

THE “NO-CALL” LAW

Solution or Problem?

By Samuel Packard

Have you ever gone home after a hard day of work and sat down to eat a family dinner when you were interrupted by one of those annoyingly pesky little telemarketing calls? If so, you are not alone. One study taken in 1999 indicates that there are 300,000 telephone solicitors calling more than 18 million Americans every day.¹ It is no wonder why in 1991 Congress found that consumers were “outraged over the proliferation of intrusive ... calls to their homes from telemarketers.”²

The federal government tried to mitigate the number of phone calls by enacting the Telephone Consumer Protection Act of 1991.³ Despite the federal government’s intervention, many states have implemented their own statewide “Do-Not-Call” lists. “The basic idea behind the [Do-Not-Call] statutes is to allow consumers” to strike first against telemarketers.⁴ This allows consumers to inform potential telephone solicitors that their calls are not welcomed before those calls are even made.⁵ State-sponsored Do-Not-Call lists have recently become very popular to the American public. By the end of the year 2000, more than 1.6 million people have signed up for state-sponsored Do-Not-Call lists or databases.⁶ Since 1998, twenty-six states have adopted No-Call legislation, “and nearly everyone in the [telemarketing] industry expects the other twenty-four states to follow suit.”⁷ The wide spread use of No-Call laws is “a signal of how unpopular telemarketing has become among Americans.”⁸

Texas recently joined the band wagon when it created the Texas Telemarketing Disclosure and Privacy Act in 2002.⁹ This act created a statewide Do-Not-Call list for residential customers who want to stop telemarketers from making calls to their homes.¹⁰ Telemarketers are now required to update their Do-Not-Call lists from the Texas Do-Not-Call list database each quarter on January 1, April 1, July 1, and October 1.¹¹ Telephone solicitors are also not allowed to block their numbers from Caller ID systems or make calls by automatic dialers.¹² Although the Do-Not-Call list in Texas will prevent many telemarketers from making unwanted calls, there are exceptions.

First, not all unsolicited telephone calls are telephone solicitations. For example, debt collectors are able to use the telephone to collect a debt.¹³ And, calls from charitable organizations are not considered telephone solicitations.¹⁴ Second, even if the call is a telephone solicitation, companies are still allowed to solicit over the telephone if the following facts are true: (1) “The company has an established business relationship with a customer; or, (2) The telemarketer is a state licensee (for example—insurance agents, real estate agents, securities brokers) and, [the following three elements are present]: (i) The call is not made by an automated telephone dialing system; (ii) The solicitation requires a face-to-face presentation to complete the sales transaction and make payment; and (iii) The consumer has not informed the telemarketer that the consumer does not wish to receive telemarketing calls from the telemarketer.”¹⁵

There is a concern, however, that the Texas Do-Not-Call laws may create an economic burden on Texas businesses as well as consumers. Telemarketing is an industry that employs 432,600 Texans.¹⁶ Last year, telemarketers sold goods and services worth \$48 billion.¹⁷ On a national level, telemarketing is a \$662 billion dollar industry that represents almost 6 percent of the gross domestic product.¹⁸ Any law that will undermine a business this big cannot go without creating negative economic consequences. As one journalist explained, “Ultimately consumers could end up bearing the costs of a national database, either because telemarketers would charge correspondingly higher prices or because



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taxpayers would be forced to subsidize any difference between the cost of the database and the fees that the database administrator actually collects from telemarketers.”¹⁹

Small businesses may actually suffer the most from a No-Call law. “Small businesses tend to be less knowledgeable about telemarketing regulations and have less financial capability to maintain [Do-Not-Call] lists and remain current with the complex regulations of each state.”²⁰ Accordingly, one of the main reasons why the Federal Communications Commission (FCC) did not want to establish a nation wide Do-Not-Call list was because they were afraid of its impact on smaller businesses.²¹ Some commentators say forcing small businesses that engage in telemarketing to bear their part of the burden of maintaining Do-Not-Call lists may overwhelm them.²²

