

# Federal and State Telemarketing Developments

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## INTRODUCTION

In 2003, the Federal Trade Commission (FTC) amended its rules in an effort to protect consumers from unwanted telemarketing calls by prohibiting telemarketers from calling telephone numbers registered with the FTC unless certain exemptions apply. As of September 17, 2003, Americans had registered more than fifty million telephone numbers with the national do-not-call registry, which opened on June 27, 2003.<sup>1</sup> Although by far the most significant, the national do-not-call registry was only one of a number of important federal and state developments in 2003 restricting the practices of businesses that solicit consumers for products and services through telemarketing. This Article summarizes key provisions of these federal and state law developments.<sup>2</sup>

## FTC ESTABLISHES THE NATIONAL DO-NOT-CALL REGISTRY

### PROHIBITED ACTS

On January 29, 2003, the FTC amended its Telemarketing Sales Rule (TSR) to establish a national do-not-call registry.<sup>3</sup> Effective October 1, 2003,<sup>4</sup> the TSR pro-

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1. Federal Trade Commission, Do Not Call Registry Tops 30 Million Phone Numbers (Aug. 6, 2003), at <http://www.ftc.gov/opa/2003/08/dncnumbers.htm>; Federal Trade Commission, Do Not Call Registrations Exceed 50 Million (Sept. 17, 2003), at <http://www.ftc.gov/opa/2003/09/dncnumbers030917.htm>.

2. Requirements and/or restrictions regulating other aspects of telemarketing (e.g., prohibitions against monitoring and recording of telephone calls) or electronic communications (e.g., restrictions against unsolicited e-mail, fax transmissions, or text messages) are beyond the scope of this Article. Regarding these matters, see, e.g., Vanessa A. Nelson, *Use of UCE: State Laws Regarding Unsolicited Commercial Electronic Mail Advertisements*, 58 BUS. LAW. 1203 (2003).

3. Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (final amended rule) (amending 16 C.F.R. §§ 310.1-8).

4. Stay of Compliance Date of Telemarketing Sales Rule, 68 Fed. Reg. 16,414-15 (Apr. 4, 2003). The national do-not-call registry has been the subject of numerous legal challenges; as of April 15, 2004, however, none of these challenges have prevented the FTC from implementing or enforcing the registry. On September 23, 2003, the U.S. District Court for the Western District of Oklahoma ruled the national do-not-call registry to be invalid as beyond the FTC's authority. *U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1290-91 (W.D. Okla. 2003), *rev'd by* *Mainstream Mktg. Servs., Inc. v.*

hibits a telemarketer from initiating an outbound telephone call to a person whose telephone number appears on the national registry.<sup>5</sup> The TSR also prohibits a seller from causing a telemarketer to initiate such calls.<sup>6</sup> In addition, the TSR prohibits telemarketers and sellers from denying or interfering with a person's right to be placed on the national registry or a company-specific do-not-call registry.<sup>7</sup> Finally, the TSR prohibits a person from using the national registry or a company-specific registry for purposes other than complying with the TSR or otherwise preventing telephone calls to telephone numbers on such registries.<sup>8</sup> Company-specific do-not-call registries, which are not new to the TSR in 2003, generally prohibit telemarketers from calling a person who has previously indicated that he or she does not want to receive telephone calls by or on behalf of the seller or charitable organization that is the subject of the call.<sup>9</sup>

### APPLICABILITY

Although most of the do-not-call prohibitions under the TSR apply to "telemarketers" and "sellers," the prohibition against using the national registry or a company-specific registry for purposes other than complying with the TSR applies to any person.<sup>10</sup> "Telemarketer" is defined as "any person who, in connection with telemarketing, initiates . . . telephone calls to or from a customer or donor."<sup>11</sup> "Seller" is defined as a "person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."<sup>12</sup> Included within the definition of "telemarketer" and "seller" is the term "telemarketing," which is generally defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call."<sup>13</sup>

FTC, 358 F.3d 1228 (10th Cir. 2004). In response to the district court's order, Congress enacted legislation giving the FTC express authority to establish the national registry. See Act of Sept. 29, 2003, Pub. L. No. 108-82, 117 Stat. 1006. On September 25, 2003, the U.S. District Court for the District of Colorado ruled the national do-not-call registry unconstitutional under the First Amendment and issued an order enjoining the FTC from enforcing the national registry. *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1168, 1171 (D. Colo. 2003), *rev'd by Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004). On February 17, 2004, however, the U. S. Court of Appeals for the Tenth Circuit reversed these district court decisions and upheld the registry in its entirety. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004).

