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June 19, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Communication
CG Docket No. 02-278

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on June 18, 2003, Peter Cassat of this office and I met with Commissioner Michael J. Copps and his Competition and Universal Service Legal Advisor, Jessica Rosenworcel, to discuss the initial and reply comments that Intuit Inc. has filed in the above-referenced dockets. In particular, we discussed Intuit's interest in seeing establishment of a single national Do Not Call ("DNC") list that will replace or absorb state DNC lists; its views on preemption of state DNC lists; its interest in having the FCC, at a minimum, clarify that the national DNC list would preempt all state lists and requirements for purposes of interstate calls; its support for the FCC's maintenance of the agency's current definition of an established business relationship; and its view that the FCC should adopt a maximum abandonment rate of five percent for predictive dialers. The two enclosed handouts were made available at the meeting, and the report from the United States House of Representatives Committee on Energy and Commerce was telecopied to Ms. Rosenworcel following the meeting.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted.

Very truly yours,

M. Anne Swanson

Enclosure
cc w/o encl. (by facsimile):
The Honorable Michael J. Copps
Jessica Rosenworcel, Esquire

DCLIB02:1398388-1

The FCC Should Clarify the Preemptive Effect of the TCPA

- The legislative history supports the conclusion that the Telephone Consumer Protection Act ("TCPA") was intended to preempt state laws with respect the operation of do-not-call ("DNC") databases:
  - "To ensure a uniform approach to this nationwide problem, this bill would preempt the States from adopting a database approach, if the FCC mandates a national database. From the industry's perspective, this preemption has the important benefit of ensuring that telemarketers are not subject to duplicative regulation." Statement of Rep. Rinaldo, 137 CONG. REC. H11311 (daily ed. Nov. 26, 1991).
  - "[A] substantive argument can be made that federal legislation is needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards." H.R. REP. NO. 102-317, at 10 (1991).
  - "The legislation, which covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to differences in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes." 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).
- At a minimum the FCC should expressly articulate the preemptive role of the TCPA and the FCC's regulations with respect to *interstate* telemarketing.
  - The TCPA's exception allowing more restrictive state laws is expressly limited to state laws that impose more restrictive *intrastate* requirements.
  - Allowing states to apply their DNC laws to *interstate* telemarketing activities would undermine the purpose of the TCPA and encroach on the FCC's jurisdiction.
  - The absence of federal preemption for interstate telemarketing creates practical compliance problems. If the FCC does not clarify that the TCPA preempts state telemarketing laws with respect to interstate calls, telemarketers operating at the regional or national level will be unduly burdened by the need to comply with multiple DNC lists. Such lists are updated at different times, maintained in varying formats and accessed in different ways. This absence of uniformity is costly and burdensome.
  - Problems for legitimate telemarketers will only become more severe if the national DNC registry does not preempt with respect to interstate calls. Notwithstanding the FTC's and now the FCC's rulemaking, several states have adopted new DNC laws within the past year. In fact, according to The Direct Marketing Association's website (www.the-dma.org/government/donotcalllists.shtml), at least 10 more will have instituted do not call lists by January 1, 2004.
  - As demonstrated by the comments submitted in this proceeding, including by the AARP and NARUC, states have taken the position that they have the authority to

enforce their DNC laws in the case of calls originating from outside the state. These positions are further evidenced by statements on various state consumer protection websites. (See, e.g., Massachusetts Consumer Affairs & Business Regulation website: www.state.ma/us/donotcall/solicitorinfo.htm; New York State Consumer Protection Board website: www.nynocall.com/faq.html; Pennsylvania Attorney General website: www.attorneygeneral.gov/ppd/bcp/telemarketing/)

  - The FCC's rules should acknowledge that telemarketers are not required to use state DNC databases or comply with differing state law standards in connection with their *interstate* telemarketing campaigns.

- It is well established that the FCC has the authority to preempt state regulation that interferes with the FCC's regulatory scheme. For instance, the FCC preempted state regulation of the interconnection of telephone customer premises equipment, and explicitly forbade the states from adopting regulations for "intrastate" connection of CPE. Telerent Leasing Corp., *Memorandum Opinion and Order,* 45 F.C.C.2d 204 (1974). The FCC's preemption was affirmed by the Fourth Circuit on the ground that Section 2(b) did not give the states the power to adopt rules that would limit the reach of valid FCC actions. *North Carolina Utilities Commission v. FCC,* 537 F.2d 787, 793 (4th Cir. 1976) (concluding that "we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority").

