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State Telemarketing Legislation: A Whole Lotta Law Goin' On

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STATE TELEMARKETING LEGISLATION: A WHOLE LOTTA LAW GOIN' ON!

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*Useless laws weaken the necessary laws.*¹

*Good laws lead to the making of better ones; bad ones bring about worse.*²

INTRODUCTION

Moreover, the shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom. . . . Unlike the radio or the television, whose delivery of speech, either commercial or noncommercial, depends on the listener's summons, the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself.³

As the Supreme Court of Minnesota noted above, the telephone is uniquely intrusive. Individuals have little control over when, or how frequently, telemarketers use individuals' telephone lines to invade the privacy of the home to solicit funds or to sell goods. "We can outlaw sound-trucks from rolling down our streets, we can outlaw people from ringing our doorbells, and we can outlaw people from sending us mail, but presently we cannot stop them from calling us on the phone."⁴ Irritation with telephone solicitations has been one of the top consumer complaints.⁵ "We're under as-

1. Charles de Secondat, Baron de Montesquieu, *De l'Esprit des Lois* XXIX, 16 (1748).

2. Jean Jacques Rousseau, *Du Contrat Social*, III, 15 (1762).

3. *State ex rel. Humphrey v. Casino Mktg. Group, Inc.*, 475 N.W.2d 505, 507 (Minn. App. 1991), 491 N.W.2d 882, 888 (Minn. 1992).

4. Joseph R. Cox, *Telemarketing, the First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMILNE J. PUB. L. & POL'Y 403, 425 (1996).

5. Michael E. Shannon, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381 (2001) (quoting Al Martinez, Sorry, Wrong Number, L.A. TIMES, Jan. 22, 1998).

sault . . . because all those cash-hungry companies out there don't give a rat's kazoo how much they intrude, as long as they make money. They don't care about our privacy, our safety, our stress rate or our homicidal tendencies."⁶

The purpose of this article is to analyze the Wyoming telemarketing legislation designed to protect the privacy of consumers⁷ and compare it with the extensive legislation in other states. Even in the absence of fraud, consumers are still harmed by the use of telephone lines to invade the privacy of the home for the purpose of soliciting funds or selling goods. Therefore, the focus here is limited to consumer privacy. Although telemarketers engage in First Amendment protected commercial speech, their rights need to be balanced by individuals' right to privacy.

Wyoming Telemarketing Legislation

Effective July 1, 2002, the Legislature of the State of Wyoming enacted Article 3, Telephone Solicitation.⁸ The Act restricts unsolicited telephone sales calls in three ways: First, at the outset of the call the solicitor must disclose the name of the individual caller, the identity, address, and telephone number of the telephone solicitor, the purpose of the call, and the nature of the consumer good or services.⁹ Second, telephone solicitors shall not call any telephone number more than sixty days after the number has appeared in the national do-not-call list.¹⁰ The list referred to is maintained by the Telephone Preference Service of the Direct Marketing Association or its successor organization.¹¹ Third, no telephone solicitor shall knowingly block subscribers' caller identification service.¹² The Act further restricts the use of automated dialing systems and the playing of recorded messages to callers included on the do-not-call list or to consumers with whom the solicitors do not have an established business relationship.¹³

The Attorney General, the enforcing authority,¹⁴ is charged with investigating complaints and is authorized to bring actions for civil penalties and to seek injunctive relief.¹⁵ The civil penalties increase with each violation; the first is not to exceed \$500, the second \$2,500, and the third

6. *Id.*

7. Telemarketing fraud, although a significant problem, especially for the elderly, is beyond the scope of this article.

8. *See* WYO. STAT. ANN. §§ 40-12-301-305 (LEXISNEXIS 2002).

9. *Id.* § 40-12-302(a).

10. *Id.* § 40-12-302(b).

11. *Id.* § 40-12-301(a)(viii).

12. *Id.* § 40-12-302(c).

13. *Id.* § 40-12-303.

14. *Id.* § 40-12-301(a)(5).

15. *Id.* § 40-12-304.

\$5,000.¹⁶ An affirmative defense that the solicitor called a consumer listed on the do-not-call list as a result of a "good faith error" is available.¹⁷ The remedies provided by the Act are not exclusive.¹⁸ When any civil litigation results from a purported violation of the Act, however, the prevailing party can receive reasonable attorney's fees and costs from the nonprevailing party.¹⁹

There are several potential problems with the Wyoming legislation if its goal is to protect Wyoming consumers from unwanted telephone solicitation. First, having consumers register with the Direct Marketing Association may be the worst possible choice. Second, allowing the affirmative defense of "good faith error" may effectively negate any protective power of the statute. Third, the Act does not specifically grant consumers the right of private action, but it also does not make its remedies exclusive. Nevertheless, the statute may have a chilling effect that discourages private parties from bringing civil actions by its provision allowing the prevailing party to recover attorney fees and court costs in civil litigation. If the defendant solicitor wins on its affirmative defense of "good faith error," the resulting attorney fees and court costs could bankrupt an individual consumer. These concerns will be analyzed *infra* in the discussion of specific provisions of state telemarketing legislation.

The Scope of the Article

This article will question whether the vast amount of state legislation, including the Wyoming Act, is necessary and effective, or whether it is useless law that weakens necessary law. Is it bad legislation that will only bring about worse? Have state legislators found it necessary to "do something" to appease an angry populace, or is there a significant social problem that requires and is solved by state regulation?

To develop a foundation the article will first provide a brief marketing perspective in which it will investigate the importance of market orientation and relationship marketing to the practice of telemarketing. This section attempts to ascertain why telemarketers continue practices that appear to offend most people. Second, a review and analysis of the state telemarketing legislations will illustrate the various approaches state legislators have taken to protect consumer privacy. Third, alternatives to state legislation, including federal regulation and industry self-regulation, will be compared for effectiveness. In conclusion, the article argues that federal regulation may be the most effective way to protect consumer privacy.

16. *Id.* § 40-12-304(a)(i)(ii)(iii).

17. *Id.* § 40-12-304(e).

18. *Id.* § 40-12-304(d).

19. *Id.* § 40-12-304(c).

MARKETING PERSPECTIVE

Welcome Offers

Of course, it would be wrong to infer that all direct marketing, including telemarketing, is unwelcome. Some research shows that consumers like buying from direct marketers. The trade publication, *Target Marketing*, found that:

1. 90% of respondents indicated they used toll-free phone numbers.
2. About one third of respondents dial toll-free numbers 60 or more times per year.
3. Some 86% of respondents preferred to deal with companies that provide toll-free numbers for customer service.²⁰

Further, there is evidence from the economics of direct marketing that implies the existence of many satisfied customers. Estimates for 2001 indicate that consumer direct mail advertising expenditures will be \$46.9 billion; and expenditures will be \$25.8 billion for business-to-business advertising.²¹ For the same year, telephone marketing to consumers cost \$26.7 billion; to business-to-business, \$57.7 billion.²² Clearly, economic activity of this magnitude could not persist if it were all unwelcome and unprofitable.

Telemarketing Practices

In 1994, telemarketing was reported to be a \$400 billion a year industry employing approximately 3.5 million people.²³ In 2002, the estimates are at \$668 billion and 6 million jobs.²⁴ Eighty to ninety percent of all large businesses engage in telemarketing. It is among the major direct marketing tools, with the average household receiving over 19 calls annually.²⁵ An average telemarketer can call up to 50 potential customers a day to create

20. *800/900 Number*, TARGET MARKETING 58 (1995).

21. RUSSELL, J. THOMAS & W. RONALD LANE, KLEPPNER'S ADVERTISING PROCEDURE 353 (14 ed. 1999).

22. *Id.*

23. Rita Marie Cain, *Call Up Someone and Just Say 'Buy' - Telemarketing and the Regulatory Environment*, 31 AM. BUS. L.J. 641 (1994).

24. American Association of Retired Persons, *Feds Offer Relief From Unwanted Calls*, AARP BULLETIN., March 2002, at 4.

25. PHILIP KOTLER, MARKETING MANAGEMENT 661 (10th ed. 2000).

new leads, qualify them and sell to them.²⁶ In addition to these tasks, telemarketers also cross-sell the company's other products, open new and reactivate former accounts, give more attention to neglected accounts and follow up and qualify direct-mail leads.²⁷ Telemarketing is a cost-efficient method of accomplishing these objectives, mostly due to its low cost per contact.

Telemarketing systems used in achieving the above goals vary in their degree of automation and sophistication. Some of the more traditional ones simply rely on a team of centrally located telemarketers, each equipped with a telephone and a list of prospects. Each telemarketer calls a prospective customer, presents a scripted sales message and attempts to solicit an order.

Some other telemarketing systems are fully automated, employing devices such as automatic-dialing and recorded message players which dial phone numbers, play a voice-activated advertising message, and last take orders from interested customers by means of an answering machine device or forwarding the call to an operator.²⁸ Whatever the medium, the purpose and the means remain the same: calling potential customers (typically) at their homes in hopes of selling products and services. That practice alone seems to be indicative of lack of customer focus, as the solicitation process seems to take place *prior* to customer need identification.

The core of contemporary marketing theory is the *marketing concept*, an axiom that every business school undergraduate is compelled to memorize and, from time to time, apply to various problems and exercises that occur in the curriculum. Practitioners, too, have heard of the concept and many try to apply it to the marketing aspects of their business or non-profit organization. Some do so because they believe this concept to be a virtuous philosophical orientation, *per se*, while others apply it in the belief or hope that it represents a route to profits. Both positions reflect awareness of some value to using the marketing concept while neither seems to grasp the entire concept.