5. Telemarketing Sales Final Amended Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003).

6. *Id.*

7. *Id.* § 310.4(b)(1)(ii).

8. *Id.* § 310.4(b)(2).

9. *Id.* § 310.4(b)(1)(iii)(A).

10. *Id.* § 310.4(b)(2); see also Final Telemarketing Sales Rule, 68 Fed. Reg. at 4645 (indicating that the FTC drafted this prohibition to apply broadly to any "person" so that it would reach entities such as list brokers, that fall outside the definition of "telemarketer" or "seller").

11. 16 C.F.R. § 310.2(bb).

12. *Id.* § 310.2(z).

13. *Id.* § 310.2(cc).

## EXEMPTIONS FROM COVERAGE

The prohibition against calling a person whose telephone number is on the national registry is subject to a number of exemptions. First, telemarketers may call a consumer whose telephone number appears on the registry if the seller has an "established business relationship" with the consumer.<sup>14</sup> An "established business relationship" exists between a seller and a consumer if the consumer has: (i) purchased, rented, or leased goods or services from the seller or entered into a financial transaction with the seller within the eighteen months immediately preceding the date of the telemarketing call; or (ii) made an "inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call."<sup>15</sup> The FTC has indicated that an "established business relationship" encompasses those affiliates of the seller that the consumer would reasonably expect to be included given the nature and type of goods or services offered and the identity of the affiliate.<sup>16</sup> The established business relationship exemption will not apply, however, if the called party has requested to be placed on the seller's company-specific do-not-call list.<sup>17</sup>

Second, a telemarketer may call a person on the national registry if the seller obtains the person's express written agreement to receive such calls.<sup>18</sup> The agreement must be signed by the person, "include the telephone number to which the calls may be placed," and "clearly evidence [the] person's authorization that calls made by or on behalf of a specific party may be placed to that person."<sup>19</sup> The signature requirement may be satisfied by an electronic or digital signature that is valid under applicable federal or state contract law.<sup>20</sup> The FTC has indicated that the express agreement exemption, like the established business relationship exemption, will not apply if the called party has requested to be placed on the seller's company-specific do-not-call list.<sup>21</sup>

Third, the TSR provides that solicitations to induce charitable contributions via outbound telephone calls are not subject to the prohibition against calling a person whose telephone number appears on the national registry.<sup>22</sup>

Fourth, a number of acts or practices are exempt from the entire TSR. For example, the TSR generally does not apply to calls between telemarketers and businesses.<sup>23</sup> Thus, such acts or practices also would be exempt from the TSR's do-not-call provisions.

Finally, certain businesses are not subject to the FTC's jurisdiction. For example, "the FTC does not have [jurisdiction] over telemarketing calls made by in-house employees of common carriers, banks, credit unions, savings and loans,

14. *Id.* § 310.4(b)(1)(iii)(B)(ii).

15. *Id.* § 310.2(n).

16. Final Telemarketing Sales Rule, 68 Fed. Reg. at 4634.

17. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

18. *Id.* § 310.4(b)(1)(iii)(B)(i).

19. *Id.*

20. Final Telemarketing Sales Rule, 68 Fed. Reg. at 4672 n.6.

21. *Id.* at 4634.

22. 16 C.F.R. § 310.6(a).

23. *Id.* § 310.6(b)(7).

insurance companies, [or] airlines.”<sup>24</sup> Consequently, these entities would not be subject to the TSR’s do-not-call provisions; they would be subject, however, to the do-not-call provisions under the Federal Communication Commission’s rules implementing the Telephone Consumer Protection Act of 1991 (“TCPA”) (see below for a summary of these provisions).