The FCC Should Administer a Single National Do-Not-Call List and Harmonize its Rules with the FTC's Telemarketing Sales Rule

1. <u>A single national Do Not Call ("DNC") list that replaces or absorbs state DNC lists will enhance consumer choice, convenience, and protection</u>.

    (a) *The TCPA Preempts State Laws with respect to Interstate Telemarketing.* The FCC should, at a minimum, clarify that telemarketers need only comply with the Federal DNC rules when conducting interstate telemarketing campaigns.

    (b) *Provide Convenient One-stop Shopping for Consumers.* Consumers will need to register on only one list to avoid receiving telemarketing calls – regardless of whether the calls are interstate or intrastate. This one-step method will be less burdensome on consumers who would otherwise be required to repeat "do not call" requests.

    (c) *Avoid Consumer Confusion.* With a single DNC list, consumers will be able to avoid the uncertainty of whether they need to register on one or multiple lists and what protections each list will provide. In addition, with a single DNC list, consumers will need not keep track of different registration processes or when their registrations need to be renewed.

    (d) *Reduce Incidence of Errors by Telemarketers.* With a single DNC list, telemarketers will avoid the problems associated with trying to comply with multiple, sometimes inconsistent, DNC lists. The existence of multiple DNC lists necessarily increases the likelihood of mistakes made by telemarketers. Mistakes by telemarketers result in unhappy consumers, enforcement actions and penalties.

    (e) *Facilitate Enforcement.* The use of a single national DNC list will facilitate more effective enforcement of telemarketing restrictions. With a single national DNC list, fewer factual questions will arise as to whether a particular consumer was registered on the particular list used by the telemarketer when the call or calls were made to the consumer.

2. <u>A single national DNC list that replaces or absorbs state DNC lists avoids placing unnecessary burdens on telemarketers and state agencies</u>.

    (a) *Ease Unnecessary Compliance Burdens for Telemarketers.* A single national DNC list that preempts state lists will relieve telemarketers of the unnecessary burdens associated with complying with duplicative regulatory procedures. Under the current regime of multiple state DNC lists, telemarketers are forced to adhere to the procedures of multiple state agencies. The inconsistencies among the different procedures implemented by the various state agencies make it extremely difficult for telemarketers to comply and add to the costs of their doing business without providing any benefit to consumers.

(b) *Avoid Unnecessary Administrative Burdens on State Agencies.* If the FCC elects to establish a national DNC without clarifying its authority to replace or absorb state DNC lists, it will be difficult for state-administered lists to be coordinated with the national DNC list. Such coordination is required under Section 227(e)(2) of the Telephone Consumer Protection Act of 1991 ("TCPA").

3. <u>A single national DNC list that replaces or absorbs state DNC lists achieves overall economic efficiency</u>.

   (a) *Use Administrative Resources More Effectively.* The continued maintenance of multiple lists by different states will further strain state budgets and result in the potential need to raise taxes in order to fund duplicative regulatory regimes. Under the current regime, each DNC list requires the expenditure of considerable governmental resources to maintain and update the list, and to create and implement consumer education programs to inform consumers about the list. In addition, if the FCC created a national DNC registry without clarifying Congress's intent that such registry preempts state lists, the FCC will need to spend substantial resources to ensure coordination with the state lists. The substantial costs associated with the continued maintenance of multiple lists will provide no additional benefit to consumers and can easily be avoided by the FCC's establishment of a single national DNC list that replaces all state DNC lists.

   (b) *Save Resources for Telemarketers and Consumers.* Under the current regulatory framework, the cost and burden to telemarketers of complying with numerous state DNC lists that are, among other things, updated on different schedules and maintained in different formats, is significant. In addition to the internal administrative costs of "scrubbing" against multiple DNC lists, telemarketers in many states must pay a fee to access such lists. Businesses already strained for revenues will ultimately have to pass at least some of these substantial costs through to consumers. By administering a single national DNC list, the FCC will reduce the operational costs of complying with telemarketing laws while at the same time helping telemarketers and consumers alike to save resources that are better spent elsewhere.

4. <u>The FCC's authority to establish a single national DNC list that preempts state DNC lists is consistent with FCC authority as well as the TCPA</u>.

   (a) *FCC Authority.* The effect of the Communications Act of 1934 is generally to preempt state regulation of interstate communications. Congress enacted the TCPA with this framework in mind.

