The Federal Do Not Call Registry: What it Signals for Future Direct Marketing Regulations?

By

Rita Marie Cain*

In Mainstream Marketing Services, Inc. v. FTC, the 10th Circuit federal court of appeals upheld the validity of the new federal do not call registry.[1] This article explains the history of the regulation and analyzes the court's opinion. The article discusses the impact of the opinion on other direct marketing regulatory issues, such as email solicitation, wireless advertising messages, data privacy protection and nonprofit solicitation.

BACKGROUND

In 2003, the Federal Trade Commission (FTC) revised its Telemarketing Sales Rule (TSR) to establish a national do not call registry for commercial telemarketing.[2] Thereafter, Congress directed the Federal Communications Commission (FCC) to coordinate its telemarketing regulations under the Telephone Consumer Protection Act of 1991 to achieve maximum consistency between the two agencies' telemarketing restrictions.[3] Now, the two agencies enforce a single list containing the personal telephone numbers of consumers who do not wish to receive calls from telemarketers. Based on the agencies' different statutory authorities, some parties are exempt from the FTC rule, (banks, insurance companies, for example) but are covered by the FCC's. Nevertheless, the competing coverage does not affect the legal analysis upholding the rule.

The federal do not call system does not preempt any existing state registry.[4] Many states have merged their registries with the federal list, saving their residents from having to register twice. Some states believe their systems provide better consumer protection, usually because of narrower exceptions, and will continue to enforce their lists separately.[5]

MAINSTREAM MARKETING V. FCC

Plaintiffs challenged the do not call registry in two separate district court actions, and in two direct appeals from the FCC final rule, all of which were consolidated on appeal to the 10th Circuit.[6] Plaintiffs' strategy of initiating these actions all in federal districts within the 10th Circuit was not likely happenstance. In 1999, the 10th Circuit struck down an FCC regulation that had restricted telephone companies' rights to use customers' calling data in targeted telemarketing solicitation.[7] The *U.S. West* case held that the "opt in" requirements of that FCC rule were an unreasonable restriction on commercial speech rights of the phone company.[8] Presumably, the telemarketing industry hoped for an equally friendly result from the 10th Circuit on the do not call regulation. But the logic that torpedoed the opt-in regulation in *U.S. West* would not apply to the opt-out approach underlying the do not call registry.

The plaintiffs in the four underlying cases variously asserted several different challenges against the validity of the do not call scheme. First, commercial telemarketers complained the regulation violates their first amendment free speech rights. The subscription fee was challenged, also on first amendment grounds. Plaintiffs challenged the exception for calling consumers with whom there is an "established business relationship" as an improper act by the FCC. Plaintiffs complained that the exception harms competition in the telecommunications field and, therefore, is arbitrary and capricious. Finally, the plaintiffs attacked the FTC's statutory authority to establish the registry. If any one of the statutory complaints had prevailed, the court would likely have avoided the free speech questions entirely. The 10th Circuit, however, found no merit in any of the plaintiffs' statutory complaints, so it was obligated to rule on the free speech challenges. This portion of the case is analyzed next.

Registry Does Not Pose An Unconstitutional Restriction on Commercial Speech

Critical to the court's analysis is the distinction in the regulation between commercial telemarketing versus political or charitable solicitation. That distinction allowed the court to apply the "more lenient scrutiny" of the first amendment commercial speech doctrine.[9] Under the commercial speech analysis, the government first must assert a substantial interest to be achieved by the regulation. The primary substantial interest underlying the do not call system is in-home privacy. Relying on the Justice Brandeis' 1928 characterization of the privacy right as "the right to be let alone," [10] to more recent Supreme Court statements on residential privacy,[11] the court "undisputedly" accepted the privacy concern as a substantial government interest to justify this commercial speech regulation.[12]

The regulation also serves a substantial public interest in preventing abusive and coercive sales practices. In its initial articulation of commercial speech protection under the first amendment, the Supreme Court explained that government

* Professor of Business Law, University of Missouri—Kansas City, Bloch School of Business and Public Administration

has an interest in insuring that "the stream of commercial information flows cleanly as well as freely."[13] Accordingly, do not call regulations meet the first prong of the *Central Hudson* test.