Historical Antecedents

The early decades of the twentieth century represent a period when most businesses were still more concerned with selling than with marketing. Observation of then-prevailing practices allows a reconstruction of what has been called a *selling concept*, a view that, if left alone, customers would not ordinarily buy enough of the firm's products to satisfy its volume and profit needs.²⁹ As a consequence, customers were not "left alone," but bothered,

26. *Id.* at 630.

27. *Id.*

28. *Id.* at 661.

29. *Id.* at 18.

badgered, baited, and bullied to “buy” by persistent advertising and by aggressive salespersons. Any consideration of customers’ needs was secondary to the objective of making the sale. The seller’s needs were predominant. Even today, some marketing by nonprofit entities, notably some politicians and some charities, use an undiluted form of the *selling concept*.³⁰

Structurally, the *selling concept* is based on four conditions: production overcapacity, similarly situated competitors, a long repurchase interval, and a disparaging view of consumers as malleable and easy to manipulate.³¹ By mid twentieth century, these conditions had evolved to the point where the concept had lost much of its effectiveness. Sellers were forced to make a closer match between capacity and demand. Competition was more intense and smarter. Competitors who employed elements of the marketing concept enjoyed greater efficiencies, larger market shares and greater profitability than did the unevolved sellers. Historical repurchase intervals shortened apace with rising household incomes. Here, consumer satisfaction was linked to more frequent repurchases to create a larger sales volume for the marketer. Consumers were better educated and less gullible. This improved their ability to evaluate products and advertising claims as well as to resist pressure from salespersons. In these ways, significant alterations in the national economy and household purchase patterns made marketers look for a better way to earn profits.

By the 1950s an alternative was conceptualized and named the *marketing concept*. An early expression of the idea stated: “The *marketing concept* holds that the key to achieving organizational goals consists of being more effective than competitors in integrating marketing activities toward determining and *satisfying the needs and wants of target markets*.”³² Another sympathetic expression of this way to earn profits by meeting consumers’ needs can be found in the work of Drucker: “The aim of marketing is to know and understand the customer so well that the product or service fits him and sells itself. Ideally, marketing should result in a customer who is ready to buy. All that should be required then is to make the product or service available”³³ Finally, Leavitt’s direct contrast of selling with marketing highlights the shifts in orientation and practices:

Selling focuses on the needs of the seller; marketing on the needs of the buyer. Selling is preoccupied with the seller’s need to convert his product into cash; marketing with the idea of satisfying the needs of the customer by means of

30. *Id.*

31. Interview with Anthony F. McGann, Emeritus Professor of Marketing, University of Wyoming. See also, KOTLER, *supra* note 25, at 18-19.

32. Fred J. Borch, *The Marketing Philosophy as a Way of Business Life, in THE MARKETING CONCEPT: ITS MEANING TO MANAGEMENT* 3-5 (1957) (emphasis added).

33. Peter Drucker, *Management: Tasks Responsibilities, Practices* 64-65 (1974).

the product and the whole cluster of things associated with creating, delivering and finally consuming it.³⁴

A recent restatement of the *marketing concept* takes into account not only the immediate needs of individuals and households, but also the longer-term macroeconomic well-being of buyers and of society. Kotler calls this the societal *marketing concept*, which "holds that the organization's task is to determine the wants, needs and interests of target markets and to deliver the desired satisfactions more effectively and efficiently than competitors in a way that preserves or enhances the consumer's and society's well-being."³⁵ This is a contemporary statement of the marketing concept and a standard for judging contemporary practices.

CURRENT PRACTICES

In today's marketplace one group of sellers, direct marketers, is often seen as a throwback. Some direct marketers operate in much the same way as the earlier practitioners of the *selling concept*. These modern-day relics seem to believe that consumers will not buy their product without high doses of pressure to do so. Their behavior implies that consumers have little to choose from in the array of substitute products offered by competitors. They appear disinterested in increasing their profit by selling additional units over time to satisfied customers. Their practices seem as disdainful, impolite and inconsiderate of consumers as did those of their predecessors a century ago. This unbridled focus on making a sale by any method created a backlash among customers and prospects and this negative reaction is also expressed in legislation and additional regulation of the direct marketing industry. Perhaps the most disliked tactic of some direct marketers is to combine a "seller's" orientation with an unwanted solicitation. The prevalent use is something of a surprise since it would seem that consumers who dislike a sales tactic are less likely to buy from those who employ it. Several key factors determine not only the popularity but also the profitability of any direct marketing offer. These elements relate not only to the product but also to its price, distribution, promotion and the behavioral patterns used to buy it.

Product performance is measured against specifications or reasonable expectation. These often include criteria such as expected economic life, durability, operating efficiency, ease and cost of maintenance and stylistic or aesthetic dimensions.³⁶ At a minimum, good products pass the fitness and merchantability screens found in commercial law. When products per-

34. Theodore Levitt, *Marketing Myopia*, 60 HARV. BUS. REV. 45, 50 (1960).

35. Kotler, *supra* note 25.

36. WILLIAM D. PERREAULT, JR. & E. JEROME MCCARTHY, *BASIC MARKETING*, 243-245 (13th ed. 1999).

form poorly, the most common marketplace recourse is to buy something else in the next repurchase cycle.³⁷ One time or infrequently repurchased products, e.g., coffins, organ transplants, and travel to remote locations, are more or less immune to this marketplace discipline.

Price is rarely determined, except for commodities, by simple supply and demand. For branded goods, price is typically set in relation to cost, to competitive prices, to demand or to some combination of these constraints.³⁸ When appropriate costs are subtracted, unit price determines unit margin and therefore unit profit. Competition and comparisons tend to lower price; monopoly and isolated prices have the opposite effect.

Distribution channels are described by their functions, members and their efficiency in delivering goods to buyers.³⁹ Within a product class, distributive functions are pretty much uniform. What may vary among sellers is who is assigned which tasks. Efficient channel operations can contribute to seller profitability and buyer satisfaction while inefficiency detracts from these results.⁴⁰

Promotion is grossly divided between personal and impersonal messages; personal selling and advertising respectively.⁴¹ When a mechanism is included in either activity that permits direct purchasing, it is referred to as "direct marketing." It is only superficially true that direct marketing cuts out the middleman. Channel functions appropriate for the sale, such as bulk breaking, warehousing or financing, must shift to the parties remaining in the transaction.⁴²

Direct marketing uses solicitations delivered in person, by mail, by telephone or by the Internet. Products sold by direct marketing range from small ticket items such as household knickknacks to major purchases of specialty goods. When consumers initiate the process, it takes place under their control. Matters such as time of day, extent of pre-purchase deliberation, financing arrangements, and delivery options can be decided before the consumers place the order. Direct marketing transactions, however, can be initiated by either consumers or by marketers. Customer initiation of the buying sequence is termed "inbound" telemarketing by the industry; seller-initiated solicitation is called "outbound," and this is the area of greatest concern of regulators, legislators, consumer activists, and customers bothered by the

37. McGann, *supra* note 31.

38. KOTLER, *supra* note 25, at 465.

39. *Id.* at 490.

40. McGann, *supra* note 31.

41. PERREAULT, *supra* note 36, at 383.

42. McGann, *supra* note 31.

nature or volume of these solicitations.⁴³ This terminology applies to out-bound messages delivered by mail, Internet or salespeople.

THE ANATOMY OF AN UNWELCOME DIRECT MARKETING SOLICITATION

Some direct marketing solicitations are unwelcome. Factors that contribute to this condition are timing, content and delivery methods. With respect to timing, phone solicitations are the most irritating.

While any phone call may arrive at an inopportune moment, those arriving during dinnertime are perhaps most disliked. It is not true that all consumers can ignore phone calls that arrive during dinner. Situations like the impending arrival of guests at an airport or occupations like law enforcement, the military, or the clergy may require round-the-clock response to an incoming call. Furthermore, many consider it polite to answer a phone call in case it is important. In contrast, unwanted mail or Internet solicitations are easier to ignore; the interruption may not be so personally disruptive and irritating.

Content of the message can add to recipients' aggravation. For example, with phone messages that are deceptive or apply high pressure sales-closing techniques, Internet banners or windows that must be "dealt with" before beginning the intended task, or overflowing mailboxes filled with "junk mail" the irritation is compounded when the message is misleading or distasteful. For Internet advertising, the most sinister hazard to consumer well-being may be the potential damage to privacy. In a recent survey, 65 % of respondents agreed with the statement: "It is a serious violation of privacy for a company to sell a mailing list without the permission of those on the list;" and 55% agreed that "[u]nsolicited phone calls for fund-raising are a serious violation of privacy."⁴⁴ Finally, messages couched in unpleasant or inconsiderate ways are often unwelcome. Callers or mailings that are based on fear appeals or on recent illness or death are the worst, but it is also irritating for a consumer to be unable to terminate an unexpected solicitation or to avoid repeated solicitation from a source whose offer has already been declined.

