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Telemarketing Regulation: National and State Do Not Call Registries

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Summary

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The development and implementation of the national do not call list was not straightforward. No single law creates the list. Instead, it developed from a combination of statutes and regulations over time, as Congress and the federal agencies tasked with the responsibility of regulating telemarketing developed strategies to better alleviate perceived consumer harm. This report will outline the laws underpinning the national do not call list; describe the regulations implementing the list; answer some of the most frequently asked questions related to the list; and discuss the possible penalties for violating the rules. The report will also briefly discuss some of the ways the various states have implemented their own do not call lists.

c11173008

Contents

Introduction 1
National Do Not Call Registry 1
Federal Statutes 1
Regulations 3
What types of numbers can be placed on the National Do Not Call List? 3
Will numbers be removed from the National Do Not Call List after a certain period of time? 3
Who must obey the prohibitions of the National Do Not Call List? 4
What are the exceptions? 4
Is there a safe harbor for telemarketers who mistakenly violate the Do Not Call List? 4
Are unwanted text message solicitations covered by the National Do Not Call List? 5
Enforcement and Penalties 5
Federal Enforcement 5
Actions by States 6
Private Rights of Action 6
State Do Not Call Regimes 7

Contacts

Author Contact Information 9

c11173008

Introduction

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National Do Not Call Registry

Arguably the most important tool for combatting intrusive telemarketing practices is the National Do Not Call Registry. The registry is a list of telephone numbers that telemarketing providers must purchase from the FTC periodically.[1] Telemarketers are forbidden from making telemarketing calls to any number on that list, unless an exception applies.[2]

Federal Statutes

Two federal statutes, and subsequent amendments, govern the telemarketing industry at the national level. They grant overlapping authority to the FCC and the FTC to create and implement a national do not call registry.

The Telephone Consumer Protection Act of 1991 (TCPA) granted the FCC the authority to develop rules related to telemarketing and the use of automated telephone dialers.[3] The TCPA directed the FCC to initiate a rulemaking proceeding "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," and explicitly includes the authority to create "a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations,

[1] 15 U.S.C. § 6152.

[2] 16 C.F.R. § 310.4(b).

[3] 47 U.S.C. § 227.

c11173008

and to make that compiled list and parts thereof available for purchase."[4] Initially, the FCC chose not to implement a single national list, and instead required companies to maintain their own lists of persons that requested not to receive telemarketing calls from each specific telemarketing company.[5] However, after that method proved to be ineffectual, the FCC adopted rules creating a national do not call registry and coordinated those rules with the FTC.[6]

The Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 (TCFAPA) directs the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[7] The TCFAPA makes clear that patterns of unsolicited phone calls are to be considered an abusive practice under the rules. Using this authority, the FTC promulgated the Telemarketing Sales Rule, which prohibited telemarketers from initiating "an outbound telephone call to a person when that person has stated that he or she does not wish to receive" such calls, and also made it an abusive telemarketing practice to initiate any telemarketing call to any phone number that had been placed on the do not call list maintained by the FTC.[8]

Following the adoption of the Telemarketing Sales Rule, telemarketers challenged the rule on two main grounds. First, the telemarketers claimed that the FTC did not have the authority under the TCFAPA to implement a do not call list.[9] Second, the telemarketers claimed that the do not call list violated their First Amendment rights. In response to the first challenge, Congress passed the Do Not Call Implementation Act.[10] That statute makes clear that the FTC has the authority under the TCFAPA to implement the do not call registry, as well as the other requirements of the telemarketing sales rule, and solidifies the agency's ability to charge fees to telemarketers that must use the registry. In response to the second challenge, the Tenth Circuit Court of Appeals held that the do not call registry was a narrowly tailored regulation of commercial speech that did not violate telemarketers' First Amendment rights.[11]

Finally, jurisdictional issues create the necessity for both the FTC and the FCC to work together to fully implement the national do not call list. The FTC does not have jurisdiction over financial institutions or common carriers, such as telephone companies.[12] As a result, the FTC's rules cannot be enforced against these institutions. The FCC's authority is much broader, covering any "telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services."[13] This language allows the FCC to enforce telemarketing rules against financial institutions and common carriers that would not be covered by the FTC's rules. The FCC and the FTC are statutorily obligated to coordinate their rules and implementation of the

[4] 47 U.S.C. § 227(c).

