



The Florida Senate

Interim Project Report 2004-117

December 2003

Committee on Commerce, Economic Opportunities, and Consumer Services James E. "Jim" King, Jr., President

EFFECT OF THE FEDERAL DO-NOT-CALL REGISTRY ON FLORIDA'S DO-NOT-CALL REGISTRY AND THE STATE AGENCIES THAT ENFORCE IT

SUMMARY

Florida's Do-Not-Call (DNC) law and the DNC registry administered by the Department of Agriculture and Consumer Services (DACS) may be significantly affected by the advent of the federal DNC program. Since 1990, DACS has administered Florida's DNC registry, and in that time it has become a self-sustaining program. In fact, excess revenues are used to fund other DACS programs. The new federal DNC registry implemented in 2003 and its accompanying litigation have created uncertainty at DACS over whether it will see a reduction in revenue generated by the state program and whether DACS can continue to administer the DNC program. Additionally, the federal litigation has raised legal issues for Florida's DNC law that remain unresolved pending the outcome of the federal litigation.

Because more data is needed to evaluate the effect of the federal DNC program on sign-ups and renewals to Florida's DNC program, and because the federal litigation regarding the federal DNC program is ongoing, this report recommends the state maintain the DNC program until more information is available. To that end, this report recommends DACS provide to the Legislature, on March 1, 2004, a report on the status of the DNC program with current data on the effect of the federal program on the level of state sign-ups and renewals, to assist in budgeting for fiscal year 2004-05. The Legislature may then wish to mandate that the department report back by December 1, 2004, with data that will have the benefit of information from a full year of operation of the federal DNC program. At that time, DACS should provide a recommendation on whether it believes Florida's DNC program should continue and, if so, what resources would be necessary for the program to maintain its current level of consumer protection.

BACKGROUND

Florida's Do-Not-Call Registry

In 1990, the Florida Legislature established a program prohibiting telemarketers from calling consumers who have registered their telephone numbers with the state in ch. 90-143, L.O.F. These state programs are commonly called Do-Not-Call (DNC) registries. Prior to passage of this law, to prevent telemarketing calls, Florida consumers had to purchase an additional listing below their telephone book listings that stated "No sales solicitation calls." However, the Legislature received testimony that the majority of telemarketers did not use the telephone directory as their source for potential customers. At the time, the National Conference of State Legislatures announced the results of a legislative issue survey which indicated that unsolicited telephone calls were the leading telecommunications issue for 1990. According to the legislative bill analysis, as of September 1988, 31 states had enacted laws or administrative rules dealing with these calls, and 26 other bills were pending.¹ Currently, 35 states have DNC programs in statute.

Florida's DNC law, s. 501.059, F.S., provides Florida consumers who pay an initial \$10 per number the opportunity to place a residential, mobile, or pager telephone number² on the "No Sales Solicitation Calls List," administered by the Department of Agriculture and Consumer Services (DACS). An annual renewal fee of \$5 per number is required each year thereafter.³ Consumers may subscribe up to five years in advance. Consumers may subscribe by calling a toll-free telephone number to request an application, or they

¹ Fla. H.R., Committee on Commerce, Final Staff Analysis & Economic Impact Statement: CS/HB 317, at 3-5, (July 26, 1990).

² Section 501.059(3)(a), F.S.; business telephone numbers may not be registered under this section.

³ Section 501.059(3)(a), F.S.

may download the application from DACS' website, and mail it to the department with the appropriate fee.

DACS updates the DNC registry quarterly. The registry is published approximately four weeks prior to the beginning of each quarter and made available for sale to telemarketers, providing them an opportunity to update their current customer lists before the next quarter begins. The cost to purchase the registry is \$30 per area code per quarter, or \$100 for the statewide registry per quarter. DACS may provide the registry by e-mail delivery or printed text.