The second and third parts of the *Central Hudson* analysis are often characterized as a "reasonable fit" test.[14] First, the regulation must "directly advance" the government interests by providing more than ineffective or remote relief from privacy intrusions and abusive, coercive sales practices. Further, the regulation must be narrowly tailored not to restrict more speech than necessary. "In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's purpose and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked as well."[15]

Regarding the effectiveness of the do not call registry to protect privacy, the plaintiffs argued that the exclusion of charitable and political calls makes the registry unconstitutionally under-inclusive. In other words, if too many calls are permitted to continue under the exemptions in the regulatory scheme, then the restriction on some calls is unconstitutional. Under-inclusion was the basis for the Supreme Court's decision in *Discovery Network*, in which the restriction on sidewalk vending machines for commercial newspapers only eliminated a fraction of the clutter that the regulation supposedly was addressing.[16]

The 10th Circuit had little trouble distinguishing the effectiveness of the do not call system from the "paltry" relief provided by the news rack regulation in *Discovery Network*. [17] Using some of the plaintiffs' own calling estimates from the FTC rulemaking docket, the court applied those numbers to the 50 million phones that are currently registered on the do not call database. Based on the telemarketers' estimates of 2.64 calls per week, the registry would block 6.85 BILLION sales calls per year.[18] The court acknowledged that it had no data to determine how many of those calls would still be permitted under the "established business relationship" exception. Nevertheless, the court stated it was entitled to rely on common sense and even anecdote to judge the effectiveness of the regulation.[19] In the FTC rulemaking, the industry predicted massive layoffs in the wake of the do not call registry. This provided additional support for the court's conclusion that the do not call registry effectively blocks "a significant number of the calls that cause the problems the government sought to redress."[20]

Next, the opt-out character of the do not call list satisfies the "narrow tailoring" requirement of *Central Hudson*. Regulations based on individual choice of what messages to receive or exclude are less offensive to free speech that direct prohibitions by the government. The do not call system is directly analogous to the postal regulation in *Rowan v. U.S. Post Office Dept*., that allowed households to register not to receive sexually-explicit mailings and required sellers to purchase the registry and honor those requests. [21] The Supreme Court in *Rowan* emphasized that the seller's right to communicate was circumscribed by the householder, not the government.

Further, according to the 10th Circuit, the do not call regulation is narrowly-tailored because it creates options for consumers to continue to receive certain welcome calls from some parties, by providing written permission to those businesses. The regulation also continues the company-specific do not call requirements for individuals who do not register in the national database but request not to be called *ad hoc*.[22]

The plaintiffs argued that the company-specific list that had been in federal law since 1991 is the narrowly tailored option that protects the privacy interest. They contended that the shortcomings in that regulatory approach - which were well documented in the TSR rulemaking - resulted from lack of consumer education and lack of consistent government enforcement. The court answered that, unlike the case-by-case do not call requests, the national registry blocks even that first unwanted call, is easier for consumers to use, and provides undisputed evidence about which phones are off limits for calling.[23]

Finally, the plaintiffs argued that caller ID or other call blocking technology is the less restrictive way to accomplish the public interests regarding unwanted telephone solicitation. On the contrary, this approach puts the expense of avoiding the calls on the consumer, according to the court.[24] Further, for every technological blocking advance consumers acquire, the industry will likely find a mechanism for circumventing it. The court characterized this approach as a technological arms race between consumers and the telemarketing industry, not an effective alternative to the national registry.[25] Based on this analysis, the court concluded that the federal do not call registry is a legitimate commercial speech regulation under the *Central Hudson* test.