[5] Implementing the Tele. Consumer Prot. Act of 1991, Report and Order, 7 F.C.C.R. 8752 (1992).

[6] Implementing the Tel. Consumer Prot. Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 F.C.C.R. 17459 (2002).

[7] 15 U.S.C. §§ 6101 *et seq*.

[8] 16 C.F.R. § 310.4(b).

[9] U.S. Security, et. al. v. FTC, 282 F. Supp. 2d 1285 (W.D. Okla. 2003).

[10] Codified at 15 U.S.C. § 6151.

[11] Mainstream Marketing Services v. FTC, No 358 F.3d 1228 (10th Cir. 2004).

[12] 15 U.S.C. § 46(a).

[13] 47 U.S.C. § 227(a)(2).

c11173008

do not call list, providing consistency to telemarketers seeking to comply with the statute and regulations.[14]

Regulations

Both the FTC and FCC have regulations implementing the national do not call list, which are required by statute to be coordinated with each other. There is only one list, and it is maintained by the FTC.[15] This section will address a number of the most salient questions related to the regulations of the national do not call list.

What types of numbers can be placed on the National Do Not Call List?

Only personal telephone numbers can be placed on the national do not call list.[16] These telephone numbers can be residential telephone lines or cellular phone numbers.[17] People are also able to place their personal telephone numbers on company-specific do not call lists that must be maintained by every company engaged in telemarketing.[18] Telemarketers must periodically pay fees for access to the list.[19]

Businesses are not allowed to place their telephone numbers on the do not call list. The TCPA applies only to telemarketing sales calls made to residential telephone lines.[20] The TCFAPA applies only to telemarketing calls made to consumers.[21] As a result, businesses are precluded from placing their numbers on the do not call list.[22] An amendment to the TCPA and TCFAPA by Congress likely would be required in order to allow businesses to place their phone numbers on the list.

Will numbers be removed from the National Do Not Call List after a certain period of time?

Numbers will not be removed from the list unless a person to whom the number is registered requests that the number be removed or the number's use is otherwise discontinued (i.e., disconnected).[23] When the do not call registry was first implemented, numbers placed on the list needed to be renewed every five years.[24] However, in 2007, Congress passed the Do Not Call

[14] 15 U.S.C.§ 6152.

[15] FTC, National Do Not Call Registry, https://www.donotcall.gov/.

[16] FTC, National Do Not Call Registry, http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry.

[17] *Id*.

[18] 16 C.F.R. § 310.4(b).

[19] 15 U.S.C. § 6152.

[20] 47 U.S.C. § 227(c).

[21] 15 U.S.C. § 6102.

[22] FTC, Complying with the Telemarketing Sales Rule, http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#Glance.

[23] 47 U.S.C. § 64.1200(c)(2).

[24] See, FTC, "FTC Pledges Not to Drop Any Numbers from Do Not Call Registry, Pending Final Congressional or Agency Action on Whether to Make Registration Permanent," press release, Oct. 23, 2007.

c11173008

Improvement Act, which eliminated the five-year statutory time limit and paved the way for the FTC and FCC to allow phone numbers to remain on the list indefinitely.[25]

Who must obey the prohibitions of the National Do Not Call List?

Telemarketers seeking to induce consumers to purchase goods or services must obey the prohibition.[26] Telemarketing is defined as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call."[27]

Although charitable solicitations are considered to be telemarketing, charitable organizations and those making phone calls to solicit donations on their behalf are not required to obey the do not call prohibitions.[28] However, telemarketers making charitable solicitations are required to abide by a number of disclosure rules and other regulations. Furthermore, charitable organizations must keep and abide by an internal do not call list of names and numbers of persons who have asked the organization to stop calling their numbers. Therefore, although charitable organizations may not be required to abide by the national do not call list, they are required to respect the requests of individuals not to be contacted again by telephone.