### DEFENSE TO LIABILITY

The TSR provides for a defense that may shield a telemarketer or seller from liability for calling a person on the national registry even if it does not fall within any of the above exemptions.<sup>25</sup> In order for this defense to apply, the seller or telemarketer must demonstrate that, as part of the seller’s or telemarketer’s routine business practice: (i) it has established written procedures to comply with the TSR’s do-not-call prohibitions; (ii) it has trained its personnel, and any entity assisting in its compliance, with these procedures; (iii) the seller, telemarketer, or another person acting on behalf of the seller or charitable organization has maintained a company-specific do-not-call registry; (iv) the seller or telemarketer uses a process to prevent telemarketing to any telephone number on the national do-not-call registry or a company-specific do-not-call registry, and uses a version of the national do-not-call registry that was obtained from the FTC not more than three months prior to making any calls and maintains records of this process; (v) the seller or telemarketer or another person acting on behalf of the seller or charitable organization monitors and enforces compliance with the written procedures described above; and (vi) any subsequent call otherwise violating the do-not-call prohibitions is the result of an error.<sup>26</sup>

### REGISTRATION AND ACCESS TO THE NATIONAL REGISTRY

The FTC has established registration procedures that allow consumers to avail themselves of the protections described above. Consumers may register their household or personal telephone numbers free of charge by calling the FTC’s toll-free telephone number or accessing its Internet Web site.<sup>27</sup> If a consumer registers by telephone, the consumer must call from the number to be registered for verification purposes.<sup>28</sup> If registration is conducted over the Internet, the consumer will be required to provide his or her e-mail address.<sup>29</sup> Once registered, the consumer’s telephone number, but not other personal identifying information, will remain on the national registry for five years.<sup>30</sup>

24. Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,171 (July 25, 2003) (final rule) (codified at 47 C.F.R. pts. 64, 68).

25. 16 C.F.R. § 310.4(b)(3).

26. *Id.*

27. Final Telemarketing Sales Rule, 68 Fed. Reg. at 4638–39.

28. *Id.* at 4639.

29. *Id.*; see also Federal Trade Commission, *National Do Not Call Registry*, at <http://www.donotcall.gov/default.aspx> (last visited Mar. 29, 2004).

30. Final Telemarketing Sales, 68 Fed. Reg. at 4640.

The FTC also has established procedures for sellers and telemarketers to access the national registry in order to remove registered numbers from their call lists. As of September 2003, sellers and telemarketers were permitted to access the national registry via the Internet by logging onto [www.telemarketing.donotcall.gov](http://www.telemarketing.donotcall.gov).<sup>31</sup> When accessing the system for the first time, the seller or telemarketer will be required to provide identifying information, such as name and address, company contact person, the contact person's telephone number, and e-mail address.<sup>32</sup> Once access has been obtained, the seller or telemarketer will be able to obtain registrants' telephone numbers (no other personal information) by area code.<sup>33</sup> The annual fee for access to the national registry is \$25 per area code, up to a maximum of \$7,375; there is no charge, however, for the first five area codes.<sup>34</sup> In addition, there is no charge to any person who accesses the registry without being required to by the TSR or other federal law (i.e., the TCPA rules summarized below).<sup>35</sup> Cost sharing arrangements for accessing the registry are prohibited.<sup>36</sup>

### ADDITIONAL AMENDMENTS TO THE TSR

The creation of the national do-not-call registry was by far the most significant, but not the only amendment to the TSR in 2003. A summary of other significant changes that were made to the TSR can be found in the FTC's Final Rule.<sup>37</sup>

### FCC AMENDS TCPA RULES TO PROHIBIT CALLS TO TELEPHONE NUMBERS ON THE NATIONAL DO-NOT-CALL REGISTRY

On July 25, 2003, the Federal Communications Commission (FCC) added do-not-call prohibitions to its rules that implement the Telephone Consumer Protection Act of 1991.<sup>38</sup> As of October 1, 2003, the TCPA rules, like the TSR, prohibited calling a person who has registered his or her telephone number on the FTC's national do-not-call registry.<sup>39</sup> There are a number of notable differences, however, between the do-not-call prohibitions under the TCPA rules and those under the TSR. First, as indicated above, the do-not-call prohibitions under the TCPA rules apply to those entities that are not subject to the FTC's jurisdiction (e.g., banks,

31. Federal Trade Commission, *National Do Not Call Registry*, at <http://www.telemarketing.donotcall.gov> (last visited Mar. 21, 2004).

