

**PROJECT NO. 29140**

**PUC RULEMAKING PROCEEDING      §      PUBLIC UTILITY COMMISSION  
TO AMEND PUC SUBST. R. 26.37,      §  
RELATING TO TEXAS NO-CALL      §      OF TEXAS  
LIST      §**

**PROPOSAL FOR PUBLICATION OF §26.37  
AS APPROVED AT THE FEBRUARY 25, 2004 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes amendments to §26.37, relating to the Texas No-Call List. The proposed amendments require telemarketers to: (1) purchase the No-Call List; (2) provide information, such as call logs or phone records, to the commission to investigate alleged violations of the No-Call List; and (3) require that such records be maintained by the telemarketer for a period of 24 months. The proposed amendments also: (1) establish presumptions relevant to enforcement of the No-Call List; and (2) specify certain types of evidence that are admissible in an action to enforce the No-Call List. Project Number 29140 is assigned to this proceeding.

Jaime Slaughter, Attorney, Legal and Enforcement Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Slaughter has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be enhanced protection of consumers' privacy rights by a curtailment of unsolicited telemarketing or telephone calls through implementation of an effective enforcement program. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this

section. There may be economic costs to persons who are required to comply with the proposed section. These costs are associated with the cost of purchasing the Texas No-Call List and of maintaining records of consumers contacted by the telemarketer. However, the cost will be a set fee and subscribing to the list will assist the telemarketer in identifying customers who do not wish to receive calls. Three factors mitigate the cost of purchasing and updating the list. First, telemarketers have been required to comply with the Texas No-Call rule as of June 17, 2002. Second, telemarketers are required to purchase and update the list in order to comply with Federal Regulations. Therefore, telemarketers' cost of doing business already reflect the initial costs of the list and quarterly updates. Third, the incremental costs associated with record retention are likely to vary from business to business, based upon types of equipment deployed, and are therefore difficult to ascertain. The commission seeks comments on this issue. However, the commission believes that the benefits accruing to the public from implementation of the proposed section will outweigh these incremental costs.

Mr. Slaughter has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, May 4, 2004 at 1:30 PM.

Comments on the proposed amendments of §26.37 (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 29140.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 and Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. In addition, these amendments are proposed under the Texas Business and Commerce Code Annotated §§44.101-.104 (Renumbered from §§43.101-.104 by Acts 2003, 78<sup>th</sup> Leg., ch. 1275, §2(3), eff. Sept 1, 2003) (Vernon 2002 and Supplement 2004) which grants the commission the authority to adopt rules to administer and enforce the no-call list.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002; Texas Business and Commerce Code Annotated §§44.101 – 44.104.

**§26.37. Texas No-Call List.**

- (a) **Purpose.** This section implements the Texas Business & Commerce Code Annotated §44.103 (Bus. & Com. Code) relating to rules, customer information, and isolated violations of the Texas no-call list.
- (b) **Application.** This section is applicable to:
- (1) Certificated telecommunications utilities (CTUs), as defined by §26.5 of this title (relating to Definitions), that provide local exchange telephone service to residential customers in Texas; and,
  - (2) Telemarketers, as defined in subsection (c)(9) of this section including, but not limited to, retail electric providers as defined in §25.5 of this title (relating to Definitions).
- (c) **Definitions.** The following words and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.
- (1) **Consumer good or service** — For purposes of this section, consumer good or service has the same meaning as Bus. & Com. Code §44.002(3) relating to Definitions.
  - (2) **Established business relationship** — A prior or existing relationship that has not been terminated by either party, and that was formed by voluntary two-way communication between a person and a consumer regardless of whether consideration was exchanged, regarding consumer goods or services offered by the person.
  - (3) **No-call database** — Database administered by the commission or its designee that contains the names, addresses, non-business telephone numbers and dates of

registration for all Texas no-call registrants. Lists or other information generated from the no-call database shall be deemed to be a part of the database for purposes of enforcing this section.

- (4) **No-call list** — List that is published and distributed as required by subsection (f)(2) of this section.
- (5) **No-call registrant** — A telephone customer who has registered, by application and payment of accompanying fee, for the Texas no-call list.
- (6) **State licensee** — A person licensed by a state agency under a law of this state that requires the person to obtain a license as a condition of engaging in a profession or business.
- (7) **Telemarketing call** — An unsolicited telephone call made to:
  - (A) solicit a sale of a consumer good or service;
  - (B) solicit an extension of credit for a consumer good or service; or,
  - (C) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for sale.
- (8) **Telephone call** — A call or other transmission that is made to or received at a telephone number within an exchange in the state of Texas, including but not limited to:
  - (A) a call made by an automatic dial announcing device (ADAD); or,
  - (B) a transmission to a facsimile recording device.
- (9) **Telemarketer** — A person who makes or causes to be made a telemarketing call that is made to a telephone number in an exchange in the state of Texas.