   (b) *Legislative History of the TCPA.* In enacting the TCPA, Congress specifically considered the fact that states do not have jurisdiction over interstate calls. As demonstrated by the comments submitted by Intuit as well as others, the legislative history of the TCPA evidences that Congress also was mindful of the problems that would arise through the creation of multiple do-not-call lists and took steps to avoid those problems.

(c) *Statutory Preemption.* In adopting the TCPA, Congress expressly amended Section 2(b) of the Communications Act to ensure that the FCC's authority would not be undermined by the jurisdictional fence it establishes. It is well established that the FCC has the authority to preempt state regulation that interferes with the FCC's regulatory scheme. For instance, the FCC preempted state regulation of the interconnection of telephone customer premises equipment, and explicitly forbade the states from adopting regulations for "intrastate" connection of CPE. Telerent Leasing Corp., *Memorandum Opinion and Order,* 45 F.C.C.2d 204 (1974). The FCC's preemption was affirmed by the Fourth Circuit on the ground that Section 2(b) did not give the states the power to adopt rules that would limit the reach of valid FCC actions. *North Carolina Utilities Commission v. FCC,* 537 F.2d 787, 793 (4th Cir. 1976) (concluding that "we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority").

(d) *Text of the TCPA.* While Section 227(e)(1) of the TCPA states that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements" (emphasis added), the ability of states to enact such laws is expressly subject to restrictions set forth in subsection (2) of Section 227(e). Section 227(e)(2) of the TCPA provides, in pertinent part, that "if . . . the [FCC] requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State."

5. <u>The FCC should harmonize its rules with the FTC's Telemarketing Sales Rule ("TSR").</u>

(a) *Avoid Adopting Conflicting Regulations.* The FCC should carry out its mandate under the Do Not Call Implementation Act (the "DNC Implementation Act") to maximize consistency with the FTC's TSR. The House Report accompanying the DNC Implementation Act specifies that the House Energy and Commerce Committee's main concern is avoiding conflicting regulatory schemes (both at the federal and state levels).

(b) *Maintain FCC's Current Established Business Relationship ("EBR") Exception.* The FCC should not simply defer to the FTC's TSR in its effort to harmonize its regulations with those of the FTC. Most importantly, the FCC should not simply adopt a revised EBR exception identical to the one adopted by the FTC. Unlike the FCC's current rules, the time-based restrictions and purchase requirements of the TSR's EBR exception fail to accommodate the variety of relationships established and communications media employed by software companies and web based service providers.

(c) *Time-Based Limitations on the EBR have Unintended Consequences.* An EBR exception based on artificial, time-based restrictions unfairly disadvantages certain types of companies. Unlike credit card companies to which customers make monthly payments, purchasers of software may not make repeat purchases for years. Intuit's personal finance products like Quicken® can be used by a customer for several years during which the customer may have extensive contacts with the company without making another purchase. Under FTC's EBR:

- It may not be lawful to contact Intuit users (*e.g.*, Quicken.com) even when they have registered a preference to be contacted by telephone.
- It may not be lawful to contact a customer regarding an upgrade when the prior purchase was more than eighteen months earlier.
- It may not be lawful to contact small business owners who operate out of their homes.

6. <u>The FCC should not impose overly burdensome requirements on the use of predictive dialers</u>.

Predictive dialing systems offer many benefits to consumers, including lower prices, fewer misdials, and improved quality controls. The abandoned call rate adopted by the FTC is overly restrictive and the FTC already has postponed its effective date recognizing the burdens it will impose on businesses. The Commission should work with the FTC to strike a better balance between consumers' interest in avoiding abandoned calls, on the one hand, and call center efficiency, on the other hand, by adopting a maximum abandonment rate of 5%. Furthermore, any regulation mandating uniform acceptable abandoned call rates should expressly preempt individual state laws mandating call abandonment rates.