The court's first amendment analysis is well reasoned and consistent with the commercial speech doctrine, as it has emerged since 1976 in *Virginia State Board of Pharmacy*. The commercial speech doctrine has always been premised on the need to improve a consumer's information about product and price alternatives. Accordingly, that consumer should have the right to restrict commercial telemarketing messages over the phone line for which the consumer pays.[26]

Under this rationale, future government-enforced opt-out systems for unsolicited email and internet pop-up ads would seem to be defensible.[27] Online forms of advertising, however, may have one argument against the court's analysis that telemarketers lacked. In *Mainstream Marketing*, the court defended its free speech conclusion with the justification that telemarketers continue to have other media, such as direct mail, to communicate with consumers.[28] In other words, the blocked phone messages do not eliminate all vehicles for communication. In the world of cyber advertising, however, the email address may be the only mechanism for communicating with an individual consumer since home addresses for direct mailing usually would not be available to the online advertiser. Further, if both email and pop up ads are blocked, then this point of the court's analysis fails completely since these are the only online vehicles for targeted cyber advertising. Admittedly, the *Mainstream Marketing* court stated that this "alternative media" concept was not dispositive of the free

speech issue. Nevertheless, it raises the question whether the court's analysis can be directly overlaid onto the world of internet advertising.

One of the plaintiffs, American Teleservices Association, has vowed to appeal the case to the Supreme Court on the grounds that "the rights to free speech are being unduly trampled under the guise of consumer protection."[29] The Direct Marketing Association, however, will not participate in any further challenges to the registry.[30] The best chance that this case could be reversed on appeal would be if the Supreme Court eliminated the distinction between commercial and political or social speech, thus altering the entire analysis.[31] Elevating commercial speech to full protection under the first amendment has been a recurring theme among scholars and judges.[32] Nevertheless, the do not call regulation has in-home privacy as its underlying premise—a public interest that has been consistently protected by the Supreme Court in both commercial and political speech cases. The registry is also based on individual choice to restrict commercial messages, not on direct governmental prohibitions. Thus, even if the Supreme Court is inclined to dismantle the commercial speech doctrine, it is unlikely it would choose the do not call rule as the case.[33] The 10th Circuit may have articulated the final constitutional law on opt-out systems for telemarketing as it did for opt-in regulations in *U.S. West v. FCC.*

Registry Fee is not a Tax on Free Speech

In an alternative first amendment complaint, plaintiffs asserted that the subscription fee to access the registry is an unconstitutional revenue tax on protected speech. Currently, a telemarketer can access five area codes in the registry for free. Thereafter, the fee is $25 per area code, with a maximum of $7375.[34] Consumers can register a number on the list at any time and telemarketers have three months to recognize new registrants and delete them from their databases. According, a telemarketer must obtain the list quarterly to continue to capture new registrants in the 3-month window.

The court in *Mainstream Marketing* acknowledged that the government could not impose a fee for the enjoyment of free speech rights.[35] The government, however, is allowed to assess fees to defray the costs of administering legitimate regulations, such as parade permit fees that cover the cost of police escorts, barricades or clean up.[36] These rulings are not based on any distinction between commercial or non-commercial speech, only on the need to pay for legitimate government administration. Nothing suggested to the court that the subscription fee would be used other than to administer the registry. Accordingly, the court upheld the fee structure.[37]

FTC and FCC were within their Statutory Authorities to Adopt Registry

Plaintiffs argued that both regulating agencies in the case lacked statutory authority to establish a do not call registry. With respect to the FTC, this position by the plaintiffs was especially weak. In the Telemarketing Act, Congress directed the FTC to adopt rules that included "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[38] Clearly, the do not call registry directly addresses the issue of consumer privacy from unsolicited telemarketing calls as provided by the statute. After a failed experiment with company-specific do not call lists, the FTC concluded that the telemarketing industry required a government-enforced national registry to prevent the unsolicited calls addressed in the statute. Administrative law requires that conclusion receive undue deference by any reviewing court.[39]

The challenge to the FCC's authority was more limited. Plaintiffs in one of the underlying district court actions asserted that the "established business relationship" exception for the do not call registry violates the pro-competition policy articulated in the Telecommunications Act of 1996, a statute the FCC also enforces.[40] Specifically, the Telecommunications Act is intended to advance competition in local telephone services, but the established business exception favors the incumbent service provider. An incumbency advantage with respect to telemarketing could be particularly harmful in the telecommunications industry in which telephone solicitation is the primary marketing mechanism. If the FCC failed to take sufficient account for these potential anti-competitive effects, its do not call rule could be deemed arbitrary and capricious.