Florida's DNC law has several exemptions that allow certain telemarketing calls to consumers, including:

- Real estate agent calls in response to a "For Sale" sign;⁴
- Calls by newspaper publishers;⁵
- Calls in response to a consumer's request to be contacted;⁶
- Calls to enforce a contract or a debt;⁷
- Calls because of a previous business relationship with the consumer;⁸
- Calls by bona fide charitable organizations;
- Calls by a telephone surveyor; and
- Calls by political organizations/candidates.⁹

Consumer complaints regarding violations of the DNC registry are investigated by DACS. Consumers may file complaints with DACS by mail or by the Internet. Upon receipt, DACS verifies a consumer complaint first by confirming that the consumer was on the DNC registry at the time the call was made to the consumer. The name of the company is determined, if not provided by the consumer, which may require lengthy research and the issuance of subpoenas for records from the telephone company. The complaint is then forwarded to the business, along with a reply form. The company may use the reply form to explain why the call was allowed under an existing exemption or to indicate that the company has removed the consumer from its list. Once five or more verified complaints about a company are received by DACS within a six-month period, a warning letter is issued to the company. Upon receipt of five more verified

complaints, a case is prepared and forwarded to DACS' legal office for an enforcement action. DACS may fine a company up to \$10,000 per violation.¹⁰ All funds collected by DACS for subscriptions, renewals, purchase of the registry, and fines are deposited in the department's General Inspection Trust Fund.

According to DACS and the Department of Legal Affairs, although the Department of Legal Affairs has legal authority to enforce Florida's DNC law,¹¹ it has not been involved in administering or enforcing the state DNC registry since its inception.

Federal Do-Not-Call Registry

In January 2003, the Federal Trade Commission (FTC) revised its Telemarketing Sales Rule (TSR) to create a national Do-Not-Call (DNC) registry that prohibits calls to a consumer registered on the registry.¹² Prior to the creation of the federal DNC registry, a consumer could request a company to place the consumer on the company's do-not-call list to prevent further calls from that company.¹³ On July 7, 2003, consumers were able to register with the FTC on the Internet and by telephone a residential or mobile telephone number.¹⁴ As of October 21, 2003, 53.7 million consumers had signed up for the federal DNC registry. Registration to the federal DNC registry is free and is effective for five years. The FTC's jurisdiction covers interstate calls only and does not cover entities such as common carriers, banks, credit unions, savings and loans, airlines, and companies in the business of insurance. Florida shares its DNC registry with the FTC, although some states have chosen not to share their registries.

The Federal Communications Commission (FCC) adopted the FTC registry as its national DNC registry in June 2003, and its rule¹⁵ has the same

¹⁰ Section 501.059(8), F.S.

¹¹ *Id.*

¹² See *Telemarketing Sales Rule, Final Amended Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003) (*FTC Order*); authorized under 47 U.S.C. s. 227 (2000).

¹³ Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA), 15 U.S.C. s. 6102 (1994) (authorizing Telemarketing Sales Rule, 60 Fed. Reg. 43842, 43854-55).

¹⁴ Press Release, FTC and FCC, "National Do Not Call Registry Opens," (June 27, 2003), available at <http://www.ftc.gov/opa/2003/06/donotcall.htm> (last visited November 25, 2003).

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Final Rule*, Federal Communications Commission, 68 Fed. Reg.

⁴ Section 501.059(4), F.S.

⁵ Section 501.059(1)(c)4., F.S.

⁶ Section 501.059(1)(c)1., F.S.

⁷ Section 501.059(1)(c)2., F.S.

⁸ Section 501.059(6)(c)3., F.S.

⁹ "Telephonic sales call," defined in s. 501.059(1)(a), F.S., does not include calls by charities, telephone surveyors, or political organizations/candidates.

implementation dates and also has closely aligned administrative procedures to the FTC's process. The FCC's jurisdiction includes entities not covered by the FTC and also includes intrastate and interstate calls.¹⁶ Although the FCC rule does not generally preempt a state's DNC law, the FCC rule requires any state operating a DNC program to download all numbers related to that state from the federal DNC registry into that state's DNC registry.¹⁷ However, both the FTC and FCC rules do preempt state exemptions that are less restrictive than the federal rules.

