

108TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } 108-8

DO-NOT-CALL IMPLEMENTATION ACT

FEBRUARY 11, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TAUZIN, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 395]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 395) to authorize the Federal Trade Commission to collect fees for the implementation and enforcement of a “do-not-call” registry, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The purpose of H.R. 395 is to authorize the Federal Trade Commission (FTC or Commission) to collect fees from telemarketers to

fund the implementation and enforcement of the Commission's national do-not-call registry, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Telemarketing has been, and continues to be, a controversial marketing practice. Telemarketing can provide many benefits for consumers, such as introducing them to new opportunities or products. According to a DRI-WEFA Group study,¹ *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast*, in 2001, consumer outbound telephone marketing generated \$274.2 billion in sales, accounting for 27.3 percent of all consumer direct marketing sales. In fact, outbound telemarketing alone generated almost four percent of all U.S. consumer sales in 2001. In 2001, the telemarketing industry that markets to consumers was estimated to employ 4.1 million workers.

Unfortunately, certain telemarketing practices can be an intrusive nuisance for consumers, an invasion of privacy, and a source of consumer confusion. In some instances, unscrupulous telemarketers have taken advantage of this confusion and committed fraud against consumers. Indeed, the FTC receives thousands of complaints annually regarding a variety of telemarketing practices. According to the FTC, consumer complaints regarding unwanted telemarketing calls increased over one-thousand percent between 1998 and 2002.

In order to assist consumers in dealing with telemarketing, Congress provided authority to the FTC and the Federal Communications Commission (FCC) to limit these intrusions into their homes. Under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101-08) enacted by Congress in 1994, the FTC implemented the Telemarketing Sales Rule (TSR). The TSR requires telemarketers to make certain disclosures and prohibits certain misrepresentations. These rules required company-specific do-not-call lists, required callers to identify the seller, their purpose and the nature of what is being sold, limited commercial telephone solicitations to between 8:00 a.m. and 9:00 p.m., and gave state law enforcement officers the authority to prosecute fraudulent telemarketers who operate across state lines.

Congress also enacted the Telephone Consumer Protection Act (TCPA) of 1991 (47 U.S.C. § 227). Regulated by the FCC, the TCPA, among other things, requires telemarketers to abide by do-not-call requests from consumers, restricts telemarketing calling hours to 8:00 a.m.-9:00 p.m., mandates that telemarketers provide the name of the solicitor, name of the entity calling, and the telephone number or address where that person may be contacted, and includes a private right of action. Exemptions exist for established business relationships and tax-exempt non-profit organizations, such as those of a charitable or political nature.

In addition to the FTC and FCC regulations, many states also maintain some form of a do-not-call list, and the Direct Marketing Association also maintains a self-regulated do-not-call list, called the Telephone Preference Service, used by its members.² Despite

¹This study was commissioned by the Direct Marketing Association.

²While all members of the Direct Marketing Association are required to participate in the Telephone Preference Service, the Association may apply sanctions only against its members.

these restrictions, telemarketing complaints continue to rise and there is an increasing need to provide consumers with the ability to opt-out of telemarketing calls.

To address the consumer demand, pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, the FTC initiated a rulemaking in January 2002 to create a national do-not-call registry and announced the adoption of its do-not-call amendments on December 18, 2002. The Commission's do-not-call registry allows consumers who prefer not to receive telemarketing calls to contact the FTC to be placed on its do-not-call list. Telemarketers would be required to subscribe to the national do-not-call registry and to refrain from calling consumers who have placed their telephone numbers on this registry.

The FTC provided telemarketing exemptions in the TSR for companies with an "established business relationship" with a consumer lasting up to 18 months after the last purchase or delivery, or the last payment, unless the company is asked not to call again. The TSR also exempts telemarketers calling to solicit charitable contributions, although calls made by for-profits on behalf of non-profits are required to maintain an organization-specific do-not-call list.

In order to implement the do-not-call registry, the Commission needs Congressional authorization to collect fees from the telemarketing industry. It is anticipated that fees collected will offset the appropriation that, in FY 2003, is estimated at \$16 million. On May 29, 2002, the FTC issued a Request for Public Comment asking for guidance on the collection of fees. Under the new authority provided by H.R. 395, the Commission intends to initiate a notice of proposed rulemaking on how the fee collection process will operate once authorization and funding are acquired.