The court acknowledged that the FCC could not adopt a do not call rule under the Telephone Consumer Protection Act that wholly ignored the competitive issues in the Telecommunications Act. The court concluded, however, that the FCC gave considerable attention to the anti-competitive potential of the "established business relationship" exception in its rulemaking procedures. The agency proposed variations of and limitations on the exception, all of which had considerable marketing or privacy shortcomings according to the public comments.

In accepting the final established business exception, the FCC concluded that the registry had a few provisions that would ameliorate the anti-competitive effects. First, all competitors could contact phone customers not on the list. Further, registered phone customers could be asked to give their service provider permission to call despite their registration. Finally, telecommunications competitors are free to use other media, especially direct mail, to solicit customers.

Based on this record in the rulemaking process, the court concluded that the FCC had not ignored the competition issue in the telecommunications market. The agency considered variations on the established business exception under both the privacy and pro-competition statutory mandates. The agency articulated ways that the anti-competitive effects of the exception could be lessened. When such an analysis has been performed, a court cannot substitute its judgment for the

reasoned policy decision of the agency.[41] Accordingly, the court concluded the FCC's established business exception was not arbitrary and capricious.[42]

Finally, after the FTC adopted the do not call registry, Congress ratified it with legislation authorizing the fee structure and ordering the FCC to coordinate its telemarketing regulations under the Telephone Consumer Protection Act. According to the *Mainstream Marketing* court, these subsequent legislative moves erase any doubts that establishing and enforcing the registry were within the agencies' statutory authority.[43]

WHAT'S NEXT FOR DIRECT MARKETING REGULATION?

The 10th Circuit outcome of the federal do not call docket may bode ill for future self-regulation in the direct marketing industry, especially related to online issues such as unsolicited email and data mining. The original company-specific do not call list was essentially a self-regulatory approach adopted in the early-1990s for telemarketing. Government would not intervene in the customer relationship unless an advertiser violated the individual customer's do not call request. Even then, all the burden of proving the violation fell on the customer. This was the closest thing to self-regulation that could have come in the wake of two federal statutes that focused on abusive telemarketing at the time, the Telephone Consumer Protection Act and the Telemarketing Act.

Unfortunately, the FTC's rulemaking process to amend the TSR told a woeful tale of industry non-compliance regarding in-house do not call lists.[44] The states, which usually hear most consumer protection complaints first, had already acted on their own: all but seven states had already implemented do not call systems or other telemarketing consumer protections statutes before the FTC took up the matter in 2001.[45]

The latest targeted marketing practice that has consumers screaming, "there ought to be a law…" is unsolicited email (SPAM). When clogged email boxes became a common complaint, state lawmakers were not going to wait almost a decade for the federal government to act this time. As of 2004, 37 states had passed various anti-SPAM regulations.[46] Then in January, 2004, the Federal CAN-SPAM Act -- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 -- took effect.[47] Despite the reference to pornography in the title, the act applies to all commercial email messaging.