DCLIB01:1396906-1

108TH CONGRESS
1st Session

HOUSE OF REPRESENTATIVES

REPORT
108–8

DO-NOT-CALL IMPLEMENTATION ACT

FEBRUARY 11, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. TAUZIN, from the Committee on Energy and Commerce, submitted the following

REPORT

[To accompany H.R. 395]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 395) to authorize the Federal Trade Commission to collect fees for the implementation and enforcement of a "do-not-call" registry, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

PURPOSE AND SUMMARY

The purpose of H.R. 395 is to authorize the Federal Trade Commission (FTC or Commission) to collect fees from telemarkers to

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fund the implementation and enforcement of the Commission's national do-not-call registry, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

Telemarketing has been, and continues to be, a controversial marketing practice. Telemarketing can provide many benefits for consumers, such as introducing them to new opportunities or products. According to a DRI–WEFA Group study,[1] Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast, in 2001, consumer outbound telephone marketing generated $274.2 billion in sales, accounting for 27.3 percent of all consumer direct marketing sales. In fact, outbound telemarketing alone generated almost four percent of all U.S. consumer sales in 2001. In 2001, the telemarketing industry that markets to consumers was estimated to employ 4.1 million workers.

Unfortunately, certain telemarketing practices can be an intrusive nuisance for consumers, an invasion of privacy, and a source of consumer confusion. In some instances, unscrupulous telemarketers have taken advantage of this confusion and committed fraud against consumers. Indeed, the FTC receives thousands of complaints annually regarding a variety of telemarketing practices. According to the FTC, consumer complaints regarding unwanted telemarketing calls increased over one-thousand percent between 1998 and 2002.

In order to assist consumers in dealing with telemarketing, Congress provided authority to the FTC and the Federal Communications Commission (FCC) to limit these intrusions into their homes. Under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§6101–08) enacted by Congress in 1994, the FTC implemented the Telemarketing Sales Rule (TSR). The TSR requires telemarketers to make certain disclosures and prohibits certain misrepresentations. These rules required company-specific do-not-call lists, required callers to identify the seller, their purpose and the nature of what is being sold, limited commercial telephone solicitations to between 8:00 a.m. and 9:00 p.m., and gave state law enforcement officers the authority to prosecute fraudulent telemarketers who operate across state lines.

Congress also enacted the Telephone Consumer Protection Act (TCPA) of 1991 (47 U.S.C. §227). Regulated by the FCC, the TCPA, among other things, requires telemarketers to abide by do-not-call requests from consumers, restricts telemarketing calling hours to 8:00 a.m.–9:00 p.m., mandates that telemarketers provide the name of the solicitor, name of the entity calling, and the telephone number or address where that person may be contacted, and includes a private right of action. Exemptions exist for established business relationships and tax-exempt non-profit organizations, such as those of a charitable or political nature.

In addition to the FTC and FCC regulations, many states also maintain some form of a do-not-call list, and the Direct Marketing Association also maintains a self-regulated do-not-call list, called the Telephone Preference Service, used by its members.[2] Despite

[1] This study was commissioned by the Direct Marketing Association.
[2] While all members of the Direct Marketing Association are required to participate in the Telephone Preference Service, the Association may apply sanctions only against its members.

these restrictions, telemarketing complaints continue to rise and there is an increasing need to provide consumers with the ability to opt-out of telemarketing calls.

To address the consumer demand, pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act, the FTC initiated a rulemaking in January 2002 to create a national do-not-call registry and announced the adoption of its do-not-call amendments on December 18, 2002. The Commission's do-not-call registry allows consumers who prefer not to receive telemarketing calls to contact the FTC to be placed on its do-not-call list. Telemarketers would be required to subscribe to the national do-not-call registry and to refrain from calling consumers who have placed their telephone numbers on this registry.

The FTC provided telemarketing exemptions in the TSR for companies with an "established business relationship" with a consumer lasting up to 18 months after the last purchase or delivery, or the last payment, unless the company is asked not to call again. The TSR also exempts telemarketers calling to solicit charitable contributions, although calls made by for-profits on behalf of non-profits are required to maintain an organization-specific do-not-call list.

In order to implement the do-not-call registry, the Commission needs Congressional authorization to collect fees from the telemarketing industry. It is anticipated that fees collected will offset the appropriation that, in FY 2003, is estimated at $16 million. On May 29, 2002, the FTC issued a Request for Public Comment asking for guidance on the collection of fees. Under the new authority provided by H.R. 395, the Commission intends to initiate a notice of proposed rulemaking on how the fee collection process will operate once authorization and funding are acquired.