- (d) **Requirement of telemarketers.** A telemarketer shall not make or cause to be made a telemarketing call to a telephone number that has been published for more than 60 calendar days on the Texas no-call list. A telemarketer shall purchase each published version of the no-call list unless the entirety of the telemarketer's business is comprised of telephone calls that are exempt pursuant to subsection (e) of this section.
- (e) **Exemptions.** This section shall not apply to a telephone call made:
- (1) By a no-call registrant that is the result of a solicitation by a seller or telemarketer or in response to general media advertising by direct mail solicitations that clearly, conspicuously, and truthfully make all disclosures required by federal or state law;
  - (2) In connection with:
    - (A) An established business relationship; or,
    - (B) A business relationship that has been terminated, if the call is made before the later of
      - (i) the date of publication of the first Texas no-call list on which the no-call registrant's telephone number appears; or,
      - (ii) one year after the date of termination;
  - (3) Between a telemarketer and a business, other than by a facsimile solicitation, unless the business informed the telemarketer that the business does not wish to receive telemarketing calls from the telemarketer;
  - (4) To collect a debt;
  - (5) By a state licensee if:
    - (A) The call is not made by an ADAD;

- (B) The solicited transaction is not completed until a face-to-face sales presentation by the seller, and the consumer is not required to pay or authorize payment until after the presentation; and,
  - (C) The consumer has not informed the telemarketer that the consumer does not wish to receive telemarketing calls from the telemarketer; or,
  - (6) By a person who is not a telemarketer, as defined in subsection (c)(9) of this section.
- (f) **No-call database.**
- (1) **Administrator.** The commission or its designee shall establish and provide for the operation of the no-call database.
  - (2) **Distribution of database.**
    - (A) **Timing.** Beginning on April 1, 2002, the administrator of the no-call database will update and publish the entire Texas no-call list on January 1, April 1, July 1, and October 1 of each year;
    - (B) **Fees.** The no-call list shall be made available to subscribing telemarketers for a set fee not to exceed \$75 per list per quarter;
    - (C) **Format.** The commission or its designee will make the no-call list available to subscribing telemarketers by:
      - (i) electronic internet access in a downloadable format;
      - (ii) Compact Disk Read Only Memory (CD-ROM) format;
      - (iii) paper copy, if requested by the telemarketer; and,
      - (iv) any other format agreed upon by the current administrator of the no-call database and the subscribing telemarketer.

(3) **Intended use of the no-call database and no-call list.**

(A) The no-call database shall be used only for the intended purposes of creating a no-call list and promoting and furthering statutory mandates in accordance with the Bus. & Com. Code, Chapter 43 relating to Telemarketing. Neither the no-call database nor a published no-call list shall be transferred, exchanged or resold to a non-subscribing entity, group, or individual regardless of whether compensation is exchanged.

(B) The no-call database is not open to public inspection or disclosure.

(C) The administrator shall take all necessary steps to protect the confidentiality of the no-call database and prevent access to the no-call database by unauthorized parties.

(4) **Penalties for misuse of information.** Improper use of the no-call database or a published no-call list by the administrator, telemarketers, or any other person regardless of the method of attainment, shall be subject to administrative penalties and enforcement provisions contained in §22.246 of this title (relating to Administrative Penalties).

(g) **Notice.** A CTU shall provide notice of the no-call list to each of its residential customers as specified by this subsection. In addition to the required notice, the CTU may engage in other forms of customer notification.

(1) **Content of notice.** A CTU shall provide notice in compliance with §26.26 of this title (relating to Foreign Language Requirements) that, at a minimum, clearly explains the following:

- (A) Beginning January 1, 2002, residential customers may add their name, address and non-business telephone number to a state-sponsored no-call list that is intended to limit the number of telemarketing calls received;
  - (B) When a customer who registers for inclusion on the no-call list can expect to stop receiving telemarketing calls;
  - (C) A customer must pay a fee to register for the no-call list;
  - (D) Registration of a non-business telephone number on the no-call list expires on the third anniversary of the date the number is first published on the list;
  - (E) Registration of a telephone number on the no-call list can be accomplished via the United States Postal Service, Internet, or telephonically;
  - (F) The customer registration fee, which cannot exceed three dollars per term, must be paid by credit card when registering online or by telephone. When registering by mail, the fee must be paid by credit card, check or money order;
  - (G) The toll-free telephone number, website address, and mailing address for registration; and,
  - (H) A customer that registers for inclusion on the no-call list may continue to receive calls from groups, organizations, and persons who are exempt from compliance with this section, including a listing of the entities exempted as specified in subsection (e) of this section.
- (2) **Publication of notice.**
- (A) Telephone directory. A CTU that publishes, or has an affiliate that publishes, a residential telephone directory may include in the directory a prominently displayed toll-free number and Internet mail address, established by the

commission, through which a person may request a form for, or request to be placed on, the Texas no-call list in order to avoid unwanted telemarketing calls.