Also not covered by the national do not call list are candidates for federal, state, or local public offices.[29] Candidates for office do not fall under the definition of telemarketers, and therefore are not prohibited from calling numbers on the national do not call list. Regulating political telephone solicitations would also likely face a First Amendment challenge because political campaigning is fully protected speech under the Constitution.[30]

What are the exceptions?

A telemarketer making calls to induce the purchase of goods or services may disregard the fact that a telephone number is on the do not call list if (1) the telemarketer has obtained the express written consent of the person to place calls to that person or (2) the telemarketer has an established business relationship with that person.[31]

Is there a safe harbor for telemarketers who mistakenly violate the Do Not Call List?

Yes, there is a safe harbor for calls mistakenly placed to numbers on the do not call list as long as the telemarketer has implemented sufficient policies and safeguards to prevent, to the greatest extent possible, mistaken telemarketing calls to numbers on the do not call list. To that end, the

[25] 15 U.S.C. § 6155.

[26] FTC, National Do-not-call Registry, http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry.

[27] 16 C.F.R. § 310.2.

[28] 16 C.F.R. § 310.4(b).

[29] See CRS Report RL34361, *Automated Political Telephone Calls ("Robo Calls") in Federal Campaigns: Overview and Policy Options*, by R. Sam Garrett and Kathleen Ann Ruane.

[30] *Id*.

[31] 16 C.F.R. § 310.4(b).

c11173008

rules state that telemarketers will not be held liable for violating the do not call list if they can demonstrate that they have (1) established written procedures to comply with the do not call list; (2) trained personnel in procedures for complying with the list; (3) maintained a list of persons that they may not contact; (4) a process in place to prevent phone calls to either numbers on the national do not call list or numbers on the telemarketers' internal do not call list; (5) a process in place to monitor calls to prevent violations of the do not call list; and (6) maintained an errant list of all calls that violate the do not call regulations.[32]

Are unwanted text message solicitations covered by the National Do Not Call List?

No. The National Do not call List does not apply to text messages.[33] Other portions of federal law cover unwanted text message solicitation. The TCPA prohibits the use of automated telephone dialers to send any text messages to mobile phones, unless the message is for emergency purposes or prior consent was given.[34] The CAN SPAM Act of 2003 prohibits the sending of unsolicited commercial email messages, which can sometimes take the form of text messages, unless the sender has an established business relationship with the recipient.[35]

Enforcement and Penalties

There are three ways that violations of the national do not call list may be enforced. The rules may be enforced by the federal government, state governments, or by private rights of action.

Federal Enforcement

Either the FCC or the FTC can enforce violations of the national do not call list. The TCFAPA makes clear that violations of the FTC's rules related to the national do not call list are to be considered unfair and deceptive trade practices under the Federal Trade Commission Act.[36] This gives the FTC the power to fine companies up to $16,000 for violations of the regulations.[37] Violators may also be subject to nationwide injunctions against violations of the do not call list.[38] According to testimony given by the FTC before the Senate Subcommittee on Consumer Protection, Product Safety, and Insurance in 2013, the agency had collected civil penalties exceeding $126 million, and had extracted $741 million in redress and disgorgement over the course of 105 enforcement actions for violations of the FTC's telemarketing sales rule.[39] The FTC

[32] 47 C.F.R. § 64.1200(c).

[33] 16 C.F.R. § 310.4(b) (prohibiting telephone calls to numbers on the do-not-call list).

[34] 47 U.S.C. § 227(b).

[35] P.L. 108-187 (108th Cong.).

[36] 15 U.S.C. § 6102(c).

[37] 15 U.S.C. § 45(m)(1)(A).

[38] 15 U.S.C. § 53(b).

[39] *Stopping Fraudulent Robocall Scams: Can More Be Done?: Hearing Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation*, 113th Cong. (2013) (statement of The Federal Trade Commission) available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf.

c11173008

also pointed out that many other enforcement cases were still ongoing at the time; therefore, the aggregate dollar figures may have grown since that testimony was given.