STATE TELEMARKETING LEGISLATION

Most states have enacted consumer protection laws regulating the activities of telemarketers.⁴⁵ Currently only seven states, Iowa, Massachu-

43. *Id.*

44. Greg Paus, *Consumers Want Privacy*, ADVERTISING AGE, Oct. 30, 1995, at 38.

45. ALA. CODE § 18-19A (2000); ALASKA STAT. § 45.50.475 (LEXISNEXIS 2000); ARIZ. REV. STAT. ANN. § 44-1271 (2001); ARK. CODE ANN. § 4-99-101 (LEXISNEXIS 1999); CAL. BUS. & PROF. CODE § 17511.1 (West 2000); COLO. REV. STAT. § 6-1-301 (West 2000); CONN. GEN. STAT. ANN. § 42-288a(b) (West. 2001); DEL. CODE ANN. tit. 6, § 2503A (2000);

sets, Nebraska, New Hampshire, South Carolina, and Vermont have no telemarketing statutes.

Constitutional Challenges

To date state telemarketing statutes in Minnesota, California and New Jersey, have faced constitutional challenge.⁴⁶ In the earliest case, *State v. Casino Marketing Group, Inc.*,⁴⁷ the Minnesota statute that is nearly identical to the federal Telephone Consumer Protection Act (TCPA)⁴⁸ faced judicial review and withstood the challenge that it was unconstitutional. The controversial part of the statute prohibits a caller from using automatic dialing-announcing devices (ADADs) unless the subscriber has “requested, consented to, permitted or authorized receipt of the message,” or a live operator obtains the subscriber’s consent before playing the recorded message.⁴⁹ Following the issuance of a temporary injunction prohibiting the defendant from using ADADs without live operators, he argued on appeal that the statute was an illegal prior restraint.⁵⁰ The appellate court, analyzing the statute according to the four-part test designed by the Supreme Court to determine the lawfulness of restrictions on commercial speech,⁵¹ determined that the Minnesota statute is constitutionally permissible.⁵² Under the test, a court must determine if: (1) the speech deserves first amendment protection (must

FLA. STAT. ANN. § 501.059 (West 2001); GA. CODE ANN. § 10-5B-1 (2000); HAW. REV. STAT. § 481P (2002); IDAHO CODE § 48-1001 (LEXISNEXIS 2000); 815 ILL. COMP. STAT. § 413/1 (1994); IND. CODE ANN. § 24-5-12-1 (Michie 1995); KAN. STAT. ANN. § 50-670 (2001); KY. REV. STAT. ANN. § 367/46951 (Banks-Baldwin Supp. 2000); LA. REV. STAT. ANN. § 45:811 (West 1991); ME. REV. STAT. ANN. tit. 10 §§ 1498, 1499 (West 2002); MD. CODE ANN., (COM. LAW) § 14-2201 (1988); MICH. COMP. LAWS ANN. § 445.111 (West 2002); MINN. STAT. §§ 325E.26-31 (1992); MISS. CODE ANN. § 77-3-601 (West 1999); MO. ANN. STAT. § 407.1101 (West. Supp. 2001); MONT. CODE ANN. § 30-14-502 (1999); NEV. REV. STAT. § 599B (LEXISNEXIS 2001); N.J. STAT. ANN. § 48:17-29 (West 1993); N.Y. GEN. BUS. LAW § 399-p (McKinney Supp. 2001); N.C. GEN. STAT. § 66-260 (2002); OHIO REV. CODE § 4719.01 (West 2002); 15 OKLA. STAT. § 775A (West 2002); OR. REV. STAT. § 646.551 (Supp. 1999); 73 PA. CONS. STAT. § 2241 (2002); R.I. GEN. LAWS § 5-61-1 (2002); S.D. CODIFIED LAWS § 37-30A-1 (LEXISNEXIS 1997); TENN. CODE ANN. § 65-4-405 (Supp. 2000); TEX. BUS. & COM. CODE ANN. § 38.101 (Vernon 1999); UTAH CODE ANN. § 13-26-1 (2002); VA. CODE § 59.1-21 (Michie 2002); WASH. REV. CODE ANN. § 19.158.010 (West 2002); W. VA. CODE § 46A-6F-101 (2002); WYO. STAT. ANN. § 40-12-301 (LEXISNEXIS 2002). See also Hebe R. Smythe, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347,376 (1994).

46. MINN. STAT. §§ 325E.26-31 (1992); CAL. PUB. UTIL. CODE § 2874(a) (West 1997); CAL. CIV. CODE § 1770(v)(1) (West 1997); N.J. STAT. ANN. § 48:17-29 (West 1993).

47. *State v. Casino Marketing Group, Inc.*, 491 N.W.2d 882 (Minn. 1992), cert. denied, 507 U.S. 1006 (1993).

48. Communications Act of 1934, codified as amended in 47 U.S.C § 227 (1993).

49. MINN. STAT. § 325E.27 (1992).

50. *State ex rel. Humphrey v. Casino Mktg. Group, Inc.*, 475 N.W.2d 505, 506 (Minn. App. (1991)).

51. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980).

52. *Casino*, 475 N.W.2d at 507.

not be unlawful or misleading), (2) the asserted governmental interest is substantial, (3) the limitation directly advances the asserted governmental interest, and (4) the limitation is not more extensive than necessary to serve the governmental interest.⁵³ Neither the Minnesota Court of Appeals nor the Minnesota Supreme Court addressed the first issue, i.e., whether the commercial speech deserved first amendment protection.⁵⁴ On the second issue, the courts found that the government did have a substantial interest in protecting privacy in the home and preventing telemarketing fraud.⁵⁵ On the third issue, the Minnesota Supreme Court agreed that the limitation did protect privacy in the home, but questioned whether it prevented telemarketing fraud.⁵⁶ Lastly, both courts found that the regulation was narrowly tailored to achieve its purpose.⁵⁷

Two years later an amended version of the same section of the Minnesota statute came under constitutional challenge in the federal courts.⁵⁸ The amendment reads, "Message means any call, regardless of its content."⁵⁹ A gubernatorial candidate, Richard T. Van Bergen, challenged its constitutionality and requested a permanent injunction and declaratory relief against enforcement of the statute.⁶⁰ The candidate argued that the statute was overbroad, it was content-based, and that the telephone system is a public forum.⁶¹ The court rejected all three allegations,⁶² noting that the consent or live operator requirements of the statute protect Minnesota residents by allowing them the opportunity "not only to decline to listen to the message at that time, but also to request that the caller not call again."⁶³

Two California statutes are very similar, prohibiting the use of ADADs unless a live operator first identifies the calling party and obtains the recipient's consent to play the recorded message.⁶⁴ Following consumer complaints about the use of ADADs for a carpet cleaning business, the telephone company threatened to disconnect the telephones lines of the company. Bland, the owner of the business, and the National Association of Telecomputer Operators (NATO) unsuccessfully sued in federal district court alleging that both of the ADAD statutes violated the First and Four-

53. *Id.* at 508.

54. *Id.*; *State ex rel. Humphrey v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 887 (Minn. 1992).

55. *Casino*, 475 N.W.2d at 507; *Casino*, 491 N.W.2d at 888.

56. *Casino*, 475 N.W.2d at 507-508; *Casino*, 491 N.W.2d at 888.

57. *Casino*, 475 N.W.2d at 508; *Casino*, 491 N.W.2d at 891.

58. *Van Bergen v. State*, 59 F.3d 1541 (8th Cir. 1995).

59. In 1994, MINN. STAT. § 325E.26 (1992) was amended to add subdivision 6, "Message means any call, regardless of its content."

60. *Van Bergen*, 59 F.3d at 1544-45.

61. *Id.* at 1549.

62. *Id.* at 1555-56.

63. *Id.* at 1556.

64. CAL. PUB. UTIL. CODE § 2874(a) (West 1997); CAL. CIV. CODE § 1770(v)(1) (West 1997).

teenth Amendments.⁶⁵ On appeal, the United States Court of Appeals for the Ninth Circuit recognized that the California statutes are very similar to the Minnesota statute, but not identical in the exemptions allowed.⁶⁶ The plaintiffs argued that the California exemptions, calls from parties with an existing relationship and calls from nonprofit organizations to their members, improperly privilege some relationships over others.⁶⁷ The test used to analyze the statute was also very similar, but not identical, to the one used with the Minnesota statute. The court applied “the time, place, and manner test, to determine whether its particular restrictions 1) are content neutral, 2) serve a significant governmental interests, 3) are narrowly tailored to serve this interest, and 4) leave open ample alternative channels of communication.”⁶⁸ The court concluded that both statutes were constitutional on their face and as applied.⁶⁹ There is content neutrality because the provision only prescribes a *method* of communication, not its content.⁷⁰ The court disagreed with the plaintiffs that the exemptions for some emergency situations and callers, but not others, is not a fatal flaw.⁷¹ Second, the court recognized that the state has a significant interest in protecting the public from ADAD calls. Quoting from Congressional reports, the court recognized that millions of people can be annoyed and disrupted every day by the use of ADADs.⁷² Third, the court determined that no less restrictive means of accomplishing the government’s objectives are readily apparent. It rejected the plaintiffs’ arguments that do-not-call lists or customer self-help protective devices would be sufficient.⁷³ Last, the court noted that there are alternative channels of communication. The test does not require that the easiest and cheapest channel be permitted.⁷⁴

Only the New Jersey statute has failed under constitutional scrutiny.⁷⁵ In August 1993, the New Jersey legislature passed a statute that is similar to the TCPA and the Minnesota statute. Three months later, following the reasoning in a case that declared the TCPA unconstitutional,⁷⁶ but was later reversed, the federal district court found that the New Jersey statute violated the First Amendment.⁷⁷ Because the statute distinguished between commercial and noncommercial speech, the district court determined that it

65. Bland v. Fessler, 88 F.3d 729, 731 (9th Cir. 1996).

66. *Id.* at 733.

