

Do Not Call: The History of Do Not Call and How Telemarketing Has Evolved

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As of September 2015, there were 222 million numbers on the National Do Not Call registry¹ and nearly 2.5 million numbers on the Indiana Do Not Call list.² Every number on a Do Not Call list represents at least one consumer who does not wish to receive telemarketing calls. With such widespread opposition to telemarketing calls, telemarketers should have gone the way of the dinosaurs by now, right?

Wrong! The Federal Trade Commission (FTC) received 3.5 million complaints about unwanted calls in fiscal year 2015.³ According to YouMail.com's Robocall Index, over 2.4 billion, yes *billion*, robocalls occurred in the month of June 2016 alone. Even if many of these calls were debt collection, scams, and other non-telemarketing calls, 2.4 billion is a lot of unwelcome calls.

Do Not Call is the number one topic on many of our constituents' minds. Each month, state attorney general representatives, along with other state, federal, and Canadian agencies hold a conference call to discuss Do Not Call enforcement lawsuits, investigations, and the latest scams. In April 2016, Missouri and Indiana co-hosted the third annual No-Call Law Enforcement Summit to keep informed of the latest cases and regulations affecting Do Not Call issues and to provide training in investigation and litigation techniques. More than 60 federal, state, and private stakeholders participated in the event, which grows each year as mass-dialing and texting become more prevalent.

Well into the second decade of the Do Not Call era, it is a good time to take a look back at where Do Not Call began, where Do Not Call is now, and why Do Not Call does not seem to be

stopping unwanted calls anymore.

History of Do Not Call

In 1991, finding that “[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers[,]” Congress amended the Communications Act of 1934 by adding the Telephone Consumer Protection Act (TCPA).⁴

Among other provisions, the TCPA authorized the Federal Communications Commission (FCC) to promulgate regulations which “may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations. . . .”⁵

In its first set of regulations following the passage of the TCPA, the FCC opted not to create a national list and, instead, mandated that “telephone solicitors maintain company-specific lists of residential subscribers who request not to receive further solicitations”⁶ The FTC included similar company-specific Do Not Call provisions in its Telemarketing Sales Rule (TSR) published in 1995.⁷

Meanwhile, states were creating their own solutions to unwanted telemarketing calls. Florida implemented the first state Do Not Call registry in 1987.⁸ Other early methods of opting out of telemarketing calls seem quaint today. In 1989, Oregon and Alaska implemented “black dot” laws requiring the telephone company to note a consumer’s telemarketing preference by literally placing a black dot next to the person’s name in the local telephone directory.⁹

In 2000, Missouri passed its No-Call Law requiring its attorney general “to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations”¹⁰

Indiana’s Telephone Solicitation of Consumers Act, popularly known as the Telephone Privacy Law, went into effect on Jan. 1, 2002.¹¹ Indiana’s version of Do Not Call is similar to that of

Missouri's, with a few significant differences. One noticeable difference is that the Indiana law imposes much harsher civil penalties. For the first violation of the Telephone Privacy Law, a telemarketer may face a penalty of up to \$10,000, and the penalty rises to a maximum of \$25,000 for each subsequent violation. Indiana's law imposes strict liability on the telephone solicitor, while Missouri's statute specifies civil penalties of up to \$5,000 for a *knowing* violation of the No-Call Law.¹² Unlike the Indiana law, the Missouri law provides criminal penalties for some telemarketing violations.¹³

By the end of 2002, 27 states had established some form of a Do Not Call list.¹⁴ As states were blazing the trail in the implementation of such laws, the federal government soon attempted to pave it. In 2002, the FCC issued a notice of Proposed Rulemaking requesting comment on, among other things, whether it should reconsider a national do not call list.¹⁵ In July 2003, the FCC issued its Report and Order establishing the National Do Not Call registry.¹⁶ By the summer of 2003, as a result of challenges to the national registry, Congress passed the Do Not Call Implementation Act, allowing the FTC to create regulations and establish fees to implement and enforce a National Do Not Call Registry.¹⁷ Following the 2003 directive of Congress, the FTC created regulations to provide for the maintenance and enforcement of the National Do Not Call registry.¹⁸