For those consumers who registered by August 31, 2003, fewer calls should be received beginning October 1, 2003. After August 31, 2003, telemarketers have up to three months to download new registrations. On September 1, 2003, telemarketers were given access to the federal registry to download consumer information. The cost to telemarketers is \$25 per area code, up to a maximum of \$7,375 for the entire U.S. database. However, up to five area codes may be downloaded for free.¹⁸

The federal DNC rules, in general, provide exemptions that allow some types of telemarketers to make calls, including:

- Calls by organizations that the consumer has a prior business relationship with or has made an inquiry to;
- Calls by tax-exempt non-profit organizations;
- Calls by companies that have the consumer's written permission;¹⁹
- Calls by political organizations; and
- Calls by telephone surveyors.²⁰

However, the FTC's rule and the FCC's rule are not identical. The FCC's rule provides an exemption for a telemarketer who makes a call to a person with whom the telemarketer has a personal relationship.²¹ The FTC's rule differs because the USA Patriot Act, passed in 2001, brought charitable solicitations by for-profit telemarketers within the scope of the FTC's rule. A for-profit telemarketer hired by a non-profit charity must now comply with most of the TSR, except the DNC registry provisions.²²

44144 (July 25, 2003).

¹⁶ 47 U.S.C. s. 152 (2000).

¹⁷ 68 Fed. Reg. 44144, 44154.

¹⁸ *Id.* at 44151.

¹⁹ *Id.* at 44148.

²⁰ *Id.* at 44147.

²¹ *Id.* at 44149.

²² FTC, *For Charities and For-Profit Telemarketers Calling on Their Behalf*, available at

The FTC and FCC have enforcement responsibilities for the federal DNC registry, but are looking to the states to play a role. A consumer may file a complaint regarding a violation of the federal DNC registry on the Internet. This information is then entered into a program called Consumer Sentinel, which may be accessed by both federal and state agencies. A state agency may download the information and use it in a case that must be filed in federal court. If the FCC or FTC succeed in an enforcement action in federal court, violations may be punished by fines up to \$11,000.²³ If a state agency wins a case in federal court, violations may be punished by a fine up to \$500 and may be tripled if the violation was knowing and willful.²⁴ Under the FCC and FTC rules, an individual consumer may also bring a case in federal court with the possibility of collecting the same amount that a state agency might collect.

The federal DNC rules are currently being litigated in a case in which the First Amendment right of some types of telemarketing organizations to make telephone calls is at issue. The outcome of this case will likely determine whether or how the new federal DNC program continues to operate. (See "Federal DNC Registry Litigation" under the Findings section of this report.)

Purpose of this Interim Project

In light of the new, free federal DNC program, and because the federal DNC program envisions working with states on certain aspects of the federal program, such as enforcement, and because of the legal issues raised by the federal litigation, this interim project was designed to explore the impact of the federal DNC program on Florida's DNC program. This project considered various issues, including the continued viability of Florida's DNC program, in particular the potential fiscal impact of the free federal DNC program, and reviewed the legal issues for the state's DNC program raised by the pending federal litigation.

METHODOLOGY

Staff conducted interviews with the Florida Department of Agriculture and Consumer Services, the Attorney General's Office, the Federal Trade Commission, the Federal Communications Commission, and the

<http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm#charity> (last visited November 25, 2003).

²³ 15 U.S.C. s. 45(m)(1)(A) (2000); Congress later raised the upper threshold of fines to up to \$11,000.

²⁴ 47 U.S.C. s. 227(f)(1) (2000).

National Conference of State Legislatures. Staff also sent questions to the state agencies listed above, surveys to state and national consumer organizations, and surveys to state telemarketing organizations, state business associations, and federal telemarketing associations. Those groups were also given the opportunity to respond outside of the surveys to provide relevant information to the committee.

FINDINGS

Administration of Florida's DNC Program

Data collected from the Department of Agriculture and Consumer Services (DACS) indicates that Florida's Do-Not-Call (DNC) registry has achieved a steady level of consumer use since its inception and is also a financially self-sustaining program. Until recently, Florida's DNC registry contained approximately 171,000 telephone numbers. The rate of sign-ups and renewals has remained fairly constant over the last five years as the table below demonstrates.

Table 1: Subscriptions & Renewals

Fiscal Year	Initial Subscriptions	Renewal Subscriptions
02-03	35,426	88,871
01-02	43,773	69,939
00-01	19,576	73,502
99-00	33,685	145,463
98-99	32,169	52,975

Data provided by the Department of Agriculture and Consumer Services

The program has generated sufficient revenue to pay for its administration and enforcement. The table below shows the funds collected from sign-ups and renewals, fees collected from organizations that purchase the list (solicitor fees), and administrative fines collected from violators over the last three years.