67. *Id.*

68. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

69. *Id.* at 739.

70. *Id.* at 733.

71. *Id.* at 734.

72. *Id.*

73. *Id.* at 736.

74. *Id.*

75. Lysaght v. New Jersey, 837 F. Supp. 646 (D.N.J. 1993).

76. Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993), *rev'd* 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 515 U.S. 1161 (1995).

77. Lysaght, 837 F. Supp. at 649.

was not content-neutral.⁷⁸ Although the court recognized that New Jersey has a substantial interest in protecting residential privacy from the intrusion of the telephone, it did not find that the state had met its burden of establishing a reasonable fit between the statute and the privacy interests.⁷⁹ The court found two problems with the New Jersey statute. First, the statute banned only commercial calls, allowing noncommercial calls. Specifically, the court noted that the calls of nonprofit organizations, exempted under the Act, equally disrupt residential privacy.⁸⁰ Second, the statute distinguished between live calls and recorded calls. The court concluded that privacy was no less invaded by recorded, commercial calls than by live, noncommercial calls.⁸¹ Later cases in New Jersey courts that have considered similar TCPA issues have either distinguished⁸² or disagreed⁸³ with this decision.

Registration and Bonding Requirements

Over half the states, as indicated in Appendix A, have registration requirements for telemarketers. Significant amounts of information are required for registration creating a heavy burden for telemarketers. To give an example of the potential extensiveness of the registration requirements, a summary of the main headings of the California statute follows:

(a) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different from the name of the seller, and the name of any parent or affiliated organization (1) that will engage in business transactions with purchasers relating to sales solicited by the seller or (2) that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller.

(b) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto, or, if a partnership, a copy of the partnership agreement, or if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to subdivision (a).

78. *Id.* at 649.

79. *Id.* at 650.

80. *Id.* at 653.

81. *Id.*

82. *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1109, (N.J. Super. Ct. Law Div. 1995).

83. *Zelma v. Market U.S.A.*, 778 A.2d 591, 593, (N.J. Super. Ct. App. Div. 2001).

(c) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business. If the principal business location of the seller is not in this state, then the seller shall also designate which of its locations within this state is its main location in the state.

(d) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located.

(e) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities.

(f) The complete address of the principal residence, the date of birth, and the driver's license number and state of issuance of each of the persons whose names are disclosed pursuant to subdivision (e).

(g) The name and principal residence address of each person the telephonic seller leaves in charge at each location from which the seller does business in this state, as defined in subdivision (a) of Section 17511.3, and the business location which each of these persons is or will be in charge of.

(h) A statement, meeting the requirements of this subdivision, as to both the seller, whether a corporation, partnership, firm, association, joint venture, or any other type of business entity (and whether identified pursuant to subdivision (e) or (g) or not), and as to any person identified pursuant to subdivision (e) or (g)

(i) A list of the names, principal residence addresses, the date of birth, and the driver's license number and state of issuance thereof, of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while so soliciting. No salesperson shall use the same name as used by any other salesperson soliciting for the telephonic seller and no telephonic seller shall permit a salesperson to use the same name as used by any other salesperson soliciting for the telephonic seller.

(j) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers, or if no sales script is required to be used, a statement to that effect.

(k) A copy of all sales information and literature (including, but not limited to, scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium-award information) provided by the telephonic seller to salespersons or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser.

(l) If the telephonic seller represents or implies, or directs salespersons to represent or imply, to purchasers that the purchaser will receive certain specific items (including a certificate of any type which the purchaser must redeem to obtain the item described in the certificate) or one or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the filing shall include the following:

(m) If the telephonic seller is offering to sell any metal, stone, or mineral, the filing shall include the following:

(n) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the filing shall include disclosure of the following:

(o) The name and address of the telephonic seller's agent in this state, other than the Attorney General, authorized to receive service of process in this state.

(p) If a person, based on paragraph (19) of subdivision (c) of Section 17511.1, claims an exemption from having to file the information required by subdivisions (a) to (o), inclusive, the person shall file, on a form provided by the Attorney General, the following information:

The filing shall be verified by a declaration signed under penalty of perjury by each principal of the person claiming the exemption. The declaration shall specify the date and location of signing.

If a person filing pursuant to subdivision (p) makes any representation to a prospective purchaser as to the historical movements or changes in the price or value of any coin or bullion, the person shall maintain in its records sufficient data to substantiate each representation. This data shall be retained in the person's records for a period of at least three years after the last date on which a representation is made and shall be made available for inspection upon request by any governmental agency at each of its business locations.

(q) If the telephonic seller represents or implies, or directs salespersons to represent or imply, that the telephonic seller can, or may be able to, make a loan or arrange or assist in arranging a loan or to assist in providing information which may lead to the obtaining of a loan, the filing shall include the following:⁸⁴

Registration fees for telemarketers vary. Some are only initial fees; some are annual fees.⁸⁵ California has an annual registration fee of only fifty dollars⁸⁶, but most states have \$100 annual fees.⁸⁷ Nevada charges an initial fee of six thousand dollars with renewal fees of \$100 a year.⁸⁸ A typical bond requirement is \$50,000,⁸⁹ but Arizona requires the highest at \$100,000.⁹⁰

Exemptions

The number of potential telephone solicitors who are exempted from the telemarketing legislation varies from 4 categories in Maryland, 25 in Alabama or 28 in Ohio and Florida. Eight states exempt 20 or more solicitors, but most states only exempt 10 or fewer categories from legislative coverage. Although Florida has often been cited as one of the strongest state statutes, the exceptions have swallowed the rule. It is estimated that only five percent of potential telemarketers are affected by the legislation. To illustrate the breadth of potential exemptions, the Florida exemptions are listed below.

- (1) A person engaging in commercial telephone solicitation where the solicitation is an isolated transaction and not done in the course of a pattern of repeated transactions of like nature.
- (2) A person soliciting for religious, charitable, political, or educational purposes. A person soliciting for other non-commercial purposes is exempt only if that person is soliciting for a nonprofit corporation and if that corporation is properly registered as such with the Secretary of State and is included within the exemption of § 501(c)(3) or (6) of the Internal Revenue Code.
- (3) A person who does not make the major sales presentation during the telephone solicitation and who does not in-

84. CAL. BUS. & PROF. CODE § 17511.3 (West 2000).

85. See Appendix A.

86. CAL. BUS. & PROF. CODE § 17511.3.

87. See Appendix A.

88. NEV. REV. STAT. § 599B.100 (LEXISNEXIS 2001).

89. See Appendix A.

90. ARIZ. REV. STAT. ANN § 44-1274 (West 2002).

tend to, and does not actually, complete or obtain provisional acceptance of a sale during the telephone solicitation, but who makes the major sales presentation and completes the sale at a later face-to-face meeting between the seller and the prospective purchaser in accordance with the home solicitation provisions in this chapter. However, if a seller, directly following a telephone solicitation, causes an individual whose primary purpose it is to go to the prospective purchaser to collect the payment or deliver any item purchased, this exemption does not apply.

(4) Any licensed securities, commodities, or investment broker, dealer, or investment adviser, when soliciting within the scope of his or her license, or any licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser, when soliciting within the scope of his or her license. As used in this section, "licensed securities, commodities, or investment broker, dealer, or investment adviser" means a person subject to license or registration as such by the Securities and Exchange Commission, by the National Association of Securities Dealers or other self-regulatory organization as defined by the Securities Exchange Act of 1934, 15 U.S.C. § 781, or by an official or agency of this state or of any state of the United States. As used in this section, "licensed associated person of a securities, commodities, or investment broker, dealer, or investment adviser" means any associated person registered or licensed by the National Association of Securities Dealers or other self-regulatory organization as defined by the Securities Exchange Act of 1934, 15 U.S.C. § 781, or by an official or agency of this state or of any state of the United States.

(5) A person primarily soliciting the sale of a newspaper of general circulation.

(6) A book, video, or record club or contractual plan or arrangement:

(a) Under which the seller provides the consumer with a form which the consumer may use to instruct the seller not to ship the offered merchandise.

(b) Which is regulated by the Federal Trade Commission trade regulation concerning "use of negative option plans by sellers in commerce."

(c) Which provides for the sale of books, records, or videos which are not covered under paragraph (a) or paragraph (b), including continuity plans, subscription ar-

rangements, standing order arrangements, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive such merchandise on a periodic basis.

(7) Any supervised financial institution or parent, subsidiary, or affiliate thereof. As used in this section, "supervised financial institution" means any commercial bank, trust company, savings and loan association, mutual savings bank, credit union, industrial loan company, consumer finance lender, commercial finance lender, or insurer, provided that the institution is subject to supervision by an official or agency of this state, of any state, or of the United States. For the purposes of this exemption, "affiliate" means a person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a supervised financial institution.

(8) Any licensed insurance broker, agent, customer representative, or solicitor when soliciting within the scope of his or her license. As used in this section, "licensed insurance broker, agent, customer representative, or solicitor" means any insurance broker, agent, customer representative, or solicitor licensed by an official or agency of this state or of any state of the United States.

(9) A person soliciting the sale of services provided by a cable television system operating under authority of a franchise or permit.