(B) Notice to individual customers. A CTU shall provide notice of the Texas no-call list to each of its residential customers in Texas by one or more of the methods listed in clauses (i)–(v) of this subparagraph.

(i) an insert in the customer's billing statement. Electronic notification is permissible for a customer who, during the notification period, is receiving billing statements from the CTU in an electronic format;

(ii) a bill message;

(iii) separate direct mailing;

(iv) customer newsletter; or

(v) Customer Rights disclosure as provided in §26.31(a)(4) of this title (relating to Disclosures to Applicants and Customers).

(3) **Timing of notice.** Beginning in 2002, a CTU shall provide notice of the Texas no-call list to its residential customers using one of the methods listed in paragraph (2)(B)(i)–(v) of this subsection.

(A) A CTU that uses a notification method listed in paragraph (2)(B)(i)–(iv) of this subsection, shall provide the notice annually beginning in 2002. The annual notice shall be easily legible, prominently displayed, and comply with the requirements listed in paragraph (1) of this subsection.

(B) A CTU that elects the Customer Rights disclosure as its notification method as allowed in paragraph (2)(B)(v) of this subsection shall comply with the timing of distribution requirement in §26.31(a)(4) of this title. The no-call list

information provided in the Customer Rights disclosure shall comply with paragraph (1) of this subsection.

- (4) **Records of customer notification.** Upon commission request, a CTU shall provide a copy of records maintained under the requirements of this subsection to the commission. A CTU shall retain records maintained under the requirements of this subsection for a period of two years.

(h) **Violations.**

- (1) **Separate occurrence.** Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence. Upon request from the commission or commission staff, a telemarketer shall provide, within 21 days of receipt of such a request, all information relating to the commission's investigation of complaints regarding violations of the no-call list such as call logs or phone records.
- (2) **Isolated occurrence.** A telemarketing call made to a number on the no-call list is not a violation of this section if the telemarketing call is determined to be an isolated occurrence.
- (A) An isolated occurrence is an event, action, or occurrence that arises unexpectedly and unintentionally, and is caused by something other than a failure to implement or follow reasonable procedures. An isolated occurrence may involve more than one separate occurrence, but it does not involve a pattern or practice.
- (B) The burden to prove that the telemarketing call was made in error and was an isolated occurrence rests upon the telemarketer who made (or caused to be made) the call. In order for a telemarketer to assert as an affirmative defense

that a potential violation of this section was an isolated occurrence, the telemarketer must provide evidence of the following:

- (i) The telemarketer has purchased the most recently published version of the Texas no-call list, unless the entirety of the telemarketer's business is comprised of telephone calls that are exempt pursuant to subsection (e) of this section and the telemarketer can provide sufficient proof of such;
- (ii) The telemarketer has adopted and implemented written procedures to ensure compliance with this section and effectively prevent telemarketing calls that are in violation of this section, including taking corrective actions when appropriate;
- (iii) The telemarketer has trained its personnel in the established procedures; and,
- (iv) The telemarketing call that violated this section was made contrary to the policies and procedures established by the telemarketer.

(i) **Record retention; Provision of records; Presumptions.**

(1) A telemarketer shall maintain a record of all telephone numbers it has attempted to contact, a record of all telephone numbers it has contacted, and the date of each, for a period of not less than 24 months from the date the call was attempted or completed.

(2) Upon request from the commission or commission staff, a telemarketer shall provide, within 21 calendar days of receipt of such request, all information relating to the commission's investigation of complaints regarding violations of the no-call list including, but not limited to, the call logs or phone records described in this paragraph.

(3) Failure by the telemarketer to respond, or to provide a thorough response, within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(4) Failure of a telemarketer to produce records that demonstrate its compliance with subsection (h)(2)(B)(i) of this section within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(j) **Evidence.** The rules of evidence as applied in a non-jury civil case in district court govern contested case hearings, including enforcement proceedings to enforce the provisions of this section, conducted by SOAH, except that evidence inadmissible under those rules may be admitted if it meets the standards set out in Texas Government Code §2001.081. Such evidence may include, but is not limited to, one or more affidavits from the recipient of a telemarketing call.

(k) **Enforcement and penalties.**

(1) **State licensees.** A state agency that issues a license to a state licensee may receive and investigate complaints concerning violations of this section by the state licensee.

(2) **Telecommunications providers.** The commission has jurisdiction to investigate violations of this section made by telecommunications providers, as defined in the Public Utility Regulatory Act (PURA) §51.002.

(3) **Retail electric providers.** The commission has jurisdiction to investigate violations of this section made by retail electric providers (REPs) as specified in

§25.492 of this title (relating to Non-Compliance with Rules or Orders; Enforcement by the Commission).

- (4) **Other Telemarketers.** A telemarketer, other than a state licensee or telecommunications provider, that violates this section shall be subject to administrative penalties pursuant to §22.246 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF FEBRUARY 2004 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
ADRIANA A. GONZALES**

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