Table 2: Revenue Sources

Fiscal Year	00-01	01-02	02-03
Initial Fees @ \$10 per phone number	\$316,615	\$478,538	\$391,706
Renewal Fees @ \$5 per year	\$588,801	\$541,368	\$878,367
Solicitor Fees	\$192,855	\$227,422	\$230,510
Administrative Fines	\$55,270	\$213,390	\$61,690
Other	\$110	\$618	\$1,205
Total Revenues	\$1,153,651	\$1,461,336	\$1,563,478

Data provided by the Department of Agriculture and Consumer Services

Also, over the last three years, revenues over expenditures have been consistently higher as seen in the following table. The additional revenues are used by DACS to supplement other department programs.

Table 3: Revenues Over Expenditures

Fiscal Year	00-01	01-02	02-03
Revenues over Expenditures	\$417,914	\$733,518	\$664,906

Data provided by the Department of Agriculture and Consumer Services

Federal DNC Registry Effects on State Revenue

The central question regarding the continued viability of the Florida DNC registry is the effect of the federal registry and associated litigation on sign-ups and renewals to the Florida DNC registry. Florida law requires a consumer to pay an initial \$10 registration fee while sign-up to the federal DNC registry is free. The FCC requires states with DNC registries to download the federal numbers for that state in order to continue to operate a state DNC program. It is possible, therefore, for a Florida consumer to be added to Florida's DNC registry at no cost to the consumer by signing up to the federal DNC registry. This situation could have a significant revenue impact on Florida's DNC program.

Because the federal DNC program was recently implemented, DACS states that it is extremely difficult to calculate the fiscal impact of the federal DNC program on the state DNC program. The department is currently conducting an internal review to gauge what effect, if any, the federal DNC program will have on Florida's DNC program. Historical data shows that, in fiscal year 2002-2003, the program generated \$1.3 million from consumer sign-ups and renewals. For fiscal year 2003-2004, DACS estimates it will collect approximately \$563,000 in subscription fees. The department also projects a reduction in revenue of \$177,430 from selling the state DNC registry to telemarketers (solicitor fees) because the same telephone numbers may be purchased from the federal DNC program. In fact, a company could receive the telephone numbers it needs for Florida at no cost since up to five area codes may be downloaded for free from the federal DNC registry. DACS received \$230,510 in solicitor fee revenue for 2002-2003 and estimates \$50,000 in revenue for 2003-2004. DACS cautions, however, that these figures are estimates used for budget preparation, and that sufficient data to estimate the effects of the federal DNC registry is not available at this time.

The following example was used by DACS to emphasize how the uncertainty surrounding the federal DNC program has made it difficult to draw a reliable prediction of future sign-ups and renewals to the Florida DNC registry. During the course of the federal litigation (See "Federal DNC Registry Litigation" discussion below), DACS has seen a tremendous

variation in the number of calls related to Florida's DNC registry. During the day the Colorado federal trial court ruled that the FTC could not enforce the federal DNC registry, DACS received almost 3,000 calls related to Florida's DNC registry and received more than 2,600 requests for applications to sign up to the Florida DNC registry. A one-day call volume of this magnitude was many times in excess of its normal call volume. Call-volume regarding the state's DNC registry has not been as intense recently.

Effect on Administration and Enforcement of State DNC Program

General Operating Costs

The Consumer Services Division of DACS has three bureaus. The Bureau of Compliance and the Bureau of Mediation and Enforcement receive funding from the DNC program. DACS has stated that it is difficult to provide a breakdown of the exact number of employees who work on the DNC program because none of their employees work exclusively on that program. However, DACS stated that the program funds the equivalent of nine FTE positions.

Enforcement Costs

Another issue under review by DACS is the potential for dual enforcement responsibilities for the state's DNC registry and the federal DNC registry. DACS receives between 600 and 800 complaints per month alleging violations of the state DNC program. DACS' enforcement procedures are very deliberate, designed to ensure there is an actual violation before an action is filed. DACS will also enforce individual consumer complaints.