(10) A business-to-business sale where:

(a) The commercial telephone seller has been operating continuously for at least 3 years under the same business name and has at least 50 percent of its dollar volume consisting of repeat sales to existing businesses;

(b) The purchaser business intends to resell or offer for purposes of advertisement or as a promotional item the property or goods purchased; or

(c) The purchaser business intends to use the property or goods purchased in a recycling, reuse, remanufacturing, or manufacturing process.

(11) A person who solicits sales by periodically publishing and delivering a catalog of the seller's merchandise to prospective purchasers, if the catalog:

(a) Contains a written description or illustration of each item offered for sale.

(b) Includes the business address or home office address of the seller.

(c) Includes at least 20 pages of written material and illustrations and is distributed in more than one state.

(d) Has an annual circulation by mailing of not less than 150,000.

(12) A person who solicits contracts for the maintenance or repair of goods previously purchased from the person making the solicitation or on whose behalf the solicitation is made.

(13) A commercial telephone seller licensed pursuant to chapter 516 or part II of chapter 520. For purposes of this exemption, the seller must solicit to sell a consumer good or service within the scope of his or her license and the completed transaction must be subject to the provisions of chapter 516 or part II of chapter 520.

(14) A telephone company subject to the provisions of chapter 364, or affiliate thereof or its agents, or a business which is regulated by the Florida Public Service Commission, or a Federal Communications Commission licensed cellular telephone company or other bona fide radio telecommunication services provider. For the purposes of this exemption, "affiliate" means a person who directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, a telephone company subject to the provisions of chapter 364.

(15) A person who is licensed pursuant to chapter 470 or chapter 497 and who is soliciting within the scope of the license.

(16) An issuer or a subsidiary of an issuer that has a class of securities which is subject to section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 781, and which is either registered or exempt from registration under paragraph (A), paragraph (B), paragraph (C), paragraph (E), paragraph (F), paragraph (G), or paragraph (H) of subsection (g)(2) of that section.

(17) A business soliciting exclusively the sale of telephone answering services provided that the telephone answering services will be supplied by the solicitor.

(18) A person soliciting a transaction regulated by the Commodity Futures Trading Commission if the person is registered or temporarily licensed for this activity with the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. §§ 1 et seq., and the registration or license has not expired or been suspended or revoked.

(19) A person soliciting the sale of food or produce as defined in chapter 500 or chapter 504 if the solicitation neither intends to result in, nor actually results in, a sale which costs the purchaser in excess of \$500.

(20) A person who is registered pursuant to part XI of chapter 559 and who is soliciting within the scope of the registration.

(21) A person soliciting business from prospective consumers who have an existing business relationship with or who have previously purchased from the business enterprise for which the solicitor is calling, if the solicitor is operating under the same exact business name.

(22) A person who has been operating, for at least 1 year, a retail business establishment under the same name as that used in connection with telemarketing, and both of the following occur on a continuing basis:

(a) Either products are displayed and offered for sale or services are offered for sale and provided at the business establishment.

(b) A majority of the seller's business involves the buyer obtaining such products or services at the seller's location.

(23) A person who is a registered developer or exchange company pursuant to chapter 721 and who is soliciting within the scope of the chapter.

(24) Any person which has been providing telemarketing sales services continuously for at least 5 years under the same ownership and control and which derives 75 percent of its gross telemarketing sales revenues from contracts with persons exempted in this section.

(25) A person who is a licensed real estate salesperson or broker pursuant to chapter 475 and who is soliciting within the scope of the chapter.

(26) A publisher, or an agent of a publisher by written agreement, who solicits the sale of his or her periodical or

magazine of general, paid circulation. The term "paid circulation" shall not include magazines that are only circulated as part of a membership package or that are given as a free gift or prize from the publisher or agent of the publisher by written agreement.

(27) A person who is a licensed operator or an identification cardholder as defined in chapter 482, and who is soliciting within the scope of the chapter.

(28) A licensee, or an affiliate of a licensee, regulated under chapter 560, the Money Transmitters' Code, for foreign currency exchange services.⁹¹

Immediate Identification and Disclosures

Many states require that telephone solicitors must disclose certain information at the outset of the phone call. For example, Wyoming requires that the name of the individual caller, the identity, address and phone number of the telephone solicitor, the purpose of the call, and the nature of the consumer goods or service be disclosed at the outset of the call.⁹² In several states telephone solicitors must also disclosure relevant and material information to the prospective purchasers.⁹³ Additionally, state statutes regulate both telemarketing and prize promotions.⁹⁴ For example, in Nebraska if a buyer is to receive a prize, the seller must tell the buyer of the chances of receiving the most valuable prize.⁹⁵ The seller must also disclose how many people received the prize in the past twelve months.⁹⁶ If an offer involves minerals, metals, or stones, the seller must disclose its ownership and the profit potential.⁹⁷ If office supplies are being sold at a discount, the brand name of the supplies must be disclosed.⁹⁸

Do Not Call Lists

Fourteen states have set up their own do-not-call lists, and in 2002 at least ten more states are considering establishing state lists.⁹⁹ The do-not-call protection typically establishes a list of consumer names telemarketers must obtain before doing business in a state. In many states, consumers must pay a small fee, usually \$10, to register and telemarketers must pay a

91. FLA. STAT. ANN. § 501.604 (West Supp. 2001);

92. WYO. STAT. ANN. § 40-12-302 (LEXISNEXIS 2002).

93. See Appendix A

94. NEB. REV. STAT. §§ 86-2001-2013 (Michie 2000).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. American Association of Retired Persons, *States Respond to "No-Call" Demand*, AARP BULLETIN, 10, March 2002, at 10.

larger fee to obtain the list.¹⁰⁰ Generally a state agency maintains the list and updates it quarterly.

Large numbers of state residents have been rushing to take advantage of the state no-call lists.¹⁰¹ It is estimated that millions of people have signed up on state do-not-call lists in an attempt to avoid the hassle of being added to each telemarketer's list.¹⁰² These lists certainly provide an advantage to the federal solution of having consumers request to have their names added to each telemarketer's list.

Other states, including Wyoming, merely provide residents with information about signing up with the DMA's Telephone Preference Service (TPS).¹⁰³ This could be the worst possible action for a consumer who wanted to be removed from telemarketing lists. At best it is described as an "incomplete solution"¹⁰⁴ because only about 20% of telemarketers are members,¹⁰⁵ and compliance is voluntary.¹⁰⁶ The administration of the TPS is informal and the worst consequence for a non-complying telemarketer is to be expelled from the DMA. A consumer may register by mail for free, but an online registration carries a \$5 fee.¹⁰⁷ The amount of information required, full name and address, (Email address is requested, but not required.), is excessive. It has been suggested that, with all this consumer information, the TPS can actually be used as a solicitation tool.¹⁰⁸

Restrictions

There are a variety of restriction that have been placed on telemarketers by state legislation. First, several states require that the telemarketers immediately identify themselves to consumers when making a call. Wyoming requires that the identification be made at the "outset" of the call,¹⁰⁹ while Ohio specifically stipulates that identification must be made in the first 60 seconds of the call.¹¹⁰ Second, some states prohibit the telemarketers

100. See Appendix A

101. Shannon, *supra* note 5, at 394.

102. See Jerry Markon, *Take Me Off Your List! (Pretty Please?)*, STAR TRIB. (Minneapolis-St. Paul), Dec. 27, 2000, at 1D.

103. See Appendix A

104. Shannon, *supra* note 5, at 383.

105. *Id.*

106. Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 120 (1986).

107. How To Get Off a Telephone List - Consumer Assistance, available at <http://www.the-dma.org/cgi/offtelephonedave>. (last visited March 30, 2002)

108. See, Private Citizen, Inc., available at <http://www.privatecitizen.com> (last visited Nov. 10, 2002).

109. WYO. STAT. ANN. § 40-12-302 (LEXISNEXIS 2002).

110. OHIO REV. CODE ANN. § 4719.01 (West 2002).

from blocking their phone numbers.¹¹¹ Third, a number of states limit the times a telemarketer may call. The earliest is 8 am and the latest is 9 pm. Many states require the telemarketer to follow up with a written contract¹¹² and to notify the consumer of the right to cancel within a specified number of days.¹¹³ The number of days varies between 3 and 14.

Rebuttals

Eight states do not permit the telemarketer to offer a rebuttal if the consumer wishes to discontinue a call. Once the person being solicited expresses disinterest in continuing the call or sales presentation the telemarketer must disconnect.¹¹⁴

Miscellaneous Provisions

Approximately one half of the states with telemarketing legislation permit a private right of action where the consumer can bring a civil suit against the telemarketer. Many of these states have also adopted the Uniform Deceptive Trade Practices Act, which includes a private right of action.

The Florida statutes concentrate on fraud.¹¹⁵ It is a felony offense to defraud via telephone for any aggregate amount over three hundred dollars.¹¹⁶ Fraud that results in an amount less than three hundred dollars is a misdemeanor. In Nevada all telemarketers must provide refunds upon a customer's request if the goods or services are defective.¹¹⁷

111. ARK. CODE ANN. § 4-99-101 (LEXISNEXIS Supp. 1999); KAN. STAT. ANN. § 50-670; KY. REV. STAT. ANN. § 367.46951 (Banks-Baldwin Supp. 2000); WYO. STAT. ANN. § 40-12-302 (LEXISNEXIS 2002).