In addition, the FCC has the power to issue warnings, citations, and fines for violations of the national do not call list up to $16,000 per violation.[40] For example, in May 2014, Sprint Corporation agreed to pay a record $7.5 million fine to settle an action brought against the company by the FCC for violations of do not call regulations.[41] Both agencies purport to vigorously enforce the do not call list as well as other telemarketing rule violations.[42]

Actions by States

Under the TCFAPA, state attorneys general may bring civil actions on behalf of the residents of their individual states against telemarketers that they believe to be violating any of the rules promulgated by the FTC under the act, including the national do not call list.[43] The lawsuits may result in orders to enjoin future violations, monetary damages, restitution, or other compensation on behalf of the residents of the state, and any other relief that a reviewing court deems appropriate.

Under the TCPA, state attorneys general may bring civil suits on behalf of residents of their state against telemarketers that have engaged in a pattern of calls in violation of the rules promulgated under the TCPA.[44] The state may recover actual monetary losses or $500 in damages, whichever is greater, for each violation. If the court finds that the telemarketer committed knowing or willful violations of the regulations, the court may award treble damages to the state.

Private Rights of Action

Both the TCPA and TCFAPA grant a private right of action to people who have been adversely affected by violations of the rules promulgated under either law. Under the TCFAPA, persons injured may bring a lawsuit in federal court within three years after the discovery of a violation of the act if the amount in controversy exceeds $50,000 in actual damages for each person affected by the alleged violations.[45] Consequences of such a lawsuit could include an order enjoining the telemarketer against future violations, monetary damages, or any other relief that the court may deem appropriate. Considering that the amount in controversy must exceed $50,000 per person affected by any alleged violation, it would likely be rare that citizens who have experienced violations of the national do not call list would be able to sue pursuant to this private right of action.

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[40] 47 U.S.C. § 503(b)(authorizing the FCC to impose forfeiture penalties); 15 U.S.C.§ 6152 (requiring the FCC to coordinate with the FTC to maximize consistency in the application of do-not-call list rules).

[41] FCC, "Sprint to Pay $7.5 Million for Unwanted Marketing Calls and Texts in Record Do-Not-Call Settlement," press release, May 19, 2014, https://apps.fcc.gov/edocs_public/attachmatch/DOC-327147A1.pdf.

[42] See statement of the Federal Trade Commission, hearing before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance, *Stopping Fraudulent Robocall Scams: Can More Be Done?*, 113th Cong., 1st sess., July 10, 2013, available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf.

[43] 15 U.S.C. § 6103.

[44] 47 U.S.C. § 227(f).

[45] 15 U.S.C. 6104

c11173008

The TCPA provides a more robust private right of action than the TCFAPA. Under the TCPA, any person who has received more than one call from the same entity in violation of the rules promulgated under the TCPA, including violations of the national do not call list, may bring a lawsuit in state court based on the violation, and may attempt to recover damages "for actual monetary loss from such violation, or to receive up to $500 dollars in damages for each such violations, whichever is greater."[46] Telemarketers are granted an affirmative defense in potential suits brought under this provision. If the telemarketer can show that it has "established and implemented, with due care, reasonable practices and procedures to effectively prevent" violations of the TCPA, then the telemarketer will not be held liable for any alleged violations. This affirmative defense mirrors the safe harbor that the FCC and FTC provide in regulation. However, if the reviewing court finds that a violation was knowing and willful, the court has discretion to award treble damages in that case.

State Do Not Call Regimes

Prior to the implementation of a national do not call list, states had various approaches to the regulation of telemarketing sales calls. However, since the creation of the national do not call list, it appears that most states, in one way or another, have chosen to use the national do not call list as the primary way to prevent the receipt of unwanted telemarketing calls within each state. Nonetheless, there is some variation in state do not call list regulation.

Many states have explicitly adopted the national do not call registry as the official state-wide registry.[47] Telemarketers within these states must abide by the prohibition on calling numbers on the national registry, and state residents need only place their number on the national registry for state penalties for violations of the registry to apply. In addition to the adoption of the national do not call list, these states may also add additional requirements for telemarketing calls within their state.[48] For example, some states require telemarketers to register with the state in order to make telemarketing calls within the state.[49] Some states, in addition to regulating which numbers can be called, regulate the use of automated dialing systems that make the phone calls.[50] Some states, like Rhode Island and North Dakota, also prohibit the sending of unsolicited commercial text

[46] 47 U.S.C. § 227(c)(5).