It is the strongly held view of the Committee that a national do-not-call list is in the best interests of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses. The FTC's rule, however, is only one piece of a multi-jurisdictional puzzle. Of primary concern to the Committee is the possibility for conflicting regulations. In addition to the FTC's national do-not-call registry, twenty-seven states³ maintain some form of a do-not-call program, and the FCC requires businesses to maintain company-specific do-not-call lists. How these different regulatory regimes can compliment each other and work as one national program is still unclear.

The Commission's do-not-call registry, standing alone, will not stop all telemarketing calls. Due to the limited jurisdiction of the FTC, there are telemarketing calls that cannot be covered by the FTC's do-not-call rule. The Commission does not have jurisdiction over common carriers (such as telephone companies and airlines), insurance companies, banks, credit unions, political solicitations, or intrastate telemarketing calls. Under the Commission's do-not-call rule, if one of these non-covered entities contracts with a third-party telemarketing company to place a call, that call would be cov-

The Direct Marketing Association has approximately 5,000 members. There are approximately 4 million consumers who have subscribed to the Telephone Preference Service.

³ Alabama, Alaska, Arkansas, California (effective April 1, 2003), Colorado, Connecticut, Florida, Georgia, Idaho, Illinois (effective July 1, 2003), Indiana, Kansas, Louisiana, Massachusetts (effective April 1, 2003), Maine, Minnesota, Missouri, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Wisconsin and Wyoming.

ered by the FTC's rule. However, if one of these non-covered entities makes the same telemarketing call in-house, that call would not be covered by the FTC's do-not-call rule.

The FCC's do-not-call rules were created under the TCPA. That statute explicitly gives the FCC the authority to set up a national do-not-call database. In 1992, the FCC undertook a rulemaking, and after reviewing comments, determined that a national do-not-call list was too costly and burdensome at that time. The FCC instead opted to require telemarketers to maintain company-specific do-not-call lists. On September 12, 2002, the FCC issued a notice of proposed rulemaking to review and possibly revise its do-not-call rules. The comment period closed on January 31, 2003, and the FCC's Chief of Consumer and Governmental Affairs Bureau announced that the FCC's goal is to avoid regulatory duplication by working closely with the FTC and fashioning rules that benefit consumers and the telemarketing industry.

As the FCC undertakes the process of revising its do-not-call regulations, there is the potential for inconsistencies between the FTC and FCC do-not-call rules. To address this issue, H.R. 395 directs the FCC to complete its rulemaking within 180 days of enactment and further requires the FCC to consult and coordinate with the FTC to maximize consistency between the two regulations. However, because the FCC is bound by the TCPA, it is impossible for the FCC to adopt rules identical to the FTC's TSR.

There are areas in which the FTC do-not-call rule is in conflict with the TCPA, such as the FTC's rule providing for a safe harbor from the call "abandonment" requirements if a telemarketer, among other things, leaves a recorded message. Under the TCPA, however, Congress by statute prohibited telemarketers from leaving recorded messages. In order to remedy these types of inconsistencies, either the FTC or FCC must address them administratively, or Congress must address them legislatively. We encourage the FTC and the FCC to take the necessary steps to make their rules as consistent and compatible as possible.

Similarly, some members of the Committee raised concerns about how the FTC do-not-call rule will work in conjunction with the existing twenty-seven state do-not-call laws. The Commission's do-not-call rules do not preempt the state lists, although the FTC has committed to "harmonizing" the Commission's rule with the state laws. We are encouraged with the FTC's commitment and efforts to work with the states to ensure a harmonized approach, although some remain concerned that consumers and businesses could continue to face conflicting and confusing regulatory approaches. In light of the fact that many states have unique laws with protections for local industries or exemptions for certain products, for example, at least 12 states have developed specific provisions for local newspapers, we encourage the FTC to work diligently to persuade states to adopt the FTC's rule. The Committee cannot understate the importance of the FTC working aggressively to seek such harmonization, and we will continue to follow the FTC's progress on this issue. The Committee takes no position on the issue of state preemption in H.R. 395.

