

Telemarketing: The Development of Federal and State “Do-Not-Call” Regulations

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- I. Commercial significance of telemarketing
 - A. \$600 billion sales volume
 - B. More than 4 million employees
 - C. 100 million calls per day
- II. Successful sales method
 - A. Five-fold increase in call volume since 1991
 - B. Cost-effective direct sales
 - C. Widely used by large and small businesses (banks, long distance phone companies, stockbrokers, airlines, insurance companies, newspapers and magazines, local merchants and service providers, etc.)
 - D. Provides entry-level employment opportunities and flexible hours and working conditions for disadvantaged groups
- III. Development of regulation
 - A. Federal
 - 1. 1991 Telephone Consumer Protection Act, 47 U.S.C. 227 *et seq.* (TCPA) prohibited automatic dialing or artificial and prerecorded messages and authorized Federal Communications Commission (FCC) to develop regulations which included a requirement for company-specific “do-not-call” lists
 - 2. 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act, U.S.C. 6101 *et seq.* (TCFAPA) directed the Federal Trade Commission (FTC) to promulgate regulations which included restrictions on calling hours and also required company-specific “do-not-call” lists
 - B. Virginia
 - 1. 1970 – Virginia Home Solicitation Sales Act (Title 59.1, Chapter 2.1) covered sales by telephone (Va. Code § 59.1-21.2.1) re contract cancellation rights and other business terms
 - 2. 2001 – Virginia Telephone Privacy Protection Act (Va. Code Title 59.1, Chapter 44) adopted provisions generally consistent with the most significant federal statutory and regulatory requirements re calling time restrictions, identification of solicitor, company-specific “do-not-call” lists

3. 2004 – Amendments to 2001 Act consistent with federal “do-not-call” National Registry requirements (2004 Va. Acts, chaps. 202 and 224 to be effective July 1, 2004)

IV. Position of telemarketing industry

- A. Response to complaints about telemarketing calls at inconvenient times
 1. 1985 – the Direct Marketing Association (DMA), which includes most major telemarketers, established Telephone Preference Service (TPS). A telephone customer can place his name on the TPS list indicating that he does not want to receive telemarketing calls. The DMA requires its members to use that “do-not-call” list. In recent years several states have required telemarketers to use the TPS “do-not-call” list.
 2. Telemarketer opposition to state “do-not-call” lists
 - a. Concern re loss of sales
 - b. Alternative sales methods less effective and more expensive
 - c. Patchwork of differing state “do-not-call” lists and related regulations would make compliance virtually impossible because most telemarketing is national and/or international.
 - d. Due process questions re a state’s authority to enforce its “do-not-call” list in other states could cause enforcement to fall more heavily on in-state telemarketers to the competitive disadvantage of in-state telemarketers who employ local citizens and pay taxes in the state.
 - e. State regulation could cause telemarketers to move to another state but not reduce number of calls received in regulating state
 - f. If a “do-not-call” list is required, it should be a federal requirement applied uniformly nationwide.

V. 2003 National “Do-Not-Call” Registry List

- A. Adopted by FTC and FCC
- B. Legal challenge rejected by 10th Circuit in Mainstream Marketing Services v. FTC, (03-1429, 03-6258, 03-9571 and 03-9594, February 17, 2004)
- C. 10th Circuit’s analysis of “commercial free speech” under Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 US 557 (1980)
 1. Less protection than non-commercial free speech
 2. Three-part test
 - a. Substantial governmental interest
 - b. Direct advancement of the governmental interest

- c. Narrowly tailored not to restrict more speech than necessary
- D. Privacy – No limitation on speech except to those who have said that they do not want to receive it.