As the National Do Not Call Registry gained popularity, some states decided to forego the expense of maintaining their own lists. Today, only 12 states have their own Do Not Call lists: Colorado, Florida, Indiana, Louisiana, Massachusetts, Mississippi, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas, and Wyoming.¹⁹

Thirty-one states have officially adopted the National Do Not Call Registry as their Do Not Call list: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio,

Oregon, South Dakota, Utah, Vermont, Virginia, and Wisconsin.²⁰

Seven states (Delaware, Iowa, Nebraska, Rhode Island, South Carolina, Washington, West Virginia) and the District of Columbia do not maintain their own lists and have not officially adopted the FTC list.²¹

Challenges

As popular as the new Do Not Call laws were with consumers, they engendered vehement opposition from those who desired unfettered access to consumers via their telephones.

Opponents filed state and federal lawsuits, as well as petitions to the FCC, challenging everything from the FTC's statutory authority to the constitutionality of charitable solicitations. They almost always failed.

These early challenges underscored both the controversy behind implementation of the restrictions placed on telemarketers and the general conflict between telemarketers and consumers. Perhaps the most dramatic challenges came in 2003 regarding the creation of the national Do Not Call registry. Two decisions at the federal district level struck an early blow against the national Do Not Call registry for different reasons. This two-pronged assault on the national Do Not Call registry would essentially be the only major victory for the telemarketers in the courtroom – and it proved to be short-lived.

The District Court of Colorado held that the creation of a Do Not Call registry was unconstitutional, largely on First Amendment grounds, in *Mainstream Marketing Inc. v. FTC*.²² The court acknowledged that commercial speech was subject to less protection than other forms of protected speech, but that the registry itself was a “significant enough government intrusion and burden on commercial speech to amount to a government restriction implicating the First Amendment.”²³ The court also held that the registry should be struck down on non-discrimination principles of the First Amendment because it applied to commercial organizations but did not apply to charitable organizations.²⁴

Because the court in *Mainstream Marketing* focused on the First Amendment issues, it did not discuss whether the FTC had authority to create such a registry.²⁵ The Western District of Oklahoma directly confronted this issue in *U.S. Security v. FTC*.²⁶ It struck down the registry, holding that Congress granted rulemaking authority to the FCC, not to the FTC.²⁷ In other words, the court held that the FTC did not even have the authority to create a national Do Not Call registry.

However, this was only the opening act of an ongoing saga. *U.S. Security* was handed down on Sept. 23, 2003, and *Mainstream* on September 25. Noting that over 50 million citizens had already registered on the list and in response to the district courts' opinions, Congress introduced and passed the legislation mentioned above, the Do Not Call Registry Act of 2003.²⁸ This law clearly expressed congressional intent in passing the Do Not Call Act.

The district court decisions of *U.S. Security* and *Mainstream Mktg.* were consolidated on appeal in the Tenth Circuit as *Mainstream Marketing Services Inc. v. FTC*²⁹. This time, the FTC and consumers prevailed. The Tenth Circuit upheld the national registry, finding that it was a reasonable restriction on commercial speech and that the FTC was, in fact, authorized to promulgate rules that would create the registry. The court emphasized that, while the government implemented and maintained the registry, "(t)he do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom such calls would constitute an invasion of privacy."³⁰ Thus, the government may have a role in restricting the ability of a telemarketer to reach a household via telephone and because the government left the ultimate decision of whether or not to be placed on the registry up to the individual, the government *itself* did not restrict the First Amendment rights of the solicitor. The wall of privacy was constructed by the individual, not the government. The decision also highlighted the congressional intent to grant such authority when it passed the Do Not Call Registry Act in response to the 2003 district decision in *U.S. Security*.³¹

Additional challenges followed, as both camps decided to test the bounds of the federal and individual state versions of Do Not Call. In 2006, the Seventh Circuit affirmed that Indiana may prohibit telemarketers soliciting on behalf of otherwise exempt charities from calling numbers on the Indiana Do Not Call list.³² The Seventh Circuit reiterated the state's legitimate interest in maintaining and enforcing its Do Not Call registry. The Eighth Circuit reversed a district court decision which had struck down part of North Dakota's Do Not Call law on similar grounds. The court held that North Dakota's version of the law was a narrowly-tailored state statute that significantly furthered the state's interest in residential privacy.³³ A nearly identical challenge to the FTC's rule was unsuccessful in the Fourth Circuit that same year when the court upheld restrictions on professional telemarketers who solicit contributions on behalf of non-profit organizations. The court held that this did not exceed the scope of the FTC's statutory authority.³⁴