It is the strongly held view of the Committee that a national do-not-call list is in the best interests of consumers, businesses and consumer protection authorities. This legislation is an important step toward a one-stop solution to reducing telemarketing abuses. * The FTC's rule, however, is only one piece of a multi-jurisdictional puzzle. Of primary concern to the Committee is the possibility for conflicting regulations. In addition to the FTC's national do-not-call registry, twenty-seven states[3] maintain some form of a do-not-call program, and the FCC requires businesses to maintain company-specific do-not-call lists. How these different regulatory regimes can compliment each other and work as one national program is still unclear. *

The Commission's do-not-call registry, standing alone, will not stop all telemarketing calls. Due to the limited jurisdiction of the FTC, there are telemarketing calls that cannot be covered by the FTC's do-not-call rule. The Commission does not have jurisdiction over common carriers (such as telephone companies and airlines), insurance companies, banks, credit unions, political solicitations, or intrastate telemarketing calls. Under the Commission's do-not-call rule, if one of these non-covered entities contracts with a third-party telemarketing company to place a call, that call would be cov-

The Direct Marketing Association has approximately 5,000 members. There are approximately 4 million consumers who have subscribed to the Telephone Preference Service.

[3] Alabama, Alaska, Arkansas, California (effective April 1, 2003), Colorado, Connecticut, Florida, Georgia, Idaho, Illinois (effective July 1, 2003), Indiana, Kansas, Louisiana, Massachusetts (effective April 1, 2003), Maine, Minnesota, Missouri, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Wisconsin and Wyoming.

ered by the FTC's rule. However, if one of these non-covered entities makes the same telemarketing call in-house, that call would not be covered by the FTC's do-not-call rule.

The FCC's do-not-call rules were created under the TCPA. That statute explicitly gives the FCC the authority to set up a national do-not-call database. In 1992, the FCC undertook a rulemaking, and after reviewing comments, determined that a national do-not-call list was too costly and burdensome at that time. The FCC instead opted to require telemarketers to maintain company-specific do-not-call lists. On September 12, 2002, the FCC issued a notice of proposed rulemaking to review and possibly revise its do-not-call rules. The comment period closed on January 31, 2003, and the FCC's Chief of Consumer and Governmental Affairs Bureau announced that the FCC's goal is to avoid regulatory duplication by working closely with the FTC and fashioning rules that benefit consumers and the telemarketing industry.

As the FCC undertakes the process of revising its do-not-call regulations, there is the potential for inconsistencies between the FTC and FCC do-not-call rules. To address this issue, H.R. 395 directs the FCC to complete its rulemaking within 180 days of enactment and further requires the FCC to consult and coordinate with the FTC to maximize consistency between the two regulations. However, because the FCC is bound by the TCPA, it is impossible for the FCC to adopt rules identical to the FTC's TSR.

There are areas in which the FTC do-not-call rule is in conflict with the TCPA, such as the FTC's rule providing for a safe harbor from the call "abandonment" requirements if a telemarketer, among other things, leaves a recorded message. Under the TCPA, however, Congress by statute prohibited telemarketers from leaving recorded messages. In order to remedy these types of inconsistencies, either the FTC or FCC must address them administratively, or Congress must address them legislatively. We encourage the FTC and the FCC to take the necessary steps to make their rules as consistent and compatible as possible. *

Similarly, some members of the Committee raised concerns about how the FTC do-not-call rule will work in conjunction with the existing twenty-seven state do-not-call laws. The Commission's do-not-call rules do not preempt the state lists, although the FTC has committed to "harmonizing" the Commission's rule with the state laws. We are encouraged with the FTC's commitment and efforts to work with the states to ensure a harmonized approach, although some remain concerned that consumers and businesses could continue to face conflicting and confusing regulatory approaches. In light of the fact that many states have unique laws with protections for local industries or exemptions for certain products, for example, at least 12 states have developed specific provisions for local newspapers, we encourage the FTC to work diligently to persuade states to adopt the FTC's rule. The Committee cannot understate the importance of the FTC working aggressively to seek such harmonization, and we will continue to follow the FTC's progress on this issue. The Committee takes no position on the issue of state preemption in H.R. 395. *

Note this Commission refers to FTC not FCC.

While this bill focuses on the necessary authority to establish the do-not-call registry, the Committee maintains a great deal of interest in the entire TSR produced by the FTC. Taken as a whole, the amended TSR is a positive development that will help consumers. The Committee is interested in working with the FTC to better understand some of the implementation details of the rule that could raise some practical problems that could affect employment and small business. As the registry becomes available, we encourage the FTC to implement aggressive education efforts, including national awareness campaigns and a toll-free number with strong consumer recall.