The FTC and FCC have stated that those agencies will not enforce individual consumer complaints but, instead, will look for patterns of violations.²⁵ The FCC has formed an enforcement team for the federal registry, but neither the FCC nor the FTC have made clear to what degree these agencies expect states to enforce the federal registry. So far, these agencies have strongly encouraged states to take enforcement actions, but the states appear to have discretion whether to access the information in Consumer Sentinel to pursue a case in federal court. The financial incentive for a state to pursue a federal case is limited since, under the federal DNC program, a state may only collect between

\$500 and \$1,500 while a federal agency may collect up to \$11,000. If states take minimal enforcement actions, it is possible that the federal rules could be modified to require more state enforcement action. If Florida is required to download 3 to 4 million names and provide enforcement services for those additional consumers, the enforcement costs to DACS will be far greater than the current enforcement costs for the 171,000 numbers currently in the state's DNC registry. No federal funds are available at this time to states to provide enforcement services for the additional numbers from the federal DNC registry. DACS states that additional resources would be necessary to take on enforcement responsibilities for the additional numbers from the federal DNC registry.

Computer Resources

In mid-November, Florida's DNC registry contained approximately 171,000 telephone numbers. DACS recently downloaded, as required, 3.5 million Florida telephone numbers from the federal DNC registry. Although DACS was able to download the large amount of data, administering the additional telephone numbers will be challenging because no name or address information was received from the federal registry. This information may not be shared with the states. Additionally, DACS received duplicate telephone numbers. DACS uploaded the Florida telephone numbers to the federal registry three months ago, and the FTC did not filter those telephone numbers for the download to DACS. DACS will be able to determine which numbers signed up through Florida's registration process, in which name/address information is provided, only because the federal numbers have no name and address information included.

Effect on Exemptions in State DNC Law

Two of Florida's exemptions may also require review in the future because of their relationship to enforcement of the state's DNC registry. Florida's exemptions for newspaper publishers and for real estate agents are not contained in the federal rules. The federal rules preempt any less restrictive state exemptions. A Florida consumer registered with the federal DNC registry may receive a call from a representative of one of these industries. If this consumer's telephone number was downloaded into Florida's DNC registry, the consumer could file with DACS a complaint under Florida's DNC law requesting an enforcement action. Although these industries are exempt under Florida's law, DACS may have no choice but to bring an enforcement action

²⁵ Press Release, FCC, "FCC Establishes Special Do-Not-Call Enforcement Team," (Oct. 2, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239488A1.pdf (last visited November 25, 2003).

because of the federal preemption of those exemptions. However, since the federal program is new, DACS is uncertain how this issue will play out until a consumer actually complains.

Federal DNC Registry Litigation

The implementation date for the federal registry was October 1, 2003. The actual implementation of the federal DNC registry was delayed because of two federal court decisions that were released just prior to that date. The following timeline, October 2003 through September 2003, provides a brief description of the litigation-related events:

- Sept. 23: Oklahoma federal court decides that FTC does not have authority to implement DNC registry.
- Sept. 25: Congress passes legislation to rectify Oklahoma court decision and gives specific authority to FTC to implement DNC registry.
- Sept. 25: Colorado federal court decides against FTC on First Amendment grounds and prevents FTC from implementing DNC registry.
- Sept. 29: President Bush signs legislation giving specific authority to FTC, although the legislation has no effect on Colorado court decision.
- Oct. 1: FCC (unaffected by court decisions) begins enforcement.
- Oct. 7: 10th Circuit Court of Appeals stays Colorado federal court decision, which allows FTC to implement DNC registry.
- Oct. 10: Federal DNC registry access restored by FTC.
- Oct. 11: Federal DNC registry takes complaints.
- Oct. 17: FTC begins enforcement of federal DNC registry against all covered entities.

FTC Authority to Create Federal DNC Registry

In the first decision rendered on September 23, 2003, the plaintiffs, among other things, claimed that the FTC lacked explicit Congressional authority to implement a federal DNC registry. The FTC claimed that, although it did not have explicit authority to create a registry, it did have authority to stop deceptive and other abusive telemarketing practices. Hence, any call to a number on a DNC registry would be abusive. The court agreed with the plaintiffs and found that the FTC did not have statutory authority to implement a DNC registry. This ruling effectively prohibited the FTC from enforcing the registry. Congress responded quickly to overturn

this decision and passed legislation within 48 hours to grant the FTC explicit authority to implement a DNC registry. This legislation was promptly signed by President Bush on September 29, 2003.