The federal CAN-SPAM Act does not prohibit sending unsolicited commercial emails. Its focus is on disclosure and opting out mechanisms. First, e-mail solicitations or advertisements for products and services must be identified by means that are "clear and conspicuous."[48] Unlike many state laws, no uniform label, such as ADV is required. Without such a uniform tag, however, blocking software will have a harder time screening for these messages and consumers will have to delete them individually. In addition to the clear and conspicuous identifier, commercial email senders are prohibited from using misleading or bogus subject lines and retransmissions of email ads for the purpose of concealing their origins.[49]

Next, the commercial solicitation email must give the recipient the ability to send a reply message or other "Internet-based communication" to opt out of additional emails from that sender.[50] This internet-based outlet for opting out must remain viable for at least 30 days after the original message was sent.[51] After receiving an opt-out request, the sender has 10 business days to cease further email solicitations to that recipient.[52] The sender also is prohibited from selling or otherwise transferring email addresses of persons who have opted out of future mailings.[53] In addition to a legitimate return e-mail address, the commercial email solicitor must also provide its postal address.[54]

These spam opt-out provisions hearken back to the original company-specific do not call list-keeping requirements for telemarketers established under the Telephone Consumer Protection Act of 1991. Presumably, Congress recalls the dismal company-specific compliance record that emerged in the recent FTC do not call rulemaking and already anticipates that these email opt-out mandates will be inadequate. Within six months, (June, 2004) the FTC is supposed to report to Congress on a proposal regarding establishment of a national "Do Not E-Mail" registry.[55]

The new anti-spam statute does not include a general "established business relationship" exception like the telemarketing statutes. Instead, the Act excludes certain "transactional or relationship messages," such as

> "an electronic mail message the primary purpose of which is –
> to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender…"[56]

In other words, instead of excluding all email communications with any customer who has had a transaction with the sender in a span of time such as 18-36 months, the CANSPAM Act *includes* most messages for its disclosure and opt-out requirements. The only messages that do not require these courtesies are those that have a purpose related to a specific transaction.

The CAN-SPAM Act is intended to supersede state anti-spam laws with stricter provisions.[57] The California law, which would have taken effect in January, 2004, is an example of a state anti-spam law that is more restrictive than the new federal law. It bans all unsolicited email unless it was from a business with which the customer had an existing relationship.[58] Any such provisions of the California law, as well as 36 other states', are now preempted. States are still permitted to enforce their prohibitions on false and deceptive advertising in conjunction with commercial email.[59]

Unlike the enforcement of federal telemarketing laws, the CAN-SPAM Act does not give recipients a private cause of action. Enforcement will be through the FTC or state law enforcement authorities.[60] Internet service providers, however, have a cause of action for violations that adversely affect their ability to provide their service.[61]

Finally, the Act also addresses cell-phone spam (sometimes called WAM for wireless advertising messages). Congress required the FCC, in consultation with the FTC, to propose rules to protect consumers from unwanted mobile-service commercial messages. The FCC rules must give subscribers a way to avoid receiving commercial mobile-service messages unless they provided express prior authorization (opt in). The FCC deadline for such proposal is September, 2004.[62] Thus, the foreseeable future promises an active regulatory environment for the direct marketing industry.

The foregoing discussion of telemarketing and internet marketing generally focused on personal, physical privacy, or the "right to be let alone."[63] But all interactive marketing yields a database of personal information. Perhaps more important for regulatory attention than physical privacy is informational privacy -- the access and use of consumer data.[64]

Generally, the United States has maintained a self-regulatory approach regarding data collection and use. For years, the U.S. has pushed back against the "permission first" data privacy approach used in Europe,[65] in part because the *U.S. West* case that found an FCC opt-in rule (similar to the EU system) to be unconstitutional under the U.S. free speech doctrine.

