted complaints, businesses as they accessed the Registry, and law enforcement as they investigated Registry violations. FTC staff continues to work closely with the contractor overseeing the Registry to maintain the integrity of the Registry and help ensure that consumers' preferences not to receive telemarketing calls are honored.

While consumers have always been able to register, verify, or submit complaints by telephone or online, we have also updated our services to allow consumers to perform all of these functions on their mobile devices.<sup>3</sup> Since the FTC launched this capability, 27% of consumer registrations have been submitted via mobile devices, as were 13% of verifications and 7% of consumer complaints.

Recently, the FTC also updated the consumer and telemarketer websites to enhance usability and better match users' current expectations for website navigation. While the basic functionality, which has always been designed to be user friendly and simple, was not changed, the websites were reorganized to highlight frequently-used functionality and streamline navigation.

### **IV. Number of Consumers Who Placed Their Telephone Numbers on the National Registry**

Americans continue to enthusiastically embrace the Registry. In the first four days following the launch of the Registry on June 27, 2003, more than 10 million numbers were registered. As of September 30, 2003, a total of 51,968,777 telephone numbers had been registered. With each fiscal year, the number has steadily increased. By the end of FY 2012, the number of active registrations was 217,568,135. As of September 30, 2013, the Registry had 223,429,112 active registrations.<sup>4</sup>

### **V. Number of Entities Paying Fees for Access to the National Registry**

In FY 2012, a total of 2,949 entities paid fees totaling \$13,752,299 for access to the Registry. In FY 2013, a total of 2,875 entities paid fees totaling \$14,112,366 for access to the Registry.<sup>5</sup> In addition, certain entities can access data from the Registry without having to pay a

fee. These include entities that access five or fewer area codes of data in a year, as well as exempt organizations (such as charitable organizations) that are not required to access the Registry to comply with do-not-call requirements under federal law, but voluntarily access the Registry to avoid calling consumers who do not wish to receive calls.<sup>6</sup> In FY 2012, 28,969 entities subscribed to access five or fewer area codes at no charge, and 631 entities claiming “exempt organization” status obtained free access. In FY 2013, 27,626 entities subscribed to access five or fewer area codes at no charge, and 598 entities claiming “exempt organization” status obtained free access.

## **VI. Impact on the National Registry of the Five-Year Re-Registration Requirement, New Telecommunications Technology, and Number Portability and Abandoned Telephone Numbers**

In accordance with the Fee Extension Act, the following sections of this Report outline the impact on the Registry of the five-year re-registration requirement, new telecommunications technology, and number portability and abandoned telephone numbers.

### **Five-Year Re-Registration Requirement**

When the Registry was first implemented in 2003, registrations were scheduled to expire after five years. Out of concern that the expiration of numbers on the Registry would be detrimental to consumers, the FTC, in the fall of 2007, pledged not to drop any numbers from the Registry, pending final Congressional action.<sup>7</sup> The following February, Congress passed the Do Not Call Improvement Act of 2007 (“DNCIA”), eliminating the automatic removal of numbers from the Registry.<sup>8</sup>

After Congress eliminated the five-year re-registration requirement, the FTC implemented new procedures for identifying numbers that should be removed from the Registry.<sup>9</sup> Those procedures involve our contractor, who operates the Registry, in collaboration with its subcontractor, conducting a monthly review of the numbers on the Registry. They compare it to industry directory assistance information to confirm which numbers have been disconnected and reassigned. This information is used to determine what numbers should be included in a monthly purge of the Registry.

The FTC continues to believe that eliminating the re-registration requirement has not decreased the accuracy of the Registry, but that it has enabled consumers to maintain their right to privacy without interruption and made it possible to avoid the cost associated with educating consumers about the need to re-register. At the time the DNCIA was enacted in February 2008, no registrations had yet expired, because the first registrations were made in late June 2003, less than five years earlier. Consequently, no consumers ever had to re-register their numbers.