First Amendment Issues of the Federal DNC Registry

However, on September 25, 2003, a U.S. District Court in Colorado issued a decision in a separate lawsuit that upheld First Amendment claims against the federal DNC registry.²⁶ One of the first things noted in the court's opinion was that, despite the value of commercial speech, which is how speech by telemarketers is classified, it is afforded lesser First Amendment protection than other types of speech, such as speech soliciting donations for charitable causes. Although commercial speech has lesser First Amendment protection, the government may regulate commercial speech only if: (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly tailored.²⁷

Regarding criteria (1), the FTC claimed that it had an interest in protecting the privacy of those who indicate they do not wish to receive telephone calls from telemarketers,²⁸ which claim the court supported. Regarding criteria (2), the FTC claimed that because there is an interest in reducing the number of unwanted telemarketing calls, every call prevented by the federal DNC registry furthers the government's interest in protecting privacy, regardless of the fact that other unwanted calls were not prevented. The plaintiffs claimed that the registry was under-inclusive because it only affected unwanted commercial calls, even though charitable calls seeking contributions were equally unwanted. The court disagreed with these arguments and found that the First Amendment imposed, not an under-inclusiveness limitation, but a limitation on content discrimination.²⁹

To overcome the distinction it made between commercial and non-commercial speech, the FTC also argued that non-profit corporations and political fundraisers are less likely to engage in abusive practices because the consumer is both a potential donor and a potential voter or volunteer for the charity

²⁶ *Mainstream Marketing Services, Inc. v. FTC*, 2003 WL 22213517 (D. Colo).

²⁷ *Id.* at 8.

²⁸ *Id.* at 10.

²⁹ *Id.* at 12.

or political party.³⁰ The FTC also argued that the distinction was based, not on content, but on a secondary effect, which was the constant ringing of unwanted telemarketing calls. The court pointed out that the secondary effects of charitable speech are the same for commercial speech because both cause the consumer's telephone to ring. As such, the court found no evidence to support the FTC's additional arguments.

In conclusion, the court found that the FTC's rules creating the federal DNC registry entangled the government in deciding what speech a consumer may hear and, in violation of the First Amendment, favored speech by charitable organizations over commercial speech without a legal justification.³¹ Since the FTC failed the second criteria, the court ruled in favor of the plaintiffs and issued an injunction preventing the FTC from enforcing the federal DNC registry. However, the court noted that if the FTC's rules applied without regard to the content of the speech, or if the government allowed the consumer to choose to prevent all telephone calls, then the outcome might be different.

Court Injunction Stayed by Court of Appeals

On October 7, 2003, the 10th Circuit Court of Appeals stayed the injunction issued by the Colorado trial court against the FTC³² pending final resolution of the appeal on the merits. The court also ordered expedited review of the appeal. The parties filed briefs, and oral arguments were held November 10, 2003. The court has not rendered its decision yet. Until the case is resolved, the FTC may enforce the federal rules against all covered telemarketers.

Federal DNC Registry Litigation Effects On Florida's DNC Program

The Colorado federal court case presents legal issues relevant to Florida's DNC law. Although Florida's DNC law has never faced a challenge on constitutional grounds, if the First Amendment claims in the Colorado case are upheld, Florida may have to examine its DNC law. Florida's DNC law creates a similar mechanism to the federal DNC registry process for Florida consumers to choose to limit telemarketing calls. Once a Florida consumer signs up to the state DNC registry, the consumer will receive fewer telemarketing calls, but not all telemarketing calls are eliminated. Florida's law provides an exemption, similar to the federal rules, for charitable organizations

that make telemarketing calls. Following the Colorado court's reasoning, this exemption potentially creates a content-based distinction between commercial speech and speech by charitable organizations. If Florida's DNC law is challenged, Florida may have to explain its legal reasons and policy choices for the distinction between the two types of speech or why the state does not believe there is a distinction made in Florida's DNC law. Part of that explanation may include a discussion of Florida's choice not to offer a Florida consumer the option to prevent all telemarketing calls. The state's answers to these questions may be influenced to a great degree by the outcome of the Colorado case. Because of the time-consuming nature of federal litigation, it may be some time before the legal issues presented by the Colorado case are resolved.

