

# Survival of the Fittest

By Joseph Sanscrainte



The year 2003 will long be remembered as the most tumultuous year ever for the telemarketing industry. 2003 marked the zenith of anti-telemarketing vitriol, and ushered in the new era of “national” Do Not Call. From consumers’ perspective, Do Not Call was the most visible of the new rules, in that it promised the most immediate gratification – sign up and (in theory at least), all of your telemarketing nightmares are over. Telemarketers, on the other hand, had to accept and implement a host of new regulations impacting virtually every aspect of their telemarketing operations.

## Questions About DNC

Before we could even get to the official launch of the national Do Not Call (DNC) list, however, the Federal Courts and Congress played a constitutional and jurisdictional ping-pong match with the right of telemarketers to make calls unfettered by DNC restrictions. First, a Federal Court declared that the Federal Trade Commission (FTC) lacked authority to even launch the national list. This ruling was met with the rarest of all responses – swift and decisive action by the United States Congress. With a speed unmatched since the declaration of war against Japan, Congress drafted and passed, and the President signed, the “Do Not Call” Act, which gave the FTC the DNC authority it heretofore had lacked.

The jurisdictional question, however, was a mere speed-bump in comparison to the constitutional concerns to follow. Ruling that the FTC’s Do Not Call rules were, in effect, under-inclusive, Judge Nottingham of the Federal District Court of Colorado fired the first salvo in the great DNC debate of 2003. Judge Nottingham determined that the FTC’s stated goal of helping consumers avoid the annoyance of ringing phones was only partially served by halting calls only from commercial marketers. By failing to include calls by non-profits and politicians in the ambit of DNC, Judge Nottingham reasoned that the FTC had indirectly and unconstitutionally infringed upon the rights of those making commercial calls.

The 10<sup>th</sup> Circuit Court of Appeals in short order determined that the FTC had a substantial likelihood of overturning Judge Nottingham’s decision on appeal. It followed (at least according to the 10<sup>th</sup> Circuit) that the FTC still had the authority to continue enforcing its list pending the outcome of the 10<sup>th</sup> Circuit deliberations. Although the 10<sup>th</sup> Circuit has yet to make its ruling, it is a virtual certainty that this case will ultimately find its way to the Supreme Court.

## Don’t Get Sidetracked

Telemarketers could ill afford to be distracted by these developments, however. Despite the temporary hiatus in DNC enforcement, most of the other provisions of the new FTC and FCC regulations (including predictive dialer/abandonment rate rules, revised billing requirements, and “upsell” provisions) had already gone into effect.

As the industry heads into 2004, it is still reeling from the effects of achieving compliance with the new rules. However, the industry can not rest on its laurels, because on the horizon are the Caller ID rules (effective January 29<sup>th</sup>, 2004), and the impact of Wireless Local Number Portability (which went into effect November 24<sup>th</sup>, 2003). In addition, a host of other issues will have to be addressed during 2004, including federal/state DNC enforcement issues, federal pre-emption, the constitutional challenge to the federal DNC list, and, last but certainly not least, the issue of how the teleservices industry is going to survive given the broad-stroke regulatory approach of state and federal agencies.

### **The DNC Impact is Significant**

Most teleservices companies report that the federal DNC list and abandonment rate rules have had a major impact on calling operations. Currently, the national DNC list has over 60 million phone numbers on it; this represents approximately 50% of the total number of residential lines available. Despite the oft-stated position of the FTC that creating a list of individuals who do not wish to be called will in fact benefit the telemarketing industry, it's hard to imagine how the removal of 50% of any industry's potential contacts could do anything but result in significant harm. The 3% abandonment rate rules have had a similar effect; a significant percentage of the efficiencies associated with predictive dialer use evaporate when companies operate at a 3% abandoned call rate. With profit margins already razor-thin for the industry, any reduction in efficiency could push many marginal companies into oblivion.

### **Then There's Wireless Local Number Portability**

The industry barely had a chance to catch its collective breath after the launch of national DNC and the abandonment rate rules when Wireless Local Number Portability (WLNP) came to the fore. WLNP enables consumers for the first time to freely "port" their wireless numbers (either from one wireless carrier to another, or back and forth between wireless and wireline service.) At first glance, WLNP appears to be nothing more than a beneficial addition to consumers' rights when it comes to their telecommunications options. However, combining WLNP with the FCC's determination that predictive dialers can not be used to call cell phone numbers means big problems for the industry.