32. Federal Trade Commission, *National Do Not Call Registry*, at <http://donotcall.gov/FAQ/FAQBusiness.aspx> (last visited Mar. 21, 2004).

33. *Id.*

34. 16 C.F.R. § 310.8(c).

35. *Id.*

36. *Id.*

37. Final Telemarketing Sales Rule, 68 Fed. Reg. at 4583.

38. Telephone Consumer Protection Act of 1991, 68 Fed. Reg. at 44,144.

39. See generally 47 U.S.C. § 227 (2000); Telephone Consumer Protection Act of 1991 Rules, 47 C.F.R. § 64.1200(c)(2) (2003); Telephone Consumer Protection Act of 1991, 68 Fed. Reg. at 44,144; see *supra* note 4 for a discussion of challenges to the national do-not-call registry that put the October 1, 2003 effective date in doubt.

credit unions, and savings and loans).<sup>40</sup> Second, the do-not-call prohibitions under the TCPA rules, unlike those under the TSR, apply to intrastate telephone calls.<sup>41</sup> Third, the “established business relationship” exemption under the TCPA rules is broader than the exemption under the TSR because the exemption under the TCPA rules may apply in the absence of an exchange of consideration.<sup>42</sup> Finally, the TCPA rules exempt calls made by telemarketers that have a personal relationship with the called party.<sup>43</sup> A “personal relationship” exists if the telemarketer is a family member, friend, or acquaintance of the called party.<sup>44</sup>

### ADDITIONAL AMENDMENTS TO THE TCPA RULES

The FCC made a number of significant amendments to the TCPA rules in addition to prohibiting calls to individuals who have registered on the national do-not-call registry. A summary of these amendments can be found in the FCC’s Final Rule.<sup>45</sup>

### STATE DEVELOPMENTS

Like the federal government, legislatures of the following seventeen states enacted or amended do-not-call statutes in 2003: Arizona; Arkansas; Colorado; Georgia; Illinois; Massachusetts; Michigan; Mississippi; Montana; Nevada; New Hampshire; New Jersey; New Mexico; North Carolina; North Dakota; South Dakota; and Utah.<sup>46</sup> To date, legislatures in forty-three states have enacted do-not-

40. Telephone Consumer Protection Act of 1991 Final Rule, 68 Fed. Reg. at 44,171.

41. *Id.*

42. 16 C.F.R. § 310.2(n); 47 C.F.R. § 64.1200(f)(3).

43. 47 C.F.R. § 64.1200(c)(2)(iii).

44. 47 C.F.R. § 64.1200(f)(11). The TSR does not contain a “personal relationship” exemption; the FTC, however, has indicated that it does not anticipate enforcing the national do-not-call provisions under the TSR against individuals who make sales calls out of their homes to personal friends, family members or small numbers of personal referrals. Federal Trade Commission, *Complying with the Telemarketing Sales Rule*, at <http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm> (last visited Mar. 21, 2004).