In contrast to the European model, market solutions for data mining are stressed in the U.S.[66] Some marketing and legal theorists espouse a market-based approach whereby individual consumers who have opted out of targeted marketing could decide to be paid to receive previously-blocked phone, email or wireless messages.[67] Other approaches, including individual tort claims, are recommended for consumer protection, rather than regulatory systems.[68]

Unfortunately, consumers hear recurring horror stories about identity theft and begin to wonder if their personal information is safe when they are online, or even when watching on-demand cable television.[69] While compensation for accepting targeted marketing would address the concern for physical privacy (it is waived for a fee) it fails to address the potential threat to information privacy in the resulting database that is collected. A new regulatory regime would have to be developed in conjunction with these systems to protect the vast majority of consumers who "have no clue about data flows…."[70]

Consumer protection advocates may feel empowered by the *Mainstream Marketing* result that the first amendment does not prohibit regulations that block internet targeted marketing and its accompanying data collection. As was noted above, only one component of the *Mainstream Marketing* constitutional analysis fails to neatly overlay onto the internet: alternative media for contacting the customer.[71] If this is the only constitutional argument in the face of a fraudulent and abusive internet advertising push, the regulatory juggernaut will not likely be deterred from developing new restrictions. Registries could be established for email and IP addresses to block some or all email and pop up ads, or even cookies downloaded into a customer's computer. In other words, some of the inherent efficiencies online marketers have come to expect may soon be regulated.

NONPROFIT SOLICITATION UNDER THE TSR

Finally, the one field that still has a more liberal, although somewhat uncertain, regulatory environment for direct solicitation is the nonprofit sector. The TSR specifically exempted nonprofit solicitation from complying with the national do not call registry. The rule, however, created a new in-house list-keeping requirement and imposed additional restrictions not previously known for nonprofit solicitors, such as time of day constraints, and technical requirements for autodialing equipment. These restrictions, however, only apply IF a commercial telemarketer is conducting the solicitation plan.[72] Additionally, telemarketers must promptly disclose that the purpose of a solicitation call is to induce charitable donations.[73]

These provisions have raised issues regarding the scope of FTC authority and first amendment rights of nonprofit organizations and are being challenged in separate litigation from the challenge to the national do not call registry.[74]

FTC Statutory Authority to Regulate Nonprofit Solicitation

The FTC's restrictions on nonprofit solicitation are based on new mandates under the USA Patriot Act.[75] Section 1011(b) of the USA Patriot Act amends the definition of "telemarketing" in the Telemarketing Act to include any telephone solicitation program conducted to induce "a charitable contribution, donation, or gift of money or any other thing of value." Further, the definition of a "deceptive practice" under the Telemarketing Act was amended to include "fraudulent charitable solicitation."[76] Although not stated in the USA Patriot Act, the FTC concluded that these amendments only apply to charitable solicitations conducted by ***commercial*** telemarketers on behalf of nonprofit organizations. According to the FTC, nonprofit organizations are exempt from the FTC's general statutory authority to regulate unfair and deceptive trade practices.[77] The USA Patriot Act did not expand the FTC's basic statutory authority. Thus, the only way to reconcile the USA Patriot Act with the FTC's existing power over for-profit firms is to conclude that the USA Patriot Act only enables the FTC to regulate charitable solicitation conducted by commercial telemarketers.[78]

Arguably, the FTC's interpretation of its statutory authority regarding charitable solicitation under the USA Patriot Act is too limited to effectuate the Act's purpose. The legislative history of the Act in the weeks following the September 11 attacks makes it clear that Congress wanted to tackle the problem of fraudulent charitable solicitors who funneled solicited

funds to alternative, illegal uses. This legislative objective will not be met if the only solicitation that gets regulated is that conducted by commercial solicitors, not the defrauding charities themselves. Potentially, if sham charities were soliciting funds to funnel to terrorists, they would not hire a third-party firm to conduct their solicitation. Such a relationship with a commercial solicitor would require contracts, payments by check or credit card between the firms, and some interaction between the telemarketer and the persons representing the sham charity. Presumably, if a sham charity were trying to launder funds to terrorists, it would try to limit paper trails and third-party contacts regarding its illegal activities. Arguably, it would keep the telemarketing function within the organization of fellow conspirators.

Another interpretation of the USA Patriot Act is that, for the purpose of regulating *fraudulent* charitable solicitation, the FTC's original jurisdiction is expanded to include all solicitors whether their legal status is commercial or non-commercial.[79] This interpretation would better accomplish the regulatory objective of the USA Patriot Act (and would sidestep the constitutional sticking point, discussed below, that the FTC is unfairly regulating the free speech of those charities that must outsource their solicitation activities).