## **New Telecommunications Technology**

The FTC also continues to track how technology affects the Registry and the consumers and telemarketers who rely on it. A variety of new technologies has increased the number of illegal telemarketing calls made to telephone numbers on the Registry. For example, VoIP technology allows callers, including law-breakers, to make higher volumes of calls inexpensively from anywhere in the world. New technologies also allow illegal telemarketers to fake the caller ID information that accompanies their calls, which allows them to conceal their identity from consumers and law enforcement. Further, many telemarketers use automated dialing technology to make calls that deliver prerecorded messages (commonly referred to as “robocalls”), which allow violators to make very high volumes of illegal calls without significant expense. The net effect of these new technologies is that individuals and companies who do not care about complying with the Registry or other telemarketing laws are able to make more illegal telemarketing calls cheaply and in a manner that makes it difficult for the FTC and other law enforcement agencies to find them. As a result, consumer complaints about illegal calls – especially robocalls – have increased significantly in the last three years. In the fourth quarter of 2009, the FTC received approximately 63,000 complaints about illegal robocalls each month. That number ballooned in three years, to an average of approximately 200,000 complaints per month in the fourth quarter of 2012.

To combat the proliferation of illegal calls due to new technologies, FTC staff has aggressively sought new strategies to tackle the problem of unlawful robocalls by engaging in ongoing discussions with academic experts, telecommunications carriers, industry coordinating bodies, technology and security companies, consumers, and our counterparts at federal, state, and international government bodies. To that end, on October 18, 2012, the Commission hosted a public summit on robocalls to explore these issues (the “Robocall Summit”). In addition, the Commission recognized the need to spur the marketplace to develop technical solutions to combat the new technologies being abused by telemarketers placing illegal calls. Thus, at the conclusion of the Robocall Summit, the FTC announced its first public contest, a “Robocall Challenge” hosted on the challenge.gov platform, with a \$50,000 prize for the individual or small team that could propose a technological solution to help consumers block robocalls on their landlines and mobile phones. The Commission also offered a separate non-cash award for the best solution by an organization with ten or more employees.

The primary goal of the Robocall Challenge was to encourage development of realistic ideas for decreasing the prevalence of robocalls, including illegal telemarketing and legal robocalls a consumer may not want, in a way that the FTC’s traditional law enforcement efforts could not achieve alone. The FTC received an astounding 798 eligible submissions, many of which were extremely well-considered technical proposals. On April 2, 2013, the agency

announced three winning solutions, all of which contained promising ideas about how to use technology to block illegal telemarketing calls from ever ringing consumers' phones. As the winning contestants and others further develop their ideas for introduction into the marketplace, we expect positive results for American consumers.

### **Number Portability and Abandoned Telephone Numbers**

According to FCC regulations, people changing service providers in the same geographic area are able to retain their phone number.<sup>10</sup> As the FTC developed procedures to be used by our subcontractor for identifying numbers to remove from the Registry, we had to consider the need to identify these ported numbers and differentiate them from abandoned or disconnected numbers. To increase the likelihood that ported numbers are not removed but abandoned numbers are, the subcontractor must first identify the numbers in the compiled disconnection and reassignment data that have been designated as new connections. A number is designated as disconnected and reassigned for purposes of removing it from the Registry only if neither the name nor the address for the new account match the name or address associated with the previous account for that number.

Consequently, the only numbers removed from the Registry are those that have been disconnected (or abandoned) and then reconnected to a different account holder at a different address. This process, which is performed monthly, ensures that numbers that have been ported are not removed, but numbers that truly have been abandoned are deleted.

### **VII. Impact of Established Business Relationship Exception on Consumers and Businesses**

The TSR and the FCC's rules contain exemptions that permit a seller or telemarketer to call a person who has listed his or her telephone numbers on the Registry if the call is to a person with whom the seller has an "established business relationship."<sup>11</sup> An established business relationship under the TSR and the FCC rules is a relationship based on (i) the consumer's purchase, rental, or lease of the seller's goods or services, or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call; or (ii) a consumer's inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of a telemarketing call.<sup>12</sup> This exception allows sellers and their telemarketers to call customers who have recently made purchases or made payments, and to return calls to prospective customers who have made inquiries, even if their telephone numbers are on the Registry.