45. Telephone Consumer Protection Act of 1991 Final Rule, 68 Fed. Reg. at 44,144.

46. See ARIZ. REV. STAT. ANN. §§ 44-1271, 44-1273 (West 2003 & Supp. 2003), amended by S.B. 1119, §§ 1-2, 46th Leg., 1st Reg. Sess. (Ariz. 2003) (effective Sept. 18, 2003); ARIZ. REV. STAT. ANN. § 44-1282, enacted by S.B. 1119, § 4 (Ariz. 2003) (effective Sept. 18, 2003); ARK. CODE ANN. §§ 4-99-404 to 44-99-405 (Michie 2003), amended by H.B. 2293, 84th Gen. Assem., Reg. Sess. (Ark. 2003) (effective July 16, 2003); COLO. REV. STAT. ANN. §§ 6-1-903 to 6-1-905 (West 2002 & Supp. 2003), amended by H.B. 03-1098, Gen. Assem. (Colo. 2003 & Supp. 2003) (effective Mar. 25, 2003); GA. CODE ANN. § 46-5-27 (Supp. 2003), amended by S.B. 272, Gen. Assem. (Ga. 2003) (effective July 1, 2003); 815 ILL. COMP. STAT. ANN. 402/10, 402/20, 402/25, 402/30, 402/35, 402/40 (West Supp. 2003), amended by H.B. 3407, 93rd Gen. Assem. (Ill. 2003) (effective Aug. 9, 2002); MASS. GEN. LAWS ANN. ch. 159C, §§ 1-14 (West Supp. 2003), enacted by H.B. 5225 (Mass. 2002) (effective Jan. 1, 2003); MICH. COMP. LAWS ANN. §§ 445.111, 111a, 111c, 111d, 111e (West 2001 & Supp. 2001), amended by H.B. 4042, 91st Leg., Reg. Sess. (Mich. 2002) (effective Mar. 31, 2003); N.H. REV. STAT. ANN. §§ 359-E:6-11 (Supp. 2003), enacted by S.B. 98-FN, Leg. Sess. (N.H. 2003) (effective Sept. 16, 2003); N.J. STAT. ANN. §§ 56:8-119 to 56:8-135 (West, WESTLAW through 2004 Legis. Sess.), enacted by A.B. 727, 210th Leg., 2nd Annual Sess. (N.J. 2003) (effective May 21, 2003); N.M. STAT. ANN. §§ 57-12A-(1) to 57-12A-(7) (Michie Supp. 2003), enacted by S.B. 573 (N.M. 2003) (effective July 1, 2003) (repealing sections 1 through 7 of the act enacting the Consumer No-Call Act on the date the

call statutes. The following thirty-eight states have statutes that prohibit telemarketers from calling individuals that are registered on a state-specific do-not-call registry or the FTC's national registry: Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Florida; Georgia; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Oklahoma; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Vermont; Wisconsin; and Wyoming.<sup>47</sup> The following fifteen states have additional or different do-not-call requirements and/or prohibitions, such as: (i) requirements to maintain a company-specific do-not-call list and refrain from calling persons on such list, or (ii) prohibitions against calling a person that is registered on a state-do-not call list that is specific to calls made by automatic dialing and announcing devices (ADADs): Arizona; Kentucky; Maine; Massachusetts; Michigan; North Carolina; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Vermont; Virginia; Washington; and Wisconsin.<sup>48</sup> Ac-

federal do-not-call rule adopted by the FCC became effective (i.e., Oct. 1, 2003)); N.C. GEN. STAT. §§ 75-100 to 75-105 (2003), enacted by S.B. 872, § 3, Gen. Assem., Reg. Sess. (N.C. 2003) (effective Oct. 1, 2003); N.D. CENT. CODE §§ 51-28-01 to 51-28-22 (Supp. 2003), enacted by S.B. 2255, 58th Leg., Reg. Sess. (N.D. 2003) (effective Aug. 1, 2003); S.D. CODIFIED LAWS §§ 49-31-1, 99-108 (Michie 2003 & Supp. 2003), enacted by S.B. 41 (S.D. 2003) (effective July 1, 2003); UTAH CODE ANN. §§ 13-25a-102-06 (West, WESTLAW, current through second special Legis. Sess.), amended by S.B. 194, §§ 1-4, Gen. Sess. (Utah 2003) (effective May 5, 2003); UTAH CODE ANN. §§ 13-25a-108 to 13-25a-111, amended by S.B. 194, §§ 6-9 (effective May 5, 2003); S.B. 2445 (Miss. 2003) (effective July 1, 2003); H.B. 424, Leg. Sess. (Mont. 2003) (effective July 1, 2003); A.B. 232 (Nev. 2003) (effective June 10, 2003 for the purposes of adopting regulations and entering into contracts or otherwise preparing to carry out the act; Jan. 1, 2004 for the purpose of the Attorney General determining whether to adopt the national do-not-call registry as the state registry; May 1, 2004 if the Attorney General makes the determination before Apr. 1, 2004; otherwise, effective May 1, 2004 for purposes of receiving and accepting requests to include telephone numbers in the registry; June 1, 2004 for purposes of publishing the first list of telephone numbers in the registry and July 1, 2004 for all other purposes).

