
IMPROVING ENFORCEMENT OF THE DO NOT CALL RULES

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I. INTRODUCTION

With the new Federal Trade Commission (“FTC” or “agency”) rule prohibiting “robocalls” going into effect,¹ it is a good time to consider other potential improvements to the Telemarketing Sales Rule (“TSR”). One such change, an improvement in the enforcement of the do not call provisions (“DNC”) of the TSR, could result in significant benefits to consumers, telemarketing companies, and the Federal Trade Commission (“FTC”).

This Essay argues that telemarketers should be allowed to disclose violations of the DNC provisions before the start of a formal violation investigation, in exchange for reduced penalties for those violations. The policy of preferential treatment for early disclosure of violations, called “voluntary self-disclosure,” has been used with great success for years by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) and the U.S. Department of State’s Directorate of Defense Trade Controls (“DDTC”), among other federal agencies.² The BIS’ voluntary self-disclosure program provides a tem-

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¹ 16 C.F.R. § 310.4(b)(4)(i), (b)(1)(v), (b)(1)(v)(A) (2008). The first amendment to the Telemarketing Sales Rule “expressly Bar[s] telemarketing calls that deliver prerecorded messages, unless a consumer previously has agreed to accept such calls from the seller. Press Release, Federal Trade Commission, FTC Issues Final Telemarketing Sales Rule Amendments Regarding Pre-recorded Calls (Aug. 19, 2008), *available at* <http://www.ftc.gov/opa/2008/08/tsr.shtml>. The second amendment “modifies the [Telemarketing Sales Rule’s] method of calculating the maximum permissible level of ‘call abandonment.’”

Id.

² Bureau of Industry and Security, Compliance and Enforcement, <http://www.bis.doc.gov/complianceand enforcement/index.htm> (last visited Nov. 4, 2009); U.S. DEPT. OF STATE, BUREAU OF MILITARY AFFAIRS, DIRECTORATE OF DEFENSE TRADE

plate for the implementation of a change in the enforcement of the TSR. This change to the DNC provisions could increase the detection of violations of the DNC provisions and would help to align the interests of the telemarketers with the interests of the FTC to enforce the provisions.

II. BACKGROUND

The DNC provisions of the TSR are a consumer protection initiative that forbids telemarketing firms from contacting consumers that register their telephone number with a national database called the National Do Not Call Registry.³ A firm that uses telemarketers to sell its products must pay for access to the Registry and regularly check the list for updates every thirty-one days.⁴ All telemarketers must consult the Registry before soliciting any person over the phone.⁵ A violation of the registry can result in civil penalties of up to \$16,000 per violation.⁶ The FTC and state attorneys general can initiate actions to enforce the rules.⁷

The TSR contains a safe harbor provision to protect companies that inadvertently violate the DNC rules.⁸ However, although most companies have written

CONTROLS, OFFICE OF DEFENSE TRADE CONTROLS COMPLIANCE, COMPLIANCE PROGRAM GUIDELINES 4 (2008), available at http://www.pmdtcc.state.gov/compliance/documents/compliance_programs.pdf.

³ 16 C.F.R. § 310.4(b)(1)(iii). A person who has registered their number on the DNC list may be contacted by an exempt organization such as a charity, political group, or survey organization. 16 C.F.R. §§ 310.6. A company with which a person has had a business relationship in the previous eighteen months is also exempt. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii). Congress created the Do Not Call Registry in 2003, and permanently authorized it in 2008. Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (2003); Do-Not-Call Improvement Act of 2007, Pub. L. No. 110-187, 122 Stat. 633 (2008) (codified at 15 U.S.C. § 6101 note). By October 2008, over 145 million phone numbers have been registered on the do not call list. FED. TRADE COMM'N, ANNUAL REPORT TO CONGRESS FOR FY 2007 PURSUANT TO THE DO-NOT-CALL IMPLEMENTATION ACT ON IMPLEMENTATION OF THE NATIONAL DO-NOT-CALL REGISTRY 1 (2008) [hereinafter 2007 DO NOT CALL REPORT].

⁴ 16 C.F.R. § 310.4(b)(3)(iv). While companies can access registered numbers in five area codes for free, they must pay \$55 to access the registered numbers for each additional area code and \$15,058 for the entire U.S. database. FED. TRADE COMM'N, Q&A FOR TELEMARKETERS AND SELLERS ABOUT THE DO NOT CALL PROVISIONS OF THE FTC'S TELEMARKETING SALES RULE 4, available at <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt129.pdf> [hereinafter FTC Q&A].

⁵ 16 C.F.R. § 310.8(a).

⁶ FTC Q&A, *supra* note 4, at 8.