112. ALASKA STAT. § 45.50.475 (LEXISNEXIS 2000); ARIZ. REV. STAT. ANN. § 44-1271 (West 2002); CONN. GEN. STAT. ANN. § 42-288a(b) (West Supp. 2001); FLA STAT. ANN. § 501.059 (West Supp. 2001); IDAHO CODE § 48-1001 (LEXISNEXIS Supp. 2000); KAN. STAT. ANN. § 50-670 (2002); KY. REV. STAT. ANN. § 367.46951 (Banks-Baldwin Supp. 2000); LA. REV. STAT. ANN. § 51:1730 (West 2002); OR. REV. STAT. § 646.551 (Supp. 1999).

113. ALA. CODE § 8-19A (Supp. 2000); ALASKA STAT. § 45.50.475 (LEXISNEXIS Supp. 2000); ARIZ. REV. STAT. ANN. § 44-1271 (West 2002); CAL. BUS. & PROF. CODE § 17511.1 (West 2002); FLA. STAT. ANN. § 501.059 (West Supp. 2001); KAN. STAT. ANN. § 50-670 (2002); KY. REV. STAT. ANN. § 367.46951 (Banks-Baldwin Supp. 2000); LA. REV. STAT. ANN. § 51:1730 (West 2002); MONT. CODE ANN. § 30-14-502 (2002); NEV. REV. STAT. § 599B (2002); OR. REV. STAT. § 646.551 (Supp. 1999).

114. ARK. CODE ANN. § 4-99-101 (LEXISNEXIS Supp. 1999); IDAHO CODE § 48-1001 (LEXISNEXIS Supp. 2000); KAN. STAT. ANN. § 50-670 (2002); MISS. CODE ANN. § 77-3-601 (2002); 73 PA. CONST. STAT. ANN. § 2241 (West 2002); UTAH CODE ANN. § 13-26-1 (2002); WASH. REV. CODE ANN. § 19.158.010 (West 2002).

115. FLA. STAT. ANN. § 501.623 (West 2001).

116. *Id.*

117. NEV. REV. STAT. § 599B.190 (LEXISNEXIS 2001).

Finally, in Nevada, telemarketers are forbidden to sell or give the names or addresses of their customers to other telemarketers. This limits the distribution of what has been called "sucker lists."

Shortcomings of State Legislation

Despite the attention of the state legislatures to the issues in telemarketing, however, they cannot eradicate the problems and frustrations of privacy-seeking consumers. It has been argued that state legislation is a step in the right direction,¹¹⁸ but still, "[u]seless laws weaken the necessary laws."¹¹⁹ They may create a false complacency and subsequent disappointment in the affected consumers, as well as delay the Federal Trade Commission in passing effective federal rules.

First, not all states require registration of telemarketers. Without this information, the state will be unable to locate many of the violators. Second, even if the state requires registration, in many cases there are too many exemptions; some "have enough loopholes to render them practically unenforceable."¹²⁰ For example, it has been estimated that Kentucky, with its 22 exemptions, only blocks 5% of the telemarketing calls.¹²¹ Some states rely on industry self-regulation and encourage their citizens to register with and rely on the Telephone Preference Service (TPS) set up by the Direct Marketing Association.¹²²

Enforcement of the state legislation is another significant problem. Solicitors are violating state laws without being punished,¹²³ as some states are choosing not to fine the violators. For example, Alaska has not levied any fines for the past 8 years and Arkansas allows 8 to 10 free violations.¹²⁴ Florida has been collecting fines, but generally settles for \$1000 per violation, rather than the maximum allowable of \$10,000.¹²⁵ In contrast, the attorney general in Oregon is reported to be actively enforcing the legislation and collecting fines.¹²⁶

118. Shannon, *supra* note 5, at 381.

119. De Secondat, *supra* note 1.

120. Shannon, *supra* note 5, at 394.

121. See *Dateline NBC: Consumers Alert, Call of the Wild; Telemarketers Invading Americans' Homes* (NBC television broadcast, Dec. 5, 2000).

122. See Appendix A.

123. See Private Citizen, Inc., available at <http://www.privatecitizen.com> (last visited Nov. 10, 2002).

124. Paul Choiniere, *New Law Gives Connecticut Residents Chance To Curb Calls from Telemarketers*, DAY (New London, Conn.) Jan. 1, 2001.

125. KOLTER, *supra* note 25.

126. See Margie Boule, *Telling Telemarketers Where to Go*, PORTLAND OREGONIAN, Dec. 14, 2000, at E01; Paula Voell, *Help for Victims of Scams, Telemarketers*, BUFF. NEWS, Dec. 5, 2000, at 1C.

Although there has only been a small amount of litigation, there remains some concern that state legislation may be declared unconstitutional.¹²⁷ The state laws may be preempted by the federal rules and they may violate the dormant aspect of the Commerce Clause.¹²⁸ If the state laws are shown to discriminate against interstate commerce they will be unenforceable.

If these shortcomings result in ineffectual consumer protection, the best alternative may be to rely on federal legislation and regulation. In the following section the effectiveness of the federal rules are evaluated.

FEDERAL LEGISLATION AND REGULATIONS

*The Telephone Consumer Protection Act of 1991*¹²⁹

The goal of the legislation is to protect consumers against unwanted telephone solicitations. For the purpose of this Act, telephone solicitation was defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person"¹³⁰ The definition does not include calls to: (A) persons who have given prior express invitation or permission to call,¹³¹ (B) persons with whom the caller has an established business relationship,¹³² or (C) a tax-exempt nonprofit organization.¹³³

Three kinds of calls are specifically prohibited: (1) auto dialed calls to emergency service providers, cellular and paging numbers, and to a patient room in a medical facility, (2) pre-recorded calls to a residence without consent, and (3) unsolicited advertising to a fax machine.¹³⁴ The Act exempted non-commercial calls and gave the Commission power to prescribe regulations to implement the requirements.¹³⁵

Constitutional Issues

Congress recognized that individuals' rights to privacy must be balanced with commercial freedom of speech. For commercial speech to come within First Amendment protection it must concern lawful activity and not

127. Shannon, *supra* note 5, at 395.

128. Shari A. Kolnicki, *The Telephone Consumer Protection Act and Its Burden on Small Business: An Evaluation of the Law and Its Ramifications on Telecommunication Advances*, 28 CAP. U. L. REV. 223, 229 (1999).

129. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1991).

130. *Id.* § 227(a)(3).

131. *Id.* § 227(a)(3)(A).

132. *Id.* § 227(a)(3)(B).

133. *Id.* § 227(a)(3)(C).

134. *Id.* § 277(b)(1).

135. *Id.* § 277(b)(2).

be misleading.¹³⁶ The government can regulate it only when there is a substantial interest, in this case, the right to privacy. Then, it must be determined that the government regulation directly advances the interest asserted. In addition, the regulation may not be more extensive than is necessary to protect the government interest. The analysis used to determine the constitutionality of the TCPA is exactly the same as the one used to determine constitutionality of the state statutes, discussed *supra*.¹³⁷

Courts are responding favorably to telemarketing regulations.¹³⁸ The TCPA has been held constitutional in both jurisdictions where it has been challenged.¹³⁹ In the first case the telemarketers argued that the FCC impermissibly distinguished speech based on the basis of commercial content.¹⁴⁰ In the second, even though content-neutrality existed, the telemarketers argued that the entire statute should be declared constitutionally invalid because a portion of it distinguishes between commercial and noncommercial speech.¹⁴¹ Finding the TCPA to be content neutral and applying the time, place or manner test,¹⁴² the telemarketers' arguments were rejected. Following the same reasoning discussed in the section of constitutionality of nearly identical state statutes, *supra*, the courts have concluded that privacy of the home is a significant interest and recognize that the telephone is a uniquely invasive technology that allows solicitors to come into the home. The courts determined that the regulations are tailored to reasonably fit a goal of protecting privacy.

Do-not-call lists

The TCPA delegates rule-making authority to the Federal Communications Commission (FCC) to secure privacy interests.¹⁴³ The FCC then created a mechanism by which consumers can "opt out" of the telephone solicitors' lists.¹⁴⁴ The FCC requires sellers to keep an internal "do not call" list that is generated from consumer requests.¹⁴⁵ The FCC also requires the

136. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

137. The test for time, place, and manner restrictions for content-neutral speech and regulations for commercial speech regulation are essentially identical. *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989).

138. *Cox*, *supra* note 4, at 419.

139. *See Moser v. FCC*, 811 F. Supp. 541 (D. Or. 1992), *rev'd* 46 F.3d 970 (9th Cir. 1995); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995).

140. *Moser*, 811 F. Supp. 541 (D. Or. 1992), *rev'd* 46 F.3d 970, 973 (9th Cir. 1995).

141. *Szefczek*, 668 A.2d 1099, at 1103.

142. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)).

143. 47 U.S.C. § 227(c) (2002).

144. 47 C.F.R. § 64.1200(e)(2) (2002).

145. *Id.*

solicitors to train their telemarketers to understand and comply with the requirement.¹⁴⁶

Excluded Calls

Specifically excluded are calls to persons with whom the caller has an established business relationship, calls from tax-exempt non-profit organizations and calls made with the consumer's prior express permission.¹⁴⁷ The meaning of "established business relationship" was recently considered in Ohio.¹⁴⁸ The issue in the case was whether a customer has maintained an "established business relationship" after requesting to be placed on the business "do-not-call list, but continuing to receive limited services.¹⁴⁹ The court answered in the negative, "Maintaining some limited commercial tie to a business should not leave consumers at the mercy of unbridled telemarketing efforts."¹⁵⁰

Private Action

The TCPA creates a private cause of action for people who receive a prohibited call or are called within twelve months of a "do not call" request.¹⁵¹ Specifically the Act provides:

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, *if otherwise permitted by the laws or rules of court of a State* bring in an appropriate court of that State

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.¹⁵²

146. *Id.* § 64.1200(e)(2)(ii).