47. See ALA. CODE § 8-19C-2(a) (2002); ALASKA STAT. § 45.50.475(a)(1) (Michie 2003); ARIZ. REV. STAT. ANN. § 44-1282(A) (Supp. 2003); ARK. CODE ANN. § 4-99-404 (Michie 2003); CAL. BUS. & PROF. CODE § 17592(c) (West Supp. 2003); COLO. REV. STAT. ANN. § 6-1-904(1)(a) (West 2002 & Supp. 2003); CONN. GEN. STAT. ANN. § 42-288a(c) (West Supp. 2003); FLA. STAT. ANN. § 501.059(4) (West 2004); GA. CODE ANN. § 46-5-27(c) (Supp. 2003); IDAHO CODE § 48-1003A(2) (Michie 2003); 815 ILL. COMP. STAT. ANN. 402/10 (West Supp. 2003); IND. CODE ANN. § 24-4.7-4-1 (Michie Supp. 2001); KAN. STAT. ANN. § 50-670a(b) (Supp. 2003); KY. REV. STAT. ANN. § 367.46955(15) (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 45:844.14(C) (West Supp. 2004); MASS. GEN. LAWS ANN. ch. 159C, § 3 (West Supp. 2003); MICH. COMP. LAWS ANN. § 445.111a(5) (West, WESTLAW, through 2004 Legis. Sess.); MINN. STAT. ANN. § 325E.312(1) (West Supp. 2004); MO. ANN. STAT. § 407.1098(1) (West 2001); N.H. REV. STAT. ANN. § 359-E:8 (Supp. 2003); N.J. STAT. ANN. § 56:8-128 (West, WESTLAW, current through 2004 Legis. Sess.); N.M. STAT. ANN. § 57-12-22(C)(1) (Michie 2002 & Supp. 2003); N.C. GEN. STAT. § 75-102(a) (2003); N.D. CENT. CODE § 51-28-06 (Supp. 2003); N.Y. GEN. BUS. LAW § 399-z(3) (McKinney Supp. 2004); OKLA. STAT. ANN. tit. 15, § 775B.6 (West Supp. 2004); OR. REV. STAT. § 646.569 (2003); 73 PA. CONS. STAT. ANN. § 2245.2(a) (West Supp. 2003); S.D. CODIFIED LAWS § 49-31-99 (Michie Supp. 2003); TENN. CODE ANN. § 65-4-404 (Supp. 2003); TEX. BUS. & COM. CODE ANN. § 44.102(a) (Vernon Supp. 2004); UTAH CODE ANN. §§ 13-25a-103, -08 (2003); VT. STAT. ANN. tit. 9, § 2464a(b)(2) (Supp. 2003); WIS. STAT. ANN. § 100.52(4)(a)(2) (West Supp. 2003); WYO. STAT. ANN. § 40-12-302(b) (Michie 2003); Miss. S.B. 2445, § 4; Mont. H.B. 424, § 2; Nev. A.B. 232, § 14.