Preemption of State Law

States that developed their own version of Do Not Call legislation faced challenges even before *Mainstream Marketing*. In 2002, a trial court upheld Indiana's version of the law against a barrage of attacks which were founded on First Amendment grounds, interpretation of the definition of "telephone sales call,"³⁵ and even the argument that the Indiana law was preempted by the TCPA. In *Steve Martin & Associates & AIMKO Associations v. Carter*,³⁶ the state prevailed in all regards, setting a trend for a broad interpretation of Indiana's law. The trial court held that, even though Martin used phone calls only to set up appointments with potential customers to demonstrate vacuum cleaners, the calls were still classified as "telephone sales calls," prohibited by Indiana's Do Not Call Law.³⁷ Perhaps the bigger issue in that case, however, was the unsuccessful claim that the Indiana law was preempted by the TCPA. This question of preemption was destined to be viewed on larger stages than a trial court in Evansville, Ind. Numerous times and in numerous jurisdictions the Do Not Call laws have faced preemption challenges and usually prevailed.

The preemption issue starts with 47 U.S.C. § 227(f)(1)—ironically, the TCPA’s non-preemption clause, often referred to as the savings clause. The clause reads in pertinent part:

“[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits”³⁸ The clause then mentions which specific types of actions that a state may prohibit or place more restrictive regulations on, such as sending unsolicited advertisements via fax, regulating the use of automatic dialing systems and prerecorded messages, and the making of telephone solicitations.³⁹ Properly read, this clause is the reason why various challenges to preemption fail.⁴⁰

What about *interstate* telemarketing? The TCPA makes specific reference to intrastate regulations, but is silent on the states’ ability to place regulations that are more stringent than the TCPA requirements on calls that are made in one state to a recipient in another state.⁴¹ In the absence of any guiding language in the federal law, would the state law be preempted in this situation? The Seventh Circuit recently addressed this issue in a case dealing with Indiana’s autodialer law.⁴² It should be noted that the challenges to state and federal laws regulating autodialing, or “robocalls” as they are often called, is an extensive topic worth its own article. However, the consequences of the 2013 decision of the Seventh Circuit in *Patriotic Veterans, Inc. v. Indiana*⁴³ extend well beyond robocalls.

In 2010, Patriotic Veterans, Inc. (PVI), an Illinois non-profit corporation, filed a complaint against the state of Indiana, seeking a declaration that Indiana’s autodialer law was invalid under the First Amendment and was preempted by the TCPA. The district court agreed with Patriotic Veterans, holding that the Indiana law was preempted by the TCPA as it applied to interstate calls. Because it ruled that the statute was preempted, the court declined to address the First Amendment claims.⁴⁴ The Seventh Circuit reversed the district court’s decision, determining that the TCPA did not expressly or

impliedly preempt the Indiana statute.⁴⁵

This was a tremendous victory for state Do Not Call laws and a blow to preemption claims. The Seventh Circuit confirmed that state regulations and prohibitions of telemarketing can cross state lines. Consumers should be able to count on an ever-widening buffer to protect them from the many unwanted calls that Do Not Call laws were intended to prevent.

Telemarketers Adapt

The early days of Do Not Call, enforcement was a game of whack-a-mole in a target-rich environment. Indiana entered into Assurances of Voluntary Compliance with 139 contrite telemarketers in the first two years. However, like the velociraptors in *Jurassic Park*, telemarketers learned to adapt.

Rise of the Robocall

Indiana's Regulation of Automatic Dialing Machines was a rarely-used law enacted in 1988.⁴⁶ Then, in 2005, we started to receive hundreds of complaints about robocalls. Automatic dialing technology had been around for years, but it required expensive and bulky standalone equipment installed in a fixed location. Early robocall messages instructed the recipient to call an 800 number and, if one could identify the subscriber of the 800 number, then one could, in theory, locate the telemarketer.