147. 47 U.S.C. § 227(a)(3).

148. *Charvat v. Dispatch Consumer Servs.*, No. 99AP-1368, 2000 WL 1180258 (Ohio App. 10 Dist. Aug. 22, 2000), *rev'd* 769 N.E.2d 829 (Ohio 2002).

149. *Id.* at 831.

150. *Id.* at 834.

151. 47 U.S.C. § 227(b)(3).

152. 47 U.S.C. § 227(c)(5) (emphasis added).

As indicated by the issues litigated, this section could have been written less ambiguously. In several instances subject matter jurisdiction of the state courts has been questioned. Because of the words emphasized in the quote above, it has been asserted that the TCPA does not grant private right of action without the express authorization of state law.¹⁵³ Many defendants have argued that each state legislature must affirmatively “opt-in” before state courts can have subject matter jurisdiction over TCPA private actions. Only one court in Texas has agreed with the defendant’s argument.¹⁵⁴ All other courts that have considered the issue have determined that the clause recognizes that states may “opt-out” or refuse to exercise the jurisdiction authorized by the statute.¹⁵⁵

Remedies

The claim may be brought in state court with a remedy of \$500, or the actual monetary loss, whichever is greater.¹⁵⁶ Treble damages are available for a knowing or willful violation of the Act. State attorneys general may seek injunctive relief in a federal court and recover \$500 fines and treble damages.

*Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (TCFAPA)*¹⁵⁷

The TCFAPA strengthens the authority of the Federal Trade Commission to protect consumers from deceptive telemarketing. It requires the FTC to prescribe rules that include: (1) a requirement that telemarketers not undertake a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or abusive of the right to privacy; (2) a restriction on the hours of the day and night when unsolicited telephone calls can be made to consumers; and (3) a requirement that any person engaged in telemarketing for the sales of goods and services promptly and clearly disclose

153. See *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091 (N.J. Super. Law Div. 2000); *Zelma v. Market U.S.A.*, 778 A.2d 591 (N.J. Super. App. Div. 2001); *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000); *Kaplan v. Democrat and Chronicle*, 698 N.Y.S. 2d 799 (N.Y. App. Div. 1999); *Kaplan v. First City Mortgage*, 701 N.Y.S.2d 859 (N.Y. City Ct. 1999); *Adamo v. AT&T*, 2001 WL 1382757 (Ohio App. 8 Dist. 2001); *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing, Inc.*, 16 S.W.3d 815 (Tex. App. 2000).

154. *Autoflex*, 16 S.W.3d 815 at 817.

155. See *Zelma v. Total Remodeling, Inc.*, 756 A.2d 1091 (N.J. Super. Law Div. 2000); *Zelma v. Market U.S.A.*, 778 A.2d 591 (N.J. Super. App. Div. 2001); *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000); *Kaplan v. Democrat and Chronicle*, 698 N.Y.S. 2d 799 (N.Y. App. Div. 1999); *Kaplan v. First City Mortgage*, 701 N.Y.S.2d 859 (N.Y. City Ct. 1999); *Adamo v. AT&T*, No. 00-CVI-1856, 2001 WL 1382757 (Ohio App. 8 Dist. Nov. 8, 2001).

156. 47 U.S.C. § 227(c)(5)(b).

157. The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.A §§ 6101-6108 (1994).

to the person receiving the call that the purpose of the call is to sell goods or services.¹⁵⁸

*FTC Telemarketing Sales Rule, 1996*¹⁵⁹

The rule, promulgated according to The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, requires prompt disclosures by telemarketers to contacted parties and provides for enforcement and stiff penalties to those who do not comply. First, no calls may be made before 8 am and after 9 pm. But, if people have requested not to be called by telemarketers they may not be contacted at any time. Second, the rule requires telemarketers to disclose four things: (1) it is a sales call, (2) the nature of the goods or services being offered, (3) no purchase is necessary to win any prizes being offered, and (4) the price of the goods or services before money is requested.¹⁶⁰ In addition, express, verifiable authorization must be obtained before any checking account can be charged.

Amendments to the FTC's Telemarketing Sales Rule, 2002

Consumers expressed considerable dissatisfaction with the federal rule.¹⁶¹ The weak federal law previously required consumers to ask each company to be removed from the calling list and then included a number of exemptions to the rule. In addition, a company could escape fines if it could show that it had trained its personnel and any subsequent call was just an "error."¹⁶²

The FTC has adopted a new rule that includes a national do-not-call registry.¹⁶³ Under the amended rule, consumer names will be removed from most, but not all, solicitation lists with only one request to the FTC. Consumers will be able to register for free online or by calling a toll-free number. The only identifying information kept on file will be the registered phone number. The number will normally stay on the list for five years and registration may be renewed for another five years. Telemarketers will be required to search the list every 90 days and remove registered phone numbers from their calling lists. Noncompliance with the Rule can result in civil penalties of up to \$11,000 per violation.¹⁶⁴ After the FTC receives funding

158. *Id.*

159. *Fed. Trade Comm'n Telemarketing Sales Rule of 8/16/95*, 16 C.F.R. 310.1 *et seq.*, 1996.

160. *Id.* § 310.4.

161. *See* Markon, *supra* note 102.

162. *Id.*

163. Telemarketing Sales Rule, 67 Fed. Reg. 4492 (proposed January 30, 2002) (to be codified at 16 C.F.R. 310) *available at* <http://www.ftc.gov/bcp.conline/edcams/donotcall/index.html> (last visited December 19, 2002).

164. *Id.*

from Congress it will take approximately seven months to make the registry functional.

In addition to the do-not-call registry, the Rule also outlaws telemarketers (1) from blocking their phone numbers and (2) abandoning calls answered by consumers.¹⁶⁵ Automatic dialing equipment sometimes reaches more numbers than there are available sales representatives. The result is "dead air" or hang-up calls.

Of course, the telemarketing industry will make a tremendous effort to block the proposed rules. A representative of the Direct Marketing Association asserts that the rules would threaten free speech and would impact four million jobs and hundreds of billions of dollars a year in sales.¹⁶⁶ The DMA is likely to challenge the rule in court.¹⁶⁷

An "Opt-in" Proposal

At least one commentator has suggested taking the regulations one step further than just a national do-not-call list.¹⁶⁸ Cox asserts that a ban on all telemarketing calls made without prior knowledge of consent would be constitutional.¹⁶⁹ The ban would switch the presumption that people want to be called unless they asked to be placed on a do-not-call list. Under the proposal the presumption would be that people do not want to be called unless they request it. It is recognized that a rule prohibiting all calls would be too broad because there are some people who might like to receive telemarketing calls, but there is no evident constitutional barrier to the limited rule that shifts the presumption.

CONCLUSION

The federal and state legislation and regulation have been effective to some extent, but they must be much broader to protect the privacy of the home. The state legislation has resulted in a patchwork of ineffective remedies. For irritated consumers, the best, realistic proposal at this time is the federal do-not-call list. The proposed federal registry would benefit consumers, but the burden is still placed on the potential customers, not on the telemarketers. Telemarketers would be benefited by having only one list to check. It would be expensive to create and maintain such a list, but the telemarketers who make billions of dollars each year from such practices should be able to bear the list expense.

165. *Id.*

166. See <http://www.msnbc.com/news/849379.asp> (last visited Dec. 20, 2002).

167. *Id.*

168. Cox, *supra* note 4, at 421.

169. *Id.* at 422.

Some have optimistically suggested that federal regulation should restrict all telemarketing calls made without prior knowledge that the recipient consents to the call.¹⁷⁰ Currently, call recipients have the “do-not-call” option discussed above, but it is largely ineffective because most recipients do not know about the option. In effect, this proposal shifts the burden from the consumer to ask each company to be put on a “do-not-call” and gives the burden to the telemarketing company to obtain consent in advance of the call. Each company would have the responsibility to compile its own “It’s-OK-to call” list. One possibility would be to have a consent form included with phone bills. The phone companies could then sell the lists to telemarketers.¹⁷¹

From the perspective of an irritated consumer, the proposed “opt-in” rule sounds attractive. But consumers need to remember that they are not the only constituents of federal and state legislators. The telemarketers represent large corporations with powerful lobbyists. Therefore, the most optimistic, realistic hope for consumers is the proposed national do-not-call registry.

170. *Id.* at 421.

171. *Id.* at 422.