48. See ARIZ. REV. STAT. ANN. § 44-1278(B) (West 2003 & Supp. 2003); KY. REV. STAT. ANN. § 367.46955 (Banks-Baldwin 2003); ME. REV. STAT. ANN. tit. 10, § 1499(1) (West Supp. 2003); MASS.

ording to both the FTC and FCC, the federal do-not-call provisions under the TSR and TCPA rules do not preempt state do-not-call laws such as those described above.<sup>49</sup> The FCC, however, has indicated that any state regulation of interstate (as opposed to intrastate) telemarketing calls that differs from the TCPA rules would conflict with and frustrate the federal do-not-call scheme and thus, almost certainly would be preempted.<sup>50</sup>

Beyond do-not-call statutes, the state laws enacted or amended in 2003 that will significantly impact the business of telemarketing include the following features:

- requiring telemarketers to transmit their names and/or telephone numbers to consumers' caller identification services;<sup>51</sup>
- extending telemarketing regulations to cover mobile and wireless subscribers;<sup>52</sup>
- requiring telemarketers to make certain disclosures during telephone calls (e.g., telemarketer's name and purpose of the call) and/or prohibiting telemarketers from making misrepresentations during telephone calls or using profane or obscene language;<sup>53</sup>
- prohibiting telephone solicitations before and after certain times of the day and on certain days, such as Sunday or legal holidays;<sup>54</sup>

GEN. LAWS ANN. ch. 159, § 19C (West 2002 & Supp. 2003); MICH. COMP. LAWS ANN. § 445.111c(1)(g) (West, WESTLAW, current through 2004 Legis. Sess.); N.C. GEN. STAT. § 75-102 (2003); OR. REV. STAT. § 646.563 (2003); 73 PA. CONS. STAT. ANN. § 2245(a)(2) (West Supp. 2003); R.I. GEN. LAWS § 5-61-3.5(a) (2002); S.C. CODE ANN. § 16-17-445(Law. Co-op. 2003 & Supp. 2003); S.D. CODIFIED LAWS § 49-31-99 (Michie 2003 & Supp. 2003); VT. STAT. ANN. tit. 9, § 2464a(b)(3) (Supp. 2003); VA. CODE ANN. § 59.1-514 (Michie 2001); WASH. REV. CODE ANN. § 80.36.390(3) (West 2001); WIS. STAT. ANN. § 100.52(4)(a) (Supp. 2003).

49. Telemarketing Sales Final Amendment Rule, 68 Fed. Reg. at 4638; Telephone Consumer Protection Act of 1991 Final Rule, 68 Fed. Reg. at 44,154.

50. Telephone Consumer Protection Act of 1991 Final Rule, 68 Fed. Reg. at 44,155.

51. See ARK. CODE ANN. §§ 4-88-107, 4-99-201, 4-99-302 (Michie 2003); ME. REV. STAT. ANN. tit. 10, § 1499-A (West Supp. 2003), enacted by L.D. 331, 121th Leg., 1st Reg. Sess. (Me. 2003) (effective Jan. 29, 2004); MASS. GEN. LAWS ANN. ch. 159C, § 4 (West Supp. 2003); MICH. COMP. LAWS ANN. § 445.111b (West, WESTLAW, current through 2004 Legis. Sess.); N.J. STAT. ANN. § 56:8-128 (West, WESTLAW, current through 2004 Legis. Sess.); N.M. STAT. ANN. §§ 57-12A-7, 57-12-22(C)(2) (Michie Supp. 2003); N.C. GEN. STAT. § 75-102(i) (2003); N.D. CENT. CODE § 51-28-08 (Supp. 2003); OHIO REV. CODE ANN. §§ 4719.08(I), 4719.21(B) (Anderson 2003), amended by H.B. 312, § 1, 124th Gen. Assem. (Ohio 2003) (effective Apr. 9, 2003); MISS. S.B. 2445, § 12 (Miss. 2003); MONT. H.B. 424, § 4 (Mont. 2003).

52. See GA. CODE ANN. § 46-5-27(c) (Supp. 2003).

53. See MASS. GEN. LAWS ANN. ch. 159C, § 5A (West Supp. 2003); MICH. COMP. LAWS ANN. §§ 445.111b, 445.111c (West, WESTLAW, current through 2004 Legis. Sess.); N.J. STAT. ANN. § 56:8-128 (West, WESTLAW, current through 2004 Legis. Sess.); N.M. STAT. ANN. §§ 57-12-22(B)(1), (2) (Supp. 2003); N.C. GEN. STAT. §§ 75-102(c), (h) (2003); N.D. CENT. CODE § 51-28-07 (Supp. 2003); MISS. S.B. 2445, § 12 (Miss. 2003); MONT. H.B. 424, § 4 (Mont. 2003).