⁷ *See id.* at 1.

⁸ 16 C.F.R. § 310.4(3). The safe harbor provision states that a telemarketer will have reduced penalties for violations if the FTC determines that: a) a telemarketer "has established and implemented written procedures to honor consumers' requests that they not be called"; b) the telemarketer "has trained its personnel and any entity assisting" in the seller's compliance procedures; c) the seller maintains an "entity-specific do not call list"; d) the seller has "a process to prevent calls to any entity on their entity-specific Do Not Call list or

procedures in place, application of this safe harbor has been a source of frustration to companies that have been penalized for violations of the DNC rules despite being able to demonstrate the good faith efforts they made to comply.⁹ The FTC may view such violations as evidence that the compliance procedures were ineffective and therefore not protected by the safe harbor provision. The agency's enforcement of the TSR provisions has created other problems, as well.

III. PROBLEMS WITH THE DO NOT CALL RULES

There are several problems with the FTC's enforcement of the DNC rules. First, it is likely that some violations will not be reported because of an unwillingness of people to complain. Second, violations may not be reported because some DNC registrants who receive unwanted calls from telemarketers do not know the process for registering a complaint with the FTC. Third, a company has the perverse incentive to hide and obscure violations from the FTC when that company becomes aware of its violations. Finally, there can be a long delay in the time between a violation and the payment of a penalty for a violation, making the penalty less relevant to the violator. All of these problems can be corrected, at least in part, by adopting an enforcement policy to allow for a reduction in penalties for telemarketers who report violations of the DNC provisions of the TSR to the FTC before the agency begins a formal investigation of the violations. Because the TSR gives discretion in setting the level of fines for DNC violations,¹⁰ no amendments to the TSR would be needed to implement this enforcement policy. This Essay will refer to the process of reporting violations of the DNC rules in exchange for favorable treatment as "voluntary self-disclosure."

IV. VOLUNTARY SELF-DISCLOSURE

Voluntary self-disclosure is a policy that has been successfully used for

on the National Do Not Call Registry"; e) someone working with the telemarketer "monitors and enforces compliance with the entity's Do Not Call procedures"; and f) subsequent calls were the result of an error. Federal Trade Commission, Facts For Business: Complying With the Telemarketing Sales Rule, <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm> (last visited Nov. 12, 2009).

⁹ See *Do Not Call Violations Snare DIRECTV, Comcast, Dish Network*, ENTREPRENEUR, June 2009, available at <http://www.entrepreneur.com/tradejournals/article/202716807.html> (noting that the FTC fined Comcast \$900,000 recently, despite Comcast having a 99.85 percent compliance with the Do Not Call regulations).

¹⁰ FTC Q&A, *supra* note 4, at 1.

many years by the BIS and the DDTC,¹¹ which reduces the penalties for companies that report their non-compliance with export control regulations before the agencies have started a formal investigation of those violations.¹² Voluntary self-disclosure reports must include an explanation of when and how violations occurred and the identities of all individuals and organizations that were involved in a company's violations.¹³ A description of any mitigating circumstances should also be included in the disclosure.

Companies that file reports that are not accurate and thorough typically receive less mitigation of their penalties.¹⁴ Complete, well received reports can often result in warning letters from the agencies without financial penalties (particularly from DDTC).¹⁵ BIS recommends that a company review its records so as to include violations from the five years prior to the date of its initial notification.¹⁶ Even when a voluntary self-disclosure report is accepted, if the report is later found to be incomplete, the agencies may levy full fines on the unreported violations.¹⁷ Thus, firms have an incentive to make voluntary self-disclosure reports accurate and complete when they decide to self-report.¹⁸ The benefits that are experienced by exporters and agencies that regulate controlled exports from voluntary self-disclosure are transferable to telemarketers and the FTC.

V. ADVANTAGES OF VOLUNTARY SELF-DISCLOSURE

Voluntary self-disclosure would make enforcement of the DNC rules proactive rather than reactive. To reduce or avoid penalties, companies would review their call records thoroughly to preempt a FTC investigation with a voluntary self-disclosure. If a company waits too long to review their records, the

¹¹ See *supra* note 2 and accompanying text.

¹² 15 C.F.R. § 764.5 (2008); 22 C.F.R. § 127.12(c)(1) (2009). A company is allowed to file an initial notification which broadly sketches out its violations. If the company later makes a more detailed filing, the initial notification sets the date that the voluntary disclosure is filed. *Id.*

¹³ 15 C.F.R. § 764.5; 22 C.F.R. § 127.12.

¹⁴ Wendy Wyson, *BIS DATA Shows Benefits of Voluntary Self-Disclosure*, EXPORT PRACTITIONER, Dec. 2006, at 4.