On the other hand, there are others who believe that a No-Call law will help the economy. Candice Carter, state legislative affairs director for AARP in Texas, explained that “telemarketing fraud is big business—at least \$40 billion is stolen from consumers every year, and only 1 in 6 victims reports the crime. Seventy-eight percent of these victims are over 55 years old, and Texas is ranked among the top three states with reported telemarketing fraud.”²³

The No-Call list, however, may not offer as much protection from telemarketing fraud as anticipated. Some believe that a No-Call law will actually help telemarketers save money. Consumers who place their names on No-Call lists “have a pre-determined propensity not to buy[.]”²⁴ As a result, not calling these consumers will actually save telemarketers time and money.²⁵

Although it might be too soon to say what type of impact a Do-Not-Call list might have on telemarketing companies, one thing is certain: Texans seem to be ecstatic about it. The first week the Texas Do-Not-Call law was implemented, more than 94,000 Texans put their names on the list.²⁶ Theresa Gage, spokeswoman for the Texas Public Utility Commission, explained, “There were several times last week actually when the circuits were overloaded in the Dallas area and in South Texas Texans are very, very excited about this.”²⁷ With such a response by the public, it looks like the Do-Not-Call list is going to be around a while. The public’s response, however, may not be so rewarding after it feels the impact that a Do-Not-Call list may have on small and large businesses.

Endnotes

¹ Stephanie Gallagher, *Telemarketers, Buzz Off! (Telephone Consumer Protection Act helps protect against telemarketers)* (Brief Article), KIPLINGER’S PERSONAL FINANCE MAGAZINE, at <http://www.findarticles.com> (April 1999).

² Michael E. Shannon, *Combating Unsolicited Sales Calls: The “Do-Not-Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 389 (2001) (footnote omitted).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102 - 243, 105 Stat. 2394 (1991); see also Ann Marie Arcadi, *What About the Lucky Leprechan?: An Argument Against “the Telephone Consumer Protection Act of 1991*, 1991 COLUM. BUS. L. REV. 417, 420 (1992) (discussing the enactment of the Telephone Consumer Protection Act of 1991).

⁴ Shannon, *supra* note 2, at 395.

⁵ *Id.*

⁶ Shannon, *supra* note 2, at 410 (footnote omitted).

⁷ Darrin Schlegel, *No-Call List Cheers Folks with Telemarketing Hang-up*, HOUSTON CHRONICLE, July 10, 2002, available at 2002 WL 23207666.

⁸ Shannon, *supra* note 2, at 409 (footnote omitted).

⁹ TEX. BUS. & COM. CODE ANN. § 43.001. (Vernon 2002) For more information about the Do-Not-Call list, go to <http://www.texasnocall.com>.

¹⁰ *Texas No Call - Telephone Solicitor FAQ*, at http://www.texasnocall.com/subscriberFAQ_TX.asp (last visited Aug. 6, 2002).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Angela K. Brown, *Telemarketers’ Lists to Shrink as No-Call law Begins*, HOUSTON CHRONICLE, July 1, 2002, available at 2002 WL 23205654.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Shannon, *supra* note 2, at 396 (footnote omitted).

²⁰ 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*, 25 CAP. U. L. REV. 237 (1999).

²¹ Shannon, *supra* note 2, at 405 (footnote omitted).

²² *Id.* at 406 (footnote omitted).

²³ AARP Urges Texans to Push No-Call Bill; Feb. 5-9, 2001 ‘No-Call Week’, PR Newswire, at <http://www.findarticles.com> (Feb. 5, 2001).

²⁴ Shannon, *supra* note 2, at 407 (footnote omitted).

²⁵ *Id.*

²⁶ *Texans Sign up in Doves to Block Telemarketers*, HOUSTON CHRONICLE, at <http://www.chron.com/cs/CDA/story.hts/front/1202234> (Jan. 8, 2002).

²⁷ *Id.*