Many businesses rely on this exemption to conduct telemarketing campaigns directed at recent or long-time customers, or consumers who have expressed an interest in becoming customers. Many consumers, however, perceive telemarketing calls that fall within this exemption to be inconsistent with the Registry because the consumers are unaware of the exception or are not aware that they have a relationship with the seller that falls within the definition of an established business relationship.

Such perceptions by consumers are especially likely when the relationship between the consumer and the seller arises from a brief, one-time transaction, or when the seller identified in the telemarketing call and the seller with whom the consumer has a relationship are part of the same legal entity, but are perceived by consumers to be different because they use different names or are marketing different products. Both the FTC and the FCC have stated that the issue of whether calls by or on behalf of sellers who are affiliates and subsidiaries of an entity with which a consumer has an established business relationship fall within the exception depends on consumer expectations. The FTC characterizes the issue as follows: “would consumers likely be surprised by that call and find it inconsistent with having placed their telephone number on the national ‘do-not-call’ registry?”<sup>13</sup>

For both the FTC and the FCC, the factors to be considered in this analysis include whether the subsidiary’s or affiliate’s goods or services are similar to the seller’s, and whether the subsidiary’s or affiliate’s name is identical or similar to the seller’s name. The greater the similarity between the nature and type of goods or services sold by the seller and any subsidiary or affiliate and the greater the similarity in identity between the seller and any subsidiary or affiliate, the more likely it is that the call will fall within the established business relationship exemption.<sup>14</sup>

Some businesses, seeking to circumvent the Registry, have sought to exploit the established business relationship exemption by making calls to persons who have not had the requisite contact with the seller. For example, some marketers claiming a business relationship have improperly placed telemarketing calls to consumers after acquiring the consumers’ telephone numbers from others. So called “lead generators” collect information on consumer interests through web advertising, by offering coupons or samples, or simply by “cold calling” consumers in order to determine whether the consumer has any interest in a particular product or service, such as debt relief or home alarms. Lead generators responsible for these so called “call verified leads” often fail to remove numbers listed on the Registry before calling consumers. At the same time, some telemarketers and sellers have acquired leads from lead generators and used them in telemarketing campaigns without screening the numbers called to remove numbers listed on the Registry. In this way, a single sales pitch can produce multiple illegal calls, generating one or more calls from both the lead generators and the telemarketer.

Telephone calls from telemarketers to phone numbers provided by lead generators generally do not fall within the established business relationship exception because, even if the consumers have a relationship with the lead generator, they do not have an established business relationship with the seller who has purchased the leads. Unless the consumer inquired into the services of a specified seller, or the lead generator made disclosures that would alert the consumer that he or she should expect telemarketing calls from the seller as a result of his or her communications with the lead generator, the seller cannot claim that it has a relationship with the consumer such that it can ignore the consumer's request not to receive telemarketing calls. In several enforcement actions, businesses that made telephone calls to consumers on the Registry after acquiring the consumers' names from a lead generator agreed to pay civil penalties to settle charges that their calls violated the TSR.<sup>15</sup>

Other businesses have sought to circumvent the Registry by utilizing sweepstakes entry forms as a way to exploit the established business relationship exemption, arguing that the submission of a sweepstakes entry form creates an established business relationship for purposes of the TSR. The TSR, however, does not permit companies to circumvent the Registry in this manner because a sweepstakes entry form does not create an established business relationship for purposes of the TSR. Companies have agreed to pay civil penalties for making illegal calls that relied upon sweepstake entry forms as a basis for making telemarketing calls.<sup>16</sup>

## **VIII. Conclusion**

The Registry exists to provide consumers a choice whether to receive telemarketing calls. As we celebrate the Registry's tenth anniversary, it is important that the FTC ensure it remains accessible and effective for both consumers and telemarketers. We continue to work to make our website easy for consumers and telemarketers to access and navigate. As new technology has created new challenges to ensuring adherence with the telemarketing laws, we have been actively addressing and confront these challenges. As the Robocall Summit and Challenge shows, this involves encouraging private industry, other government entities, academia, and other interested parties to work towards solutions and create new strategies to tackle illegal robocalls.