APPENDIX A

STATE TELEMARKETING STATUTES

STATE	REGIS. & BONDING	EXEMPT.	DO NOT CALL	RESTRICT.	DISCLOSE & REBUTTAL	SANCTIONS
ALA. CODE § 18-19A	8-19A-5 annual fee ^a \$500 8-19A-10 Bond ^b \$50,000	8-19A-4 25 exemp-tions ^c	8-19C-2 State ^d	8-19A-14 cancel ^e 8am-8pm ⁿ	8-19A-12 Disclo-sure ^f	8-19A18 private right of action permit- ted ^g
ALASKA STAT. § 45.50.475	45.63.010	45.63.080 18 exemp-tions ^c	45.50.475	45.63.030 Cancel ^e 45.63.020 written contract ^h		45.63.020 private right of action permit- ted ^g UDTP class C felony
ARIZ. REV. STAT. ANN. § 44-1271	44-1272 annual fee \$500 44-1274 \$100,000	gifts and prizes ⁱ	44-1278(B) (2)(c) company ^j	cancel ^e written contract ^h ADAD restriction ^f		private right of action permit- ted ^g UDTP class 5 felony civil penalty \$10,000
ARK. CODE ANN. § 4-99-101	4-99-104 \$100 fee 4-99-107 \$50,000	12 exemp-tions ^c	4-99- 404 \$5 fee ^k	No block permitted ^l written contract ^h ADAD restriction	4-99-201 disclosure ^f no rebut-tal ^q	4-99-203 UDTP class D felony

a. In many states telemarketers are required to register and some states also require an annual fee.

b. In many states telemarketers are required to post a bond when they register.

c. This is the number of categories of telephone solicitors who are exempted from the state legislation.

d. Some states have created their own database of citizens who do not wish to be called by telemarketers.

e. In many states consumers have a cooling off period, a number of days in which they can cancel a contract made on the telephone.

f. Many states require the telemarketers to disclose information about themselves and their purpose in calling at the beginning of the call.

g. Consumers have a private right of action to bring civil suit for violation of the state legislation. In many states this right is granted under the Uniform Deceptive Trade Practices Act (UDTP), 7A U.L.A. 206 (2000).

h. Oral contracts entered into over the telephone are not valid until a written contract is signed by them.

i. A few states limit the coverage of their legislation to situations where gifts and prizes are offered to consumers.

j. Similar to the TCPA, many states require that telemarketing companies maintain their own do-not-call lists.

k. Consumers are charged a small fee to sign up on the do-not-call list.

l. Telemarketers are prohibited from blocking their telephone numbers from Caller ID programs.

CAL. BUS. & PROF. CODE § 17511.1	17511.3 \$50 annual fee 17511.12 \$100,000	17511.4 22 exemp- tions ^c	17591	17511.5 cancel ^e 3 days 9am-9pm ⁿ restricted auto-dial	disclosure ^f	private right of action permit- ted ^g
COLO. REV. STAT. § 6-1-301	6-1-303 \$250		6-1-904- 905 Mkt. \$0 - 500 ^m	61-304 cancel ^e 3 days		Private Right. UDTP
CONN. GEN. STAT. ANN. § 42-288a(b)			42-288a	written contract ^h 42-288a 9am-9pm ⁿ 42-285		42-286
DEL. CODE ANN. tit. 6, § 2503A	2503A 2503A \$50,000			cancel ^e 7 days	2506A disclosure ^f	private right of action permit- ted ^g UDTP
D.C. CODE ANN. § 43-1418				ADAD restriction ^f		civil penalty \$5,000
FLA. STAT. ANN. § 501.059	501.605 \$1500 fee 501.611 \$50,000	501.604 28 exemp- tions ^c	501.059 (3)(a) state ^d \$5 fee	501.615 cancel ^e 7 days written contract ^h ADAD restriction ^f	501.606 disclosure ^f	private right of action permit- ted ^g civil penalty \$10,000
GA. CODE ANN. § 10-5B-1	43-17.5		46-5-27	46-5-187		private right of action permit- ted ^g UDTP
HAW. REV. STAT. § 481P			481P-4 company ^j	481P-2 cancel ^e written contract ^h 481P-3 8am-9pm ⁿ		418P-2
IDAHO CODE § 48-1001	48-1004	48-1005	48-1003A \$10 fee	cancel ^e 3 days 48-1004 written contract ^h	48-1003	48-1007 pri- vate right of action permit- ted ^g UDTP
815 ILL. COMP. STAT. ANN. § 4 13/1		413/20 5 exemp- tions ^c	413/15 (b)(3)	413/10 413/15 9am-8pm ⁿ	no rebut- tal ^o	private right of action permit- ted ^g
IND. CODE ANN. § 24-5-12-1	24-5-12- 10 \$50 annual fee	Only two categories are cov- ered	?	24-5-12-25 no block permitted ⁱ	24-5-12- 12 disclo- sure ^f	private right of action permit- ted ^g UDTP
IOWA						
KAN. STAT. ANN. § 50-670			50-675a DMA ^o	50-673 cancel ^e written	50-670 disclosure ^f no rebut-	50-672 private right of action permit-

m. Telemarketers are charged a fee to obtain a do-not-call list.

n. Telemarketers are limited to calling between these hours.

o. Some states direct that a particular state agency shall make consumers aware of the telephone preference service of the Direct Marketing Association.

				contract ^h 50-672 no block permitted ^l ADAD restriction ^f	tal ^q	ted ^g UDTP
KY. REV. STAT. ANN. § 367.46951	permit ^p	5 exemp- tions ^c	367.46955	cancel ^e 367.46955 written contract ^h no block permitted ^l 10am-9pm ⁿ ADAD restriction ^f	367.46977 disclosure ^f	367.170 private right of action permit- ted ^g UDTP
LA. REV. STAT. ANN. § 45:811	45:813 \$10,000	45:816 20 exemp- tions ^c	45:844.14 \$5 fee ^k	45:831 cancel ^e written contract ^h 45:812 8am-8pm ⁿ	disclosure ^f	
ME. REV. STAT. ANN. tit. 10 §§ 1498, 1499	9 § 5008 10 § 14716	32 §14716	14716 DMA ^o	9am-5pm ⁿ ADAD restriction ^f		private right of action permit- ted ^g UDTP
MD. CODE ANN. COM. LAW § 14- 2201		4 exemp- tions ^c		written contract ^h		private right of action permit- ted ^g UDTP
MASSACHU- SETTS						
MICH. COMP. LAWS ANN. § 445.111		5 exemp- tions ^c	?	cancel ^e written contract ^h 9am-9pm ⁿ		
MINNESOTA M.S.A. § 325E.26-31			?	9am-9pm ⁿ ADAD restriction ^f	disclosure ^f	private right of action
MISS. CODE ANN. § 77-3- 601	77-3-605	20 exemp- tions ^c		77-3-603 8am-9pm ⁿ	77-3-603 disclosure ^f	77-3-607
MO. ANN. STAT. § 407.1101	407.1085		407.1101	407.1076		407.1076
MONT. CODE ANN. § 30-14-502	30-14- 1404	5 exemp- tions ^c		30-14-1412 cancel ^e	disclosure ^f	30-14-1411 private right of action permit- ted ^g UDTP
NEBRASKA			86-1212 company ^j	cancel ^e		
NEV. REV. STAT. § 599B	599B.08 0 599B.10 0 fee	25 exemp- tions ^c		cancel ^e		private right of action permit- ted ^g
NEW HAMPSHIRE						

p. Similar to registration, Kentucky requires that telemarketers obtain permits before soliciting.

N.J. STAT. ANN. § 48:17-29			48:17-25			
N. M. STAT. ANN. § 57-12-22				399-2 9am-9pm ⁿ	disclosure ^f	private right of action permitted ^g UDTP
N.Y. GEN. BUS. LAW § 399-p	399-pp-3c \$500 399-pp-4	6 exemptions ^c	399-z	8am-9pm ⁿ	disclosure ^f	
N.C. GEN. STAT. § 66-260			Proposed			
NORTH DAKOTA						
OHIO REV. CODE § 4719.01	4719.02	28 exemptions ^c			60 second disclosure ^f	4719.07 private right of action permitted ^g UDTP
15 OKLA. STAT. § 775A	775A-4	21 exemptions ^c		cancel ^e		private right of action permitted ^g UDTP
OR. REV. STAT. § 646.551	646-533		646.574-569 Mkt. fee \$120 Con. Fee \$10	cancel ^e written contract ^h	no rebuttal ^q	private right of action permitted ^g UDTP
73 PA. CONS. STAT. § 2241	2243 fee 2244	12 exemptions ^c	2242	2245 8am-9pm ⁿ	2245	private right of action permitted ^g UDTP
R.I. GEN. LAWS § 5-61-1	5-61-3 fee 5-61-3.1	9 exemptions ^c	5-61-3.5 company ^j	5-61-3.6		
S. C. CODE ANN. § 16-17-445(E)			16-17-445(E)		no rebuttal	
S.D. CODIFIED LAWS § 37-30A-1			Proposed	37-30A-3	37-30A-2 no rebuttal ^q	37-30A-6
TENN. CODE ANN. § 65-4-405	47-18-1503 \$500 annual fee 47-18-1503	3 exemptions ^c	47-18-1502 65-4-405 Mkt. fee \$500	47-18-1502		
TEX. BUS. & COM. CODE ANN. § 38.101	38.101 38.107		55.151	37.02 9am-9pm ⁿ		37.03
UTAH CODE ANN. § 13-26-1				13-25a-103 cancel ^f ADAD restriction ^r	13-25-103 no rebuttal ^q	

q. If the consumers say they are not interested in the product or service offered the seller must end the call.

VERMONT						
VA. CODE § 59.1-21-1	5.9-21		Proposed	cancel ^e		private right of action permit- ted ^g UDTP
WASH. REV. CODE ANN. § 19.158.010	19.158.0 50			15.158.040 8am-9pm ⁿ	15.158.11 0 disclosure ^f	private right of action permit- ted ^g UDTP
W. VA. CODE § 46A-6F-101	46A-6F- 201					
WISCONSIN						
WYO. STAT. § 40-12-305	40-12- 305		40-12-302 DMA ^o	no block permitted ^l	disclosure ^f	

r. Auto dialing and automatic delivery of messages are prohibited in many states.