While this bill focuses on the necessary authority to establish the do-not-call registry, the Committee maintains a great deal of interest in the entire TSR produced by the FTC. Taken as a whole, the

amended TSR is a positive development that will help consumers. The Committee is interested in working with the FTC to better understand some of the implementation details of the rule that could raise some practical problems that could affect employment and small business. As the registry becomes available, we encourage the FTC to implement aggressive education efforts, including national awareness campaigns and a toll-free number with strong consumer recall.

The Committee is committed to holding hearings during the 108th Congress to better understand how these different do-not-call regulatory regimes can best be coordinated to protect consumers in a manner that is fair and balanced to industry participants.

HEARINGS

The Committee on Energy and Commerce did not hold hearings on H.R. 395. The Full Committee did hold a briefing on January 8, 2003 where FTC Chairman Muris testified.

COMMITTEE CONSIDERATION

On Wednesday, January 29, 2002, the Full Committee on Energy and Commerce met in open markup session and ordered H.R. 395, favorably reported to the House, without amendment, by a voice vote, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 395 reported. A motion by Mr. Tauzin to order H.R. 395 reported to the House was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has not held oversight or legislative hearings on this legislation.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of this legislation is to authorize the FTC to collect fees from the telemarketing industry to fund the operation and enforcement of the do-not-call registry.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 395, the "Do-Not-Call Implementation Act," would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 4, 2003.

Hon. W.J. "BILLY" TAUZIN,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DERA MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 395, the Do-Not-Call Implementation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs), Victoria Heid Hall (for the state and local impact), and Jean Talarico (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON,
Acting Director.

Enclosure.

H.R. 395—Do-Not-Call Implementation Act

Summary: H.R. 395 would authorize the Federal Trade Commission (FTC) to collect and spend new fees during the 2003–2007 period for the purpose of creating a national "do-not-call" registry. The "do-not-call" registry is a list of consumers whom telemarketers would be prohibited from calling because the consumers do not wish to receive such calls.

Based on information from the FTC, CBO estimates that the agency would collect and spend a total of about \$73 million in fees over the 2003–2008 period to implement H.R. 395, assuming appropriation of the necessary amounts. Over the six-year period, the total net effect on the federal budget would be insignificant. Enacting H.R. 395 would not affect direct spending or revenues.

H.R. 395 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. By authorizing the FTC to collect fees from telemarketing firms, H.R. 395 would impose a private-sector mandate as defined by UMRA. CBO expects that the cost of that mandate would fall well below the annual threshold for the private sector established by UMRA (\$117 million in 2003, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 395 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2003	2004	2005	2006	2007	2008
CHANGES IN SPENDING SUBJECT TO APPROPRIATION ¹						
Gross FTC Spending for the Do-Not-Call Registry:						
Estimated Authorization Level	16	18	13	13	13	0
Estimated Outlays	3	26	16	13	13	2
Offsetting Collections from Telemarketers:						
Estimated Authorization Level	-16	-18	-13	-13	-13	0
Estimated Outlays	-16	-18	-13	-13	-13	0
Net Changes to FTC Spending for the Do-Not-Call Registry:						
Estimated Authorization Level	0	0	0	0	0	0
Estimated Outlays	-13	8	3	0	0	2

¹ A full-year appropriation for 2003 for the FTC has not yet been enacted. In 2002, the agency received a gross appropriation of \$156 million.

Basis of estimate: H.R. 395 would authorize the FTC to collect fees sufficient to create and operate a “do-not-call” registry, contingent upon the approval of the fees in appropriation acts. For this estimate, CBO assumes that H.R. 395 and the necessary appropriation provisions will be enacted by the middle of this fiscal year. Based on information from the FTC, CBO expects that the agency would start collecting fees from telemarketers in 2003, in amounts equal to the full estimated cost of the registry.

The costs of operating the “do-not-call” registry would have four main components: purchasing new computer systems, designing and maintaining those systems, hiring personnel to manage the registry and investigate violations, and advertising the new system to consumers. Based on information from the FTC, CBO estimates that the initial costs of purchasing the computer system would amount to about \$1 million in 2003, \$8 million in 2004, and \$4 million in 2005. We expect that these costs would decline to between \$1 million and \$2 million a year during the 2006–2008 period. CBO estimates that designing and maintaining these computer systems would cost about \$45 million over the 2003–2008 period. Finally, staff salaries and advertising expenses would together amount to an estimated \$2 million each year.