For the purposes of this article, references to nonprofit or charitable solicitation under the FTC rule implies solicitation done by commercial telemarketers on behalf of the nonprofit organization.

Whether or not the FTC is correct in limiting its approach to commercial parties soliciting for nonprofits, there is still a question whether the FTC could use the Patriot Act mandates to impose privacy protections on nonprofit solicitation. These privacy protections include the in-house do not call list-keeping requirement, disclosure requirements and autodialer restrictions. By enacting the Patriot Act, Congress targeted fraudulent charitable solicitation as part of a law enforcement regime designed to prevent money laundering for terrorist activity. Arguably, the Patriot Act does not support the FTC's move to also extend its various personal privacy restrictions to charitable solicitation.

The FTC addressed this point in its Notice of Proposed Rulemaking by stating that nothing in the Patriot Act suggested that Congress sought to exclude nonprofit solicitation from the privacy provisions of the Telemarketing Sales Rule.[80] Under this approach, Congress would have to tell a federal agency what powers it is NOT bestowing when it enacts enabling legislation. In particular, after the September 11 terrorist attacks, the country and the Congress were focused exclusively on catching members of terror cells and preventing future attacks. In that context, the anti-fraud authority granted the FTC should not be bootstrapped to restrict nonprofit solicitation under the privacy provisions of the existing or proposed Telemarketing Sales Rule. [81]

This interpretation of the FTC's limited authority in the Patriot Act also is supported by the fact that Congress specified certain disclosure requirements to be extended to charitable solicitation. The disclosure requirements serve the dual purpose of fraud and privacy protection by providing information for potential fraud complaints and by allowing the consumer to terminate the call immediately upon hearing the nature and source of the call. In other words, the statute actually goes beyond the general references to fraudulent and deceptive charitable telemarketing, and states one, and only one, additional specific telemarketing restriction for the FTC to address – disclosure provisions. Arguably, if Congress were authorizing the FTC to consider any and all other possible telemarketing regulations for nonprofits, such as the do not call list requirement, it would not have expressly set out disclosure alone in the legislation. In other words, once Congress expressed one additional requirement that the FTC could impose on nonprofit solicitation, the FTC was not free to assume authority to do any more.

The FTC's position to support imposing privacy restrictions on non-profit solicitation hinges on the provision in the USA Patriot Act that redefines "telemarketing" in the Telemarketing Act to include charitable solicitation. According to the FTC, by rewriting the basic definition of telemarketing to include charitable solicitation, Congress "altered the scope of the TSR," and thus empowered the FTC to impose any of the anti-fraud and abuse restrictions on non-profit solicitation, including the do not call provisions. (Despite this "altered scope", however, these newly-impose privacy restrictions on charitable solicitation still are limited to calls made by commercial parties on behalf of non-profit clients).

At least one U.S. Senator put the FTC on notice of his contrary interpretation of the USA Patriot Act. In a June 14, 2002, letter FTC Chairman Timothy Muris, Senator Mitch McConnell commented on the NPRM:

> In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations.... When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal "do-not-call" list, and certainly not a list that applied to charitable organizations or their authorized agents.[82]

Since the national do not call registry specifically exempts all calling for nonprofit solicitation, whether done by commercial or noncommercial solicitors, the follow-up Do Not Call Implementation Act by Congress does not answer the congressional authority issue as it did for the other statutory interpretation issues discussed above.