[47] Alabama, Code of Ala. § 8-19C-2; Alaska, A.S. § 45.50.475; Arizona, A.R.S. § 44-1278; Arkansas, A.C.A. §4-99-405; California, Cal Bus & Prof Code § 17590; Connecticut, Conn. Gen. Stat. § 42-288a; Georgia, O.C.G.A. § 46-5-27; Idaho, Idaho Code § 48-1003A; Illinois, 815 ILCS 413/15; Kansas, K.S.A. § 50-670a; Kentucky, KRS § 367.46955; Maine, 10 M.R.S. § 1499-B; Michigan, MCLS § 445.111a; Nevada, N.R.S. §228.540; New Hampshire, RSA 359-E:8; New Mexico, New Mexico Statute § 57:12-22; New Jersey, N.J. Stat. § 56:8-127; New York, General Business Law §399-z; North Carolina, N.C. Gen. Stat. § 75-102; North Dakota, N.D. Cent. Code, § 51-28-06; Oregon, ORS § 646.572; Rhode Island, R.I. Gen. Laws § 5-61-3.5; South Dakota, S.D. Codified Laws § 49-31-99-49-31-101; Utah, Utah Code Ann. § 13-25a-103; Virginia, Code of Virginia §59.1; Wyoming, Wyo. Stat. § 40-12-302.

[48] See National Conference of State Legislators, State Unsolicited Commercial Communication Laws (April 24, 2014), available at http://www.ncsl.org/research/telecommunications-and-information-technology/unsolicited-commercial-communication-laws.aspx.

[49] See, e.g., Arizona, A.R.S. § 44-1272; California, Cal Pub Util Code § 2871; Kentucky, KRS § 367.46971; New Jersey, N.J. Stat. § 56:8-121.

[50] See National Conference of State Legislators, State Unsolicited Commercial Communication Laws (April 24, 2014), available at http://www.ncsl.org/research/telecommunications-and-information-technology/unsolicited-commercial-communication-laws.aspx. The federal government also regulates the use of automated telephone dialers. 47 U.S.C. § 227(a).

c11173008

messages to telephone numbers within the state that are on the national do not call list.[51] Other states, like California, place independent restrictions and prohibitions on the sending of unsolicited text messages.[52]

Some states continue to operate their own do not call registries, or designate a private non-profit corporation to maintain the state-specific list.[53] Telemarketers in these states, in addition to obtaining and complying with the national registry, must also obtain and comply with the state registry. State registries may provide more protection from unsolicited commercial calls than the federal government, or less as the case may be. For example, Indiana, Missouri, Louisiana, and Oklahoma in addition to prohibiting commercial phone calls, also prohibit commercial text messages sent to numbers on the state do not call list, a prohibition not included in the national statutory scheme.[54] Tennessee, in addition to allowing residential and personal wireless telephone numbers on its statewide list, also permits certain state government entities to place their numbers on the list.[55] On the other hand, Florida residents must register their numbers every five years to remain on the state do not call list, whereas numbers remain on the national list permanently.[56] Residents in these states have the option of placing their residential or cellular phone numbers on either or both do not call lists. These states may also have additional state telemarketing regulations, including regulations of the use of automated telephone dialers, registration, or disclosure requirements.[57]

Texas has two state-maintained do not call registries. One registry is similar in scope to the national do-not call registry in that it permits Texas residents to register their residential and cellular telephone numbers to avoid receiving any unsolicited telemarketing calls or text messages.[58] The other list, however, allows businesses to register their telephone numbers to avoid receiving only telephone solicitation calls relating to the customer's choice of retail electric provider.[59] Texas's limited-business do not call list appears to be the only do not call registry that prohibits telemarketing sales calls to business telephone numbers. All other do not call lists, both

[51] N.D. Cent. Code, § 51-28-06; N.D. Cent. Code §51-28-01; R.I. Gen. Laws § 5-61-3.5; Utah Code Ann. § 13-39-202 (prohibiting text messages that may be harmful to children from being sent to numbers on the do not call list). See also, National Conference of State Legislators, State Unsolicited Commercial Communication Laws (April 24, 2014), available at http://www.ncsl.org/research/telecommunications-and-information-technology/unsolicited-commercial-communication-laws.aspx.