¹⁵ U.S. Bureau of Industry and Security, Compliance and Enforcement, <http://www.bis.doc.gov/complianceand enforcement/index.htm> (last visited Nov. 4, 2009) (noting that of the Voluntary Self Disclosures (VSDs) "resolved in Fiscal Year 2005, 97% were resolved with either a finding that no violation of the EAR [Export Administration Regulations] . . . or with the issuance of a warning letter . . .").

¹⁶ 15 C.F.R. § 764 (c)(3).

¹⁷ *Id.*

¹⁸ Disclosure reports also commonly include an explanation of how the reporting company has already improved or is in the process of improving their policies, processes and systems, and training in an effort to avoid future violations. *Id.*

FTC may discover do not call violations and initiate an investigation. If the FTC begins a formal investigation before the company files a voluntary self-disclosure, the company would not receive the benefit of a reduction in penalties. Thus, voluntary self-disclosure would align the FTC and the telemarketer's interests—both entities would want to expose violations as quickly and thoroughly as possible.

Proactive enforcement reduces the risk that violations will go unreported.¹⁹ As the DNC provisions are now enforced, violations involving people who are not willing to complain or do not know how to report unwanted telemarketer calls have little chance of coming to light.²⁰ In contrast, companies who would want to take advantage of voluntary self-disclosure would have to review their records for violations going back a number of years. As part of the review process, violations that may not otherwise have been exposed would become known and would be reported.

Voluntary self-disclosure gives companies an incentive to report violations. At present, telemarketers only receive penalties for violations of the DNC list that the FTC discovers. Thus, telemarketers have a financial reason to keep quiet regarding—or even possibly obscure—DNC violations that the marketer discovers but that the FTC has not yet discovered.²¹ Voluntary self-disclosure motivates companies to report violations before the FTC begins a formal investigation.

Penalties become more timely and relevant when voluntary self-disclosure is allowed. Currently, several years may pass between the beginning of an investigation and penalty collection.²² As time passes, penalties may lose their relevance to the company involved. Management may distance themselves from the responsibility for past violations. Consequently, investigated telemarketers may fail to take the necessary steps to prevent future violations. However, voluntary self-disclosure requires speedy, company-initiated reviews to obtain meaningful penalty reduction. Penalty payments are thereby received closer to the time of violation, making these payments more pertinent to the violating

¹⁹ In the export enforcement area, a significant percentage of enforcement cases involve voluntary self-disclosures. See Philip S. Rhodes, *The International Traffic in Arms Regulations: Compliance and Enforcement in the Directorate of Defense Trade Controls U.S. Department of State*, in Practising Law Institute Commercial Law and Practice Course Handbook Series, *Coping with U.S. Export Controls* (2008), available at WL 910 PLI/Comm 443, 472.

²⁰ See *supra* Part III.

²¹ Based on the FTC's record of enforcement, currently a company does not have an incentive to admit to even an inadvertent call to a person on the Registry. See Federal Trade Commission, *Do Not Call Enforcement Action Announcements – Alphabetical List*, <http://ftc.gov/bcp/edu/microsites/donotcall/cases.html> (last visited Nov. 11, 2009) (listing a total of sixty-three Do Not Call registry enforcement actions from 2003 to 2009).

²² See 2007 DO NOT CALL REPORT, *supra* note 3, at 8–12.

companies. The speed and the detail needed for an effective voluntary self-disclosure would also reduce the investigative resources and time involved in the FTC's investigations of DNC violations, saving the agency time and money.

VI. PUBLIC RELATIONS

Companies that make voluntary self-disclosures could gain a significant public relations advantage in addition to the benefits discussed above. Currently, the public first gains knowledge of DNC violations through FTC press releases. After such negative exposure, companies must work to control the damage to their reputations. Under the proposed policy, a voluntary self-disclosure that is accepted by the FTC would allow a company to mitigate the negative press from a FTC announcement by pointing out that violations were self-reported and corrective actions have been implemented. Such announcements can be the first step in a public relations campaign to redeem the company's image after the company discovers a violation. The FTC would also benefit from the public's perception that more DNC violations have been discovered.

VII. CONCLUSION

The FTC should amend its enforcement of the TSR to allow companies to disclose violations of the DNC provisions prior to the start of a formal FTC investigation in return for reduced penalties. This change in enforcement policy would help to better align the interests of telemarketers with the interests of the FTC in exposing and correcting violations of the DNC rules. The successful use of voluntary self-disclosure by other federal agencies demonstrates that voluntary self-disclosure can be an efficient and effective strategy to reform the enforcement of the TSR to the benefit of consumers, telemarketers, and the FTC.