Later came "press 1 transfer" calls from "Rachel from Card Services," variations of which are still occurring today.⁴⁷ The consumer receives a call that begins with a pre-recorded message from Rachel (or Heather or Anne, etc.), and Rachel's cheerful voice instructs the consumer to press "1" (or another number) to talk to an agent about lowering the consumer's credit card interest rate. When the consumer presses "1," the call is transferred to a call center. The call center never makes out-going calls; it only receives in-bound calls. An operator pre-qualifies the consumer, weeding out the complainers and those who do not meet specific criteria, and then transfers the call to a closer who takes the consumer's payment information. Thus, the entity that actually completes the transaction is several times removed from the entity or machine that dialed

the call. Rachel does not provide a call-back number, so there is no number to track down. Boiler rooms train their employees to hang up on consumers who ask suspicious questions.

Beyond the repetitive and unstoppable robocalls, the main trouble with Rachel is that she is schilling for a scam. Her accomplices charge an up-front fee of up to \$5,000 dollars to provide a service that does nothing for the consumer.⁴⁸

VoIP and Spoofing

Although Internet-based telecommunications technology had existed for years, it did not become widely marketed to the public until 2004.⁴⁹ Voice over Internet Protocol (VoIP) was a game-changer for both consumers and telemarketers.

Consumers enjoyed low-cost, unlimited long distance calls through providers like Vonage.⁵⁰ Telemarketers found the hardware and software easy to obtain and relatively inexpensive. VoIP was limited only by the breadth and speed of the telemarketer's Internet connection, enabling mass-dialing of thousands of calls for pennies. Also, VoIP allowed the telemarketer to fake or "spoof" Caller ID.

In response to the growing practice of spoofing, Congress amended the TCPA to add the Truth in Caller ID Act of 2009, prohibiting the knowing transmission of false or misleading Caller ID "with the intent to defraud, cause harm or wrongfully obtain anything of value."⁵¹

Conclusion

Do Not Call laws are premised upon the theory that whoever makes a telemarketing call can be held accountable for calling a number on the list. They are most effective against identifiable companies that use the telephone to market their products and services to consumers. A majority of legitimate sellers adhere to compliance procedures and avoid calling numbers on federal and state Do Not Call lists. For those callers, the Do Not Call laws are working.

On the other hand, scammers do not care about Do Not Call laws and Do Not Call lists. Since they can operate

anonymously, they often act with impunity. Many are located off-shore and beyond our jurisdiction. In Indiana, the number one complaint today is Internal Revenue Service imposters threatening arrest and demanding payment. Do Not Call laws were designed to address unwanted sales calls from telemarketers, not extortion from pirates and come-ons from con artists.

The proliferation of unwanted calls was caused by technology and the solutions also depend upon technology. Short-term solutions include services that block unwanted calls. On Sept. 9, 2014, Indiana, Missouri, and 37 other state and territorial attorneys general asked the FCC to clarify that telephone service providers may block unwanted calls at the request of consumers.⁵² In July 2015, the FCC granted that request, opening a new era where consumers can begin to take back control of their ringing phones.⁵³ Following the FCC's ruling, Indiana and Missouri again led a group of attorneys general to call upon the major telephone carriers to do more to provide these services to consumers, especially landline subscribers.⁵⁴

Currently, a growing number of call-blocking applications provide temporary relief for unwanted and spam calls.⁵⁵ A long-term solution is going to require an overhaul of the outdated Caller ID system. Groups such as the Internet Engineering Task Force (IETF) are working on strategies to restore the authenticity of caller identification.⁵⁶ When rogue telemarketers and scammers are no longer able to hide behind fake caller ID, then law enforcement's hands will no longer be tied.

Endnotes

1 Source: National Do Not Call Registry Data Book, FY 2015, p. 3.

2 Source: Office of the Indiana Attorney General records.

3 FTC Databook, FY 2015, table at 4. The fiscal year accounting period for the federal government begins on October 1 and ends on September 30 of each year. 31 U.S.C. § 1102.

4 47 U.S.C. § 227.

5 *Id.*

6 Report and Order, In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752 (1992).

7 Telemarketing Sales Rule, Statement of Basis and Purpose, 60 Fed. Reg. 43842-01, 43866 (Aug. 23, 1995).

8 Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580, 4629 n. 591 (Jan. 29, 2003) *citing* Fla. Stat. Ann. § 501.059.