The Committee is committed to holding hearings during the 108th Congress to better understand how these different do-not-call regulatory regimes can best be coordinated to protect consumers in a manner that is fair and balanced to industry participants.

HEARINGS

The Committee on Energy and Commerce did not hold hearings on H.R. 395. The Full Committee did hold a briefing on January 8, 2003 where FTC Chairman Muris testified.

COMMITTEE CONSIDERATION

On Wednesday, January 29, 2002, the Full Committee on Energy and Commerce met in open markup session and ordered H.R. 395, favorably reported to the House, without amendment, by a voice vote, a quorum being present.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 395 reported. A motion by Mr. Tauzin to order H.R. 395 reported to the House was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has not held oversight or legislative hearings on this legislation.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of this legislation is to authorize the FTC to collect fees from the telemarketing industry to fund the operation and enforcement of the do-not-call registry.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 395, the "Do-Not-Call Implementation Act," would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 4, 2003.

Hon. W.J. "BILLY" TAUZIN,
Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.

DERA MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 395, the Do-Not-Call Implementation Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Ken Johnson (for federal costs), Victoria Heid Hall (for the state and local impact), and Jean Talarico (for the private-sector impact).

Sincerely,

BARRY B. ANDERSON,
Acting Director.

Enclosure.

H.R. 395—Do-Not-Call Implementation Act

Summary: H.R. 395 would authorize the Federal Trade Commission (FTC) to collect and spend new fees during the 2003–2007 period for the purpose of creating a national "do-not-call" registry. The "do-not-call" registry is a list of consumers whom telemarketers would be prohibited from calling because the consumers do not wish to receive such calls.

Based on information from the FTC, CBO estimates that the agency would collect and spend a total of about $73 million in fees over the 2003–2008 period to implement H.R. 395, assuming appropriation of the necessary amounts. Over the six-year period, the total net effect on the federal budget would be insignificant. Enacting H.R. 395 would not affect direct spending or revenues.

H.R. 395 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments. By authorizing the FTC to collect fees from telemarketing firms, H.R. 395 would impose a private-sector mandate as defined by UMRA. CBO expects that the cost of that mandate would fall well below the annual threshold for the private sector established by UMRA ($117 million in 2003, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 395 is shown in the following table. The costs of this legislation fall within budget function 370 (commerce and housing credit).

	By fiscal year, in millions of dollars—					
	2003	2004	2005	2006	2007	2008
CHANGES IN SPENDING SUBJECT TO APPROPRIATION[1]						
Gross FTC Spending for the Do-Not-Call Registry:						
Estimated Authorization Level	16	18	13	13	13	0
Estimated Outlays	3	26	16	13	13	2
Offsetting Collections from Telemarketers:						
Estimated Authorization Level	−16	−18	−13	−13	−13	0
Estimated Outlays	−16	−18	−13	−13	−13	0
Net Changes to FTC Spending for the Do-Not-Call Registry:						
Estimated Authorization Level	0	0	0	0	0	0
Estimated Outlays	−13	8	3	0	0	2

[1] A full-year appropriation for 2003 for the FTC has not yet been enacted. In 2002, the agency received a gross appropriation of $156 million.

Basis of estimate: H.R. 395 would authorize the FTC to collect fees sufficient to create and operate a "do-not-call" registry, contingent upon the approval of the fees in appropriation acts. For this estimate, CBO assumes that H.R. 395 and the necessary appropriation provisions will be enacted by the middle of this fiscal year. Based on information from the FTC, CBO expects that the agency would start collecting fees from telemarketers in 2003, in amounts equal to the full estimated cost of the registry.

The costs of operating the "do-not-call" registry would have four main components: purchasing new computer systems, designing and maintaining those systems, hiring personnel to manage the registry and investigate violations, and advertising the new system to consumers. Based on information from the FTC, CBO estimates that the initial costs of purchasing the computer system would amount to about $1 million in 2003, $8 million in 2004, and $4 million in 2005. We expect that these costs would decline to between $1 million and $2 million a year during the 2006–2008 period. CBO estimates that designing and maintaining these computer systems would cost about $45 million over the 2003–2008 period. Finally, staff salaries and advertising expenses would together amount to an estimated $2 million each year.

In sum, CBO estimates that the FTC would implement H.R. 395 by collecting and spending a total of about $73 million in fees over the 2003–2008 period, assuming the necessary appropriations action. Over this six-year old period, CBO estimates that the total net effect of the bill on the federal budget would be insignificant.