Do-Not-Call Issues Presented to Consumer and Business Organizations

Committee staff requested feedback through surveys to consumer groups, industry organizations, and telemarketing companies on key issues for the state DNC program and its relationship with the federal DNC program. The following is a summary of the responses received.³³

Underlying Policy

The consumer organizations made a number of suggestions for policymakers to consider when asked how to balance the interests of citizens with the interests of telemarketers. The organizations point out that policymakers should remember that consumers choose to put themselves on DNC registries and in doing so declare that they do not want calls from telemarketers. The organizations believe protecting a consumer's right to do so should be the overarching interest of state policymakers. Additionally, providing effective mechanisms to give consumers protection from unwanted telemarketing solicitations and providing effective mechanisms for consumers and government to enforce DNC rights should be among the highest priorities.

Telemarketing companies, which nationally generate \$275 billion annually and employ 5.4 million people, believe that do-not-call registries are unnecessary to balance the interests of consumers with the interests of telemarketers. Responding companies point out that other options have always been available to consumers,

³⁰ *Id.* at 13.

³¹ *Id.* at 14.

³² *FTC v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10th Cir. Oct. 7, 2003).

³³ Two consumer organizations provided responses:

AARP and the National Consumers League; three Florida telemarketing companies provided responses.

such as an unlisted telephone number, caller identification, or turning off the telephone during busy times and returning messages later. The companies believe the federal rules are unfair because either all solicitation calls should be prohibited or none should be prohibited. One company suggests a return to the government's previous policy of requiring company-specific lists, currently the approach used for non-profit telemarketing companies, where upon receipt of a telemarketing call, the consumer requests to be placed on the company's DNC list to prevent future calls by that organization. The companies submit that the federal registry and some state registries suffer from deficiencies that diminish the integrity of those registries. One example provided notes that although a consumer should only be able to register their own telephone numbers, it is possible to sign up other consumer numbers to a registry over the Internet, without any verification required.

Administration of State DNC Program

One statewide consumer organization suggested that consumers be allowed to sign up and renew to the state's DNC registry at no cost, and that DACS should add an Internet subscription capability. This organization also suggested that the administration and enforcement of the state DNC registry be moved to the Attorney General's Office.

Florida DNC Law Exemptions

Consumer organizations suggested the elimination of the newspaper publisher and real estate exemptions to mirror the exemptions in the federal rules. However, one organization suggested that Florida's previous business relationship exemption should only extend to one year, not 18 months as provided in the federal rules.

Continuation of State DNC Program

Consumer organizations were also asked whether, in light of the creation of the federal DNC list, Florida should continue to maintain its state DNC registry. Although these organizations strongly support the federal rules and the decision to preempt less restrictive state exemptions, they believe that enforcement will be more effective on the state level. The organizations point out that state regulators are closer to consumers and know more about businesses that primarily operate in Florida. Additionally, since federal law provides for civil penalties that are remitted to the federal treasury, states may not be able to collect much money to cover the costs of bringing an action in federal court.

Telemarketing companies respond that the state DNC registry may be unnecessary since the state numbers are uploaded to the federal DNC registry. These companies also indicate that the advent of the federal DNC registry has begun to make their businesses unprofitable. Some telemarketing companies have spent up to \$375 this year on compliance with the federal DNC registry. The companies also believe that, depending upon the outcome of the federal litigation, the federal DNC rules may shed light on the state law and whether it is constitutionally permitted.

RECOMMENDATIONS

It is difficult to quantify the operational, financial, and legal effects of the new federal Do-Not-Call (DNC) program on the state DNC program. The legal issues surrounding the federal program have not been resolved, and the federal program has just been implemented. Once the federal legal issues are resolved and there is more program experience, the Legislature will be confronted with a number of state-specific issues, including whether it is logical to continue the state program, the resources necessary to continue the state program, and how to address the less-restrictive state exemptions.

Because there is insufficient data to recommend continuing or ending the state DNC program, committee staff recommends the state maintain the current program until more data is available. The Legislature may wish to request the Department of Agriculture and Consumer Services (DACS) provide a report by March 1, 2004, on the initial effects of the federal program on the state program. Following this report, the Legislature may wish to mandate that the department provide an additional report on December 1, 2004. The federal DNC program will be in operation for over a year and better information can be collected. The follow-up report should include a recommendation on whether the state DNC program should be continued. If DACS recommends continuation, the resources necessary to continue the program at its current level of consumer protection should be described. Also, by that date, the compatibility of the state exemptions with the federal exemptions should be clear. DACS could conduct the review and report internally, or in consultation with OPPAGA.