54. See MASS. GEN. LAWS ANN. ch. 159C, § 3 (West Supp. 2003); N.J. STAT. ANN. § 56:8-128 (West, WESTLAW, current through 2004 Legis. Sess.); N.C. GEN. STAT. § 75-102(f) (2003); N.D. CENT. CODE § 51-28-05 (Supp. 2003); UTAH CODE ANN. § 13-25a-103 (West, WESTLAW, current through 2003 second special Legis. Sess.); WYO. STAT. ANN. § 40-12-302(d) (Michie 2003), amended by H.B. 53, § 1 (Wyo. 2003) (effective Feb. 26, 2003); MISS. S.B. 2445, § 12 (Miss. 2003); NEV. A.B. 232; §§ 1-2 (Nev. 2003).

- requiring telemarketers to disclose the telephone number of an organization on whose behalf a call is made and requiring a person to answer calls made to such number and provide certain information (e.g., description of the organization on whose behalf the call was made and the telephone solicitation);<sup>55</sup>
- prohibiting telemarketers from requesting or accepting payment from a consumer or making or submitting charges to a consumer's credit or bank account before receiving an express verifiable authorization (i.e., a written authorization or confirmation, an oral authorization that is recorded, or a confirmation through an independent third party);<sup>56</sup>
- prohibiting telemarketers from offering prize promotions in which a purchase or payment is necessary to obtain the prize;<sup>57</sup>
- requiring registration, bonding, and/or annual fees of telemarketers;<sup>58</sup>
- prohibiting or restricting calls made by the use of an ADAD or a recorded message player;<sup>59</sup>
- prohibiting violations of the TSR;<sup>60</sup>
- prohibiting telemarketers from making telemarketing sales calls to consumers' mobile telephones;<sup>61</sup>
- requiring telemarketers to promptly terminate a telephone solicitation upon an objection of the called party;<sup>62</sup>
- prohibiting telemarketers from contacting individuals who are under the age of eighteen;<sup>63</sup> and
- requiring telemarketers to maintain records of individuals that make telephone solicitations and prohibiting telemarketers from using fictitious names unless they are traceable to a specific individual.<sup>64</sup>

55. See MICH. COMP. LAWS ANN. § 445.111b (West, WESTLAW, current through 2004 Legis. Sess.).

56. See MICH. COMP. LAWS ANN. § 445.111c (West, WESTLAW, current through 2004 Legis. Sess.).

57. See MICH. COMP. LAWS ANN. § 445.111c (West, WESTLAW, current through 2004 Legis. Sess.).

58. See N.J. STAT. ANN. §§ 56:8-121, -126 (West, WESTLAW, current through 2004 Legis. Sess.); S.D. CODIFIED LAWS § 49-31-105 (Supp. 2003); Miss. S.B. 2445, §§ 7, 8(f) (Miss. 2003).

59. See MASS. GEN. LAWS ANN. ch. 159C, § 3 (West Supp. 2003), enacted by Mass. H.B. 5225 (effective Jan. 1, 2003); MICH. COMP. LAWS ANN. § 445.111a (West, WESTLAW, current through 2004 Legis. Sess.); N.C. GEN. STAT. § 75-104 (2003); N.D. CENT. CODE §§ 51-28-02-05 (Supp. 2003); Miss. S.B. 2445, § 12 (Miss. 2003); Nev. A.B. 232, § 1 (Nev. 2003).

60. See N.H. REV. STAT. ANN. § 359-E:8(II) (Supp. 2003); N.C. GEN. STAT. §§ 75-102(e), (o) (2003).

61. See N.J. STAT. ANN. § 56:8-130 (West, WESTLAW, current through 2004 Legis. Sess.).

62. See N.C. GEN. STAT. § 75-102(c)(4) (2003).

63. See N.C. GEN. STAT. § 75-102(g) (2003).

64. See N.C. GEN. STAT. § 75-102(j) (2003).