In sum, CBO estimates that the FTC would implement H.R. 395 by collecting and spending a total of about \$73 million in fees over the 2003–2008 period, assuming the necessary appropriations action. Over this six-year old period, CBO estimates that the total net effect of the bill on the federal budget would be insignificant.

If the FTC continued to operate the “do-not-call” registry beyond 2007, CBO estimates annual operating costs would be about \$13 million a year, assuming appropriation of the necessary amounts. H.R. 395 would authorize the collection of fees to offset those costs through 2007.

Estimated impacts on direct spending and revenues: None.

Estimated impact on state, local, and tribal governments: H.R. 395 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: The final rule that provides for a national “do-not-call” registry was published on January 29, 2003, in the Federal Register. Under that rule, telemarketing firms will be required to search the national registry at least four times a year and drop from their call lists the telephone numbers of consumers who have registered. The FTC anticipates that full

compliance with the “do-not-call” provision will be required within a few months after funding has been approved.

In order to implement the national “do-not-call” registry, and subject to approval in appropriation acts, H.R. 395 would authorize the FTC to collect fees from telemarketing firms and certain businesses associated with those firms that sell goods and services. The duty to pay those fees would be considered a private-sector mandate under UMRA. Assuming the necessary appropriation action, CBO estimates that the fees would amount to no more than \$18 million annually over the next five years. Consequently, the cost of the mandate would fall well below the annual threshold for private-sector mandates established by UMRA (\$117 million in 2003, adjusted annually for inflation).

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 establishes the short title as the “Do-Not-Call Implementation Act.”

Section 2. Telemarketing Sales Rule; do-not-call registry fees

Section 2 authorizes the FTC to promulgate regulations to collect offsetting fees sufficient to implement and enforce the national do-not-call registry. The authorization is effective between fiscal years 2003–2007. The FTC may only collect the amounts as provided for in advance in appropriations Acts. The funds collected shall only be used to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement.

In its forthcoming rulemaking to establish fees, the FTC should ensure that the fees are commercially reasonable and do not exceed

the amounts necessary to effectively establish, maintain, and enforce the do-not-call rules.

No section of this Act should be construed by the FTC to confer any additional authority to regulate common carriers, or any other industries, outside of the Commission's statutory jurisdiction under the Federal Trade Commission Act (15 U.S.C. § 1 et seq).

Section 3. Federal Communications Commission do-not-call regulations

Section 3 directs the FCC, within 180 days of enactment, to issue a final do-not-call rule pursuant to the rulemaking proceeding initiated on September 18, 2002, under the TCPA. The FCC is directed to consult and coordinate with the FTC to maximize consistency with the do-not-call rule promulgated by the FTC.

In enacting section 3, it is not the intent of the Committee to dictate the outcome of the FCC's pending rulemaking proceeding. At the same time, however, it does endeavor to prevent situations in which legitimate users of telephone marketing are subject to conflicting regulatory requirements. The purpose of the consultation and coordination requirements of section 3 and the reporting requirements of section 4 are intended to prevent this possibility from becoming reality. The Committee further recognizes that the TCPA requires the FCC to consider a variety of factors in structuring a national do-not-call list. It is not the Committee's intent to foreclose consideration of those factors by enacting this legislation.

Section 4. Reporting requirements

Section 4(a) requires the FTC and the FCC to each, within 45 days of the FCC completing a final do-not-call rule, to report to the Committee on Energy and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate on the following: (1) an analysis of the telemarketing rules created by the FTC and FCC; (2) any inconsistencies between the two rules and the effect of any such inconsistencies on consumers and purchasers of the do-not-call registry; and (3) proposals to remedy any inconsistencies.

Section 4(b) contains an annual reporting requirement that mandates the FTC and FCC to report to the Committee on Energy and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate on the following: (1) an analysis of the effectiveness of the do-not-call registry as a national registry; (2) number of consumers placed on the registry; (3) the number of persons paying for access to the registry; (4) an analysis of the progress of coordinating the operation and enforcement of the do-not-call registry with other similar state registries; (5) an analysis of the progress of coordinating the operation and enforcement of the do-not-call registry with the enforcement activities of the FCC; and (6) a review of the enforcement activities of the FTC under the Telemarketing Sales Rule and of the FCC under the TCPA. The annual reporting requirement is applicable to fiscal years 2003–2007.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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