If the FTC continued to operate the "do-not-call" registry beyond 2007, CBO estimates annual operating costs would be about $13 million a year, assuming appropriation of the necessary amounts. H.R. 395 would authorize the collection of fees to offset those costs through 2007.

Estimated impacts on direct spending and revenues: None.

Estimated impact on state, local, and tribal governments: H.R. 395 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: The final rule that provides for a national "do-not-call" registry was published on January 29, 2003, in the Federal Register. Under that rule, telemarketing firms will be required to search the national registry at least four times a year and drop from their call lists the telephone numbers of consumers who have registered. The FTC anticipates that full compliance with the "do-not-call" provision will be required within a few months after funding has been approved.

In order to implement the national "do-not-call" registry, and subject to approval in appropriation acts, H.R. 395 would authorize the FTC to collect fees from telemarketing firms and certain businesses associated with those firms that sell goods and services. The duty to pay those fees would be considered a private-sector mandate under UMRA. Assuming the necessary appropriation action, CBO estimates that the fees would amount to no more than $18 million annually over the next five years. Consequently, the cost of the mandate would fall well below the annual threshold for private-sector mandates established by UMRA ($117 million in 2003, adjusted annually for inflation).

Federal Mandates Statement

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

Advisory Committee Statement

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

Constitutional Authority Statement

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

Applicability to Legislative Branch

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

Section-by-Section Analysis of the Legislation

Section 1. Short title

Section 1 establishes the short title as the "Do-Not-Call Implementation Act."

Section 2. Telemarketing Sales Rule; do-not-call registry fees

Section 2 authorizes the FTC to promulgate regulations to collect offsetting fees sufficient to implement and enforce the national do-not-call registry. The authorization is effective between fiscal years 2003–2007. The FTC may only collect the amounts as provided for in advance in appropriations Acts. The funds collected shall only be used to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement.

In its forthcoming rulemaking to establish fees, the FTC should ensure that the fees are commercially reasonable and do not exceed the amounts necessary to effectively establish, maintain, and enforce the do-not-call rules.

No section of this Act should be construed by the FTC to confer any additional authority to regulate common carriers, or any other industries, outside of the Commission's statutory jurisdiction under the Federal Trade Commission Act (15 U.S.C. § 1 et seq).

Section 3. Federal Communications Commission do-not-call regulations

Section 3 directs the FCC, within 180 days of enactment, to issue a final do-not-call rule pursuant to the rulemaking proceeding initiated on September 18, 2002, under the TCPA. The FCC is directed to consult and coordinate with the FTC to maximize consistency with the do-not-call rule promulgated by the FTC.

In enacting section 3, it is not the intent of the Committee to dictate the outcome of the FCC's pending rulemaking proceeding. At the same time, however, it does endeavor to prevent situations in which legitimate users of telephone marketing are subject to conflicting regulatory requirements. The purpose of the consultation and coordination requirements of section 3 and the reporting requirements of section 4 are intended to prevent this possibility from becoming reality. The Committee further recognizes that the TCPA requires the FCC to consider a variety of factors in structuring a national do-not-call list. It is not the Committee's intent to foreclose consideration of those factors by enacting this legislation.

Section 4. Reporting requirements

Section 4(a) requires the FTC and the FCC to each, within 45 days of the FCC completing a final do-not-call rule, to report to the Committee on Energy and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate on the following: (1) an analysis of the telemarketing rules created by the FTC and FCC; (2) any inconsistencies between the two rules and the effect of any such inconsistencies on consumers and purchasers of the do-not-call registry; and (3) proposals to remedy any inconsistencies.

Section 4(b) contains an annual reporting requirement that mandates the FTC and FCC to report to the Committee on Energy and Commerce in the House of Representatives and the Committee on Commerce, Science, and Transportation in the Senate on the following: (1) an analysis of the effectiveness of the do-not-call registry as a national registry; (2) number of consumers placed on the registry; (3) the number of persons paying for access to the registry; (4) an analysis of the progress of coordinating the operation and enforcement of the do-not-call registry with other similar state registries; (5) an analysis of the progress of coordinating the operation and enforcement of the do-not-call registry with the enforcement activities of the FCC; and (6) a review of the enforcement activities of the FTC under the Telemarketing Sales Rule and of the FCC under the TCPA. The annual reporting requirement is applicable to fiscal years 2003–2007.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

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