[52] See, e.g., California, Cal Bus & Prof Code § 17538.41; Michigan, MCLS § 752.1061 (prohibiting sending text message advertisements to minors in certain circumstances).

[53] Colorado, C.R.S. 6-1-905; Florida, Fla. Stat. § 501.059; Indiana, Burns Ind. Code Ann. § 24-4.7-4-1; Louisiana, La. R.S. 45:844.14; Massachusetts, ALM GL ch. 159C, § 2; Mississippi, Miss. Code Ann. § 77-3-707 (repealed effective July 1, 2017); Missouri, Mo. R.S. §407.1098.1; Montana, 30-14-1602, MCA; Oklahoma, 15 Okl. St. § 775B.4, Pennsylvania, 73 P.S. § 2245.2, 73 P.S. § 2242 (list maintained by non-profit corporation designated by the Attorney General); Tennessee, Tenn. Code Ann. § 65-4-405(requires the state list to include the names on the national registry, but does not substitute the national registry for the state); Wisconsin, Wis. Stat. § 100.52.

[54] I.C. 24-5-14-5; I.C. 24-4.7-2-9; La. R.S. 45:844.14; Mo. R.S. §407.1095(3); 15 Okl. St. § 775B.4.

[55] Tenn. Code Ann. § 65-4-410.

[56] Fla. Stat. § 501.059.

[57] See National Conference of State Legislators, State Unsolicited Commercial Communication Laws (April 24, 2014), available at http://www.ncsl.org/research/telecommunications-and-information-technology/unsolicited-commercial-communication-laws.aspx. The federal government also regulates the use of automated telephone dialers. 47 U.S.C. § 227(a).

[58] Tex. Bus. & Com. Code § Tex. Bus. & Com. Code §§ 304.002; 304.051.

[59] Tex. Utilities Code § 39.1025.

c11173008

national and state, apply only to personal (i.e., either residential or cellular) telephone numbers, and one state permits the registration of certain state government entities.[60]

Finally, a few states have not statutorily adopted the national do not call registry as the state's official registry, or implemented state penalties for violation of the do not call list, but do have other telemarketing restrictions in place.[61] These states may require registration with the state to engage in telemarketing.[62] They also may regulate the use of automated telephone dialers[63] or text messages.[64] In these states, the national do not call list remains available to state residents.

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[60] Tenn. Code Ann. § 65-4-410.

[61] Delaware, 6 Del. C. § 2507A; Hawaii, HRS § 481P-3; Iowa, Iowa Code § 476.57; Minn. Stat. § 325E.27; Ohio, ORC Ann. 4719.01-4719.99; South Carolina, S.C. Code Ann. § 16-17-445; Washington, Rev. Code Wash. (ARCW) § 19.158.020; West Virginia, W. Va. Code § 46A-6F-601.

[62] See, e.g., Delaware, 6 Del. C. § 2503A; Ohio, ORC Ann. 4719.02; Washington, Rev. Code Wash. (ARCW) § 19.158.050; West Virginia, W. Va. Code § 46A-6F-301.

[63] See, e.g., Iowa Code § 476.57; Md. PUBLIC UTILITIES Code Ann. § 8-204; Nebraska, R.R.S. Neb. § 86-244; S.C. Code Ann. § 16-17-446.

[64] Rev. Code Wash. (ARCW) § 19.190.060 (prohibiting the sending of commercial solicitations via text message to any wireless number registered in the state). See also, National Conference of State Legislators, State Unsolicited Commercial Communication Laws (April 24, 2014) available at http://www.ncsl.org/research/telecommunications-and-information-technology/unsolicited-commercial-communication-laws.aspx.

c11173008