9 *Id.*, *citing* Or. Rev. Stat. § 646.567; Alaska Stat. Ann. § 45.50.475.

10 Mo. Rev. Stat. § 407.1101.

11 Ind. Code § 24-4.7.

12 Ind. Code § 24-4.7-5-2; Mo. Ann. Stat. § 407.1107.

13 Mo. Ann. Stat. § 407.1082.

14 Telemarketing Sales Rule, Final Amended Rule, 68 Fed. Reg. 4580, 4630 (Jan. 29, 2003).

15 67 Fed. Reg. 62667-01, 2002.

16 In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014 (July 3, 2003).

17 15 U.S.C.A. § 6152.

18 16 C.F.R. § 310.4(b)(1)(iii)(B).

19 Betty Montgomery, *et al.*, www.RegulatoryGuide.com.

20 *Id.*

21 *Id.*

22 283 F. Supp. 2d 1151 (D. Colo. 2003).

23 *Id.* at 1163.

24 *Id.* at 1168.

25 *Id.*

26 282 F. Supp. 2d 1285 (W.D. Okla. 2003).

27 *Id.*

28 15 U.S.C. § 6151.

29 358 F.3d 1228 (10th Cir. 2004).

30 *Id.* at 1242.

31 *Id.* at 1250.

32 Nat'l Coal. of Prayer, Inc. v. Carter, 455 F.3d 783 (7th Cir. 2006).

33 Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).

34 Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331 (4th Cir. 2005).

35 Ind. Code § 24-4.7-4-1.

36 Cause No. 82C01-0201-PL-38 (Vanderburgh Circuit Court 2002).

37 *Id.*

38 47 U.S.C. § 227(f)(1).

39 *Id.*

40 See, Utah Div. of Consumer Prot. v. Flagship Capital, 125 P.3d 894 (2005); TSA Stores, Inc. v. Dep't of Agric. & Consumer Servs., 957 So. 2d 25 (Fla. Dist. Ct. App. 2007); State ex rel. Stenehjem v. Simple.net, Inc., 765 N.W.2d 506 (2009).

41 47 U.S.C. § 227(f)(1).

42 Ind. Code Ann. § 24-5-14-5(b).

43 *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 at 1044-45 (7th Cir. 2013).

44 *Id.* at 1045.

45 *Id.* at 1054. The case is currently before the Seventh Circuit again for the purpose of deciding PVI's First Amendment claims.

46 Ind. Code § 24-5-14.

47 Bandy Bikram, *What's the Deal with 'Rachel from Card Services'? Your Top 3 Questions Answered* at <https://www.consumer.ftc.gov/blog/whats-deal-rachel-card-services-your-top-3-questions-answered> (Aug. 21, 2015).

48 *Id.*

49 *In the Matter of IP-Enabled Services*, 19, FCC Rcd. 4863, 4873-74 (March 10, 2004).

50 *Id.* at 4874.

51 47 U.S.C. § 227(e).

52 Attorneys General Urge Federal Government to Allow Phone Companies to Block Unwanted Sales Calls to Customers, <http://www.naag.org/naag/media/naag-news/attorneys-general-urge-federal-government-to-allow-phone-companies-to-block-unwanted-sales-calls-to-customers.php> (Sept. 9, 2014).

53 Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telecommunications Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015).

54 Attorneys General Urge Phone Companies to Offer Technology that Blocks Unwanted Sales Calls or Texts, <http://www.naag.org/naag/media/naag-news/attorneys-general-urge-phone-companies-to-offer-technology-that-blocks-unwanted-sales-calls-or-texts.php> (July 22, 2015).

55 See, e.g., CTIA—The Wireless Association,

<http://www.ctia.org/your-wireless-life/consumer-tips/blocking-robocalls>; FTC, <https://www.consumer.ftc.gov/articles/0548-blocking-unwanted-calls>.

56 J. Peterson, H. Schulzrinne, and H. Tschofenig, *Secure Telephone Identity Problem Statement and Requirements* (Sept. 2014), <https://tools.ietf.org/html/rfc7340>.



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