There is currently no commercially available, up-to-date database that contains all wireless numbers (either in use or assigned to wireless service) in the United States. Without such a database, telemarketers have no way to reliably prevent calls made by predictive dialers to cell phones and other wireless devices. The FCC was well aware of the potential for wireless number identification issues when it adopted its rule regarding predictive dialers; however, the FCC chose to rely upon the telemarketing industry to develop solutions to these problems. Telemarketers now must choose between making use of predictive dialers and risk being hit with heavy fines, or stop making use of them and lose all of the technological efficiencies which they offer.

WLNP will only serve to exacerbate this problem, given the fact that consumers can freely port numbers between wireless and wireline service. An additional hurdle is the fact that the information regarding WLNP is only available to telephone carriers and law enforcement personnel, and not telemarketers. The entity responsible for administering

the Local Number Portability database has indicated that there is only one means available today for disseminating WLNP database information to telemarketers – a screening/blocking service provisioned directly by telephone carriers.

### **DNC Fines**

In December of 2003, the FTC and the FCC moved forward with conducting the investigations that are the necessary precursor to the levying of fines for violations of the national DNC registry. Individual states, in the meantime, beat the federal agencies to the enforcement punch with a number of actions based upon violations of the FTC's DNC list. There is little doubt that 2004 will witness an unprecedented wave of Do Not Call enforcement, as the states and the federal agencies compete against each other for the attention of consumers.

With fines of up to \$11,000 per violation and with no indication that any effort is being made to coordinate enforcement efforts between the states and the FTC/FCC, the industry is going to be caught in the DNC enforcement cross-hairs. Accordingly, the most important issue for the industry for 2004 will be how to achieve the 100% compliance mandated under Federal DNC law. With traditional "scrubbing" technology failing the 100% compliance test, the industry will increasingly need to turn to emerging "blocking" technology for answers.

### **Who's the Boss?**

The dual authority wielded at the state and federal levels over telemarketing will also pose some interesting questions for the industry in 2004. All states have at least some rules or regulations that govern telephone solicitation. There are still twenty-two states that operate their own, separate DNC program. The FTC never addressed the issue of pre-empting the state rules, due to the fact that its jurisdiction is severely limited. The FCC, although it addressed the issue, is hampered by language in the legislation passed by Congress (the Telephone Consumer Protection Act or TCPA) that gave the FCC the authority to regulate telemarketing – specifically, the TCPA mandates that state law not be pre-empted.

The preemption question is a complex one. The FCC made the determination that any less restrictive state telemarketing rule, whether it applied to intra or inter-state calls, would be pre-empted by its regulations. However, more restrictive state rules applied to purely intra-state calls are not pre-empted. The last remaining category, more restrictive state rules applied to interstate calls, will be the most interesting one for 2004. For these rules, the FCC concluded that “. . . any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.”

It's the "almost certainly" language that will cause the greatest confusion over the upcoming year(s). The FCC went on to add, however, that it "...will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with . . . our rules may seek a declaratory ruling from the [FCC]." As states attempt to enforce existing state law against telemarketers in 2004, we will see a number of requests from these telemarketers to have the FCC rule that the state law in question is pre-empted. Most observers predict, however, that the states will not easily relinquish the authority

over telemarketers that they have wielded for many years. This stance will, in turn, result in the need for federal courts to make the final determination.

### **Smart Marketing is the Best Answer**

What can be done? State and federal regulators, in response to pressure from various consumer interest groups, will be seeking to put the teeth into all telemarketing regulations. The current regulatory climate therefore requires all teleservices companies to think of themselves not as “direct” marketers, but as “smart” marketers.

“Smart” marketing means deploying information technology to an even greater extent than ever before in order to maximize the probability that the consumer contacted will at least be interested in the product offered (think “just in time” manufacturing applied to the marketing sector). Smart marketing also requires entities to ensure that their information accurately reflects the high mobility of consumers in the United States; up-to-the-minute information is an absolute necessity. Smart marketing reduces the probability that a consumer receives a completely irrelevant marketing offer and correspondingly reduces the consumer aggravation being exploited by politicians today.

Smart marketing also means absolute, no-questions asked compliance with every element of the new laws in order to stay off the regulators' enforcement radar screen. A “proactive” compliance mindset combined with deployment of new compliance technologies and careful record-keeping will enable the smart marketers of the future to anticipate compliance issues before they arise, and to take advantage of exemptions in the laws as well as any safe harbors offered.

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