We publish an Annual DNC Databook that gives a substantial amount of detail regarding registration numbers and other statistical information regarding the Registry. The 2013 Databook can be found at (url to be added). FTC staff continues to work closely with the contractor overseeing the Registry to ensure that the integrity of the Registry is maintained and that consumers' preferences not to receive telemarketing calls are honored.

## ENDNOTES

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1. Pub. L. No. 110-188, 122 Stat. 635 (2008).
2. On January 29, 2003, the FTC issued the final amendments to the Telemarketing Sales Rule (“TSR”) that, *inter alia*, established the National Do Not Call Registry. 16 C.F.R. § 310.
3. These changes have been in production approximately two years.
4. These totals exclude those telephone numbers that have been deleted by consumers or eliminated as part of the FTC’s removal process. A telephone number that was registered more than once between FY 2003 - FY 2013 is counted only once in these totals.
5. As established by the Fee Extension Act, in FY 2013, the annual fee per area code was \$59 (with the first five area codes provided at no cost) with the maximum annual fee for accessing the entire Registry being \$16,228.
6. Such “exempt” organizations include entities that engage in outbound telephone calls to consumers that do not involve the sale of goods or services, such as calls to induce charitable contributions, to raise funds for political purposes, or to conduct surveys. They also include entities who are engaged solely in calls to persons with whom they have an established business relationship or from whom they have obtained express written agreement to call, pursuant to the Amended TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) or (ii), and who do not access the Registry for any other purpose.
7. See FTC Press Release at <http://www.ftc.gov/opa/2007/10/dnctestimony.shtm>.
8. Pub. L. No. 110-187, 122 Stat. 633 (2008).
9. See FTC Do-Not-Call Improvement Act of 2007 Report to Congress: Regarding the Accuracy of the Do Not Call Registry at <http://www.ftc.gov/os/2008/11/P034305dncreport.pdf>.
10. 47 C.F.R. § 52.2.
11. 16 C.F.R. § 310.4(b)(1)(iii)(B) and § 310.2(o). The FCC’s rules similarly include an exemption for live-voice calls to consumers with whom the seller has an established business relationship. See 47 C.F.R. § 64.1200(c)(2) and § 64.1200(f)(14)(ii). These exemptions do not apply if the person has asked to be on the seller’s “entity-specific” do-not-call list by telling the seller or its representatives that he or she does not wish to receive telemarketing calls from the seller. See C.F.R. § 64.1200(f)(5)(i). The FCC eliminated the established business relationship exemption that applied to prerecorded telemarketing calls to residential lines, effective October 16, 2013. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of*

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1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1845-47, ¶¶ 35-43 (2012).

12. See *United States v. Columbia House Co.*, Civ. No. 05C-4064 (N.D. Ill. filed July 14, 2005). In this case, the company agreed to a settlement after the FTC’s analysis found that its telemarketers continued to call former customers after the 18-month period provided by the established business relationship exemption had expired.

13. 68 Fed. Reg. at 4594. See also 47 C.F.R. § 64.1200(f)(5)(ii) (under the FCC’s rules, a consumer’s “established business relationship with a particular business entity does not extend to affiliated entities unless the [consumer] would reasonably expect them to be included”).

14. See *Complying with the Telemarketing Sales Rule*, at <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>. Similarly, the FCC has stated that “affiliates fall within the established business relationship exemption only if the consumer would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14082-83, para. 117 (2003).

15. See *United States v. Central Fla. Investments, Inc.*, Civ. No. 6:09-cv-00104-PCF-GJK (M.D. Fla. filed Jan. 15, 2009); *United States v. Ameriquest Mortg. Co.*, Civ. No. 8:07-cv-01304-CJC-MLG (C.D. Cal. filed Nov. 6, 2007).

16. See *United States v. Electric Mobility Corp.*, No. 1:11-cv-2218-RMB-KMW (D.N.J. filed April 19, 2011); *United States v. All in One Vacation Club, L.L.C.*, No. 6:09-cv-103-Orl-31DAB (M.D. Fla. filed Jan. 14, 2009); *United States v. Craftmatic Indus., Inc.*, 2:07-cv-04652-LDD (E.D. Pa. filed Nov. 6, 2007).