The only court to address the issue to date agreed with the FTC.[83] According to the federal district court of Maryland, the applicable provisions of the Patriot Act were amendments to the Telemarketing Act. The original Telemarketing Act instructed the FTC to enact rules to prevent fraud and protect privacy. From this authority emerged the

original Telemarketing Sales Rule. Thus, the court opined, by adding charitable solicitation to the definition of "telemarketing" used in the TSR, Congress must have recognized "all the telemarketing rules would apply to charitable solicitation."[84] As for the views of Senator McConnell, "the statements of one Congressman cannot be treated as a definitive recitation of Congress' purpose with respect to the statute."[85]

Free Speech Protection for Charitable Solicitation

Shortly after the Supreme Court articulated the commercial speech doctrine in *Virginia Pharmacy*, it was faced with various challenges to state charitable solicitation laws. Typically, these state laws restricted the use of commercial solicitors for charitable purposes. For example, charitable solicitation by a professional telemarketing firm might be prohibited unless a certain percentage of the collections were returned to the charity for the asserted charitable purpose. The states' objective in passing such legislation was to protect citizens from unscrupulous solicitors and to protect legitimate charities from the "black eye" created by disreputable organizations. Residential privacy also was articulated as a justification for such rules, as in most commercial telemarketing regulation today.

In 1980, the Supreme Court struck down one such charitable solicitation statute and established the principle that charitable solicitation cannot be regulated as "purely commercial speech."[86] The Court explained that charitable solicitation "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues. …"[87] Accordingly, speech by charitable organizations, even when soliciting contributions, receives the highest free speech protection available to all other political or social speech. Additionally, solicitation conducted by commercial telemarketers on behalf of nonprofit organizations is afforded the same protection. "[S]peech is not entitled to less protection simply because the speaker is compensated for the message. … [T]he State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter."[88]

Accordingly, restrictions on nonprofit solicitation must meet the strict scrutiny applied to regulations affecting political and social speech. The regulation must effectuate a compelling interest and be narrowly tailored to protect the interest without unduly limiting speech.[89] This strictest free speech standard applies whether the solicitation is conducted by the charity itself or by a paid agent.

The FTC's new restrictions on nonprofit solicitation are supported by the government's interest in protecting personal privacy and solicitation fraud. The 10th Circuit characterized these interests as "undisputable" as the basis for the restrictions on commercial calling. The Supreme Court has stated that fraudulent misrepresentation in nonprofit solicitation is not protected speech and can be regulated.[90] Of the new nonprofit restrictions, however, only the disclosure provisions seem directly related to fraud protection. The do not call list requirement, the time of day restrictions and the autodialing restrictions all are more closely associated with protecting in-home privacy than fraud.

The Supreme Court never has directly addressed the issue of whether in-home privacy is a compelling enough interest to justify regulations that block non-commercial messages from coming into the home via the phone. Competing with the personal privacy right is the position that the messages of nonprofit organizations do not simply inform the consumer of giving opportunities, but additionally promote the ideas and activities that these organizations undertake on behalf of entire communities. When these messages are preemptively blocked, important information and dialogue is lost about social issues and needs and how these charities meet those needs. Perhaps the interest of society to insure that charities survive and thrive is more important than the needs of individuals to remain totally unperturbed by this limited group of telephone calls. Under such an analysis, individual telephone consumers may not have the right to preemptively thwart a charity's opportunity to persuade about the importance of its charitable mission.

Free Speech Concerns in the FTC Do Not Call Provisions for Nonprofit Solicitation

Even assuming in-home privacy is a compelling interest to justify restrictions on non-commercial speech, the do not call list-keeping requirement that the FTC now has imposed on nonprofits still must withstand the second part of the first amendment analysis: the regulation must be narrowly tailored to satisfy the compelling interest without unduly burdening speech. Arguably, the FTC approach faces several problems under this part of the free speech scrutiny.

First, the FTC interprets its statutory authority under the USA Patriot Act as limited to nonprofit solicitation conducted by commercial solicitors. This distinction in the amended rule between charitable solicitation done by the charity's own volunteers and solicitation by commercial telemarketers presents a questionable dichotomy. Courts will strictly scrutinize any regulatory classification when "the classification impermissibly interferes with the exercise of a fundamental right . . ."[91] in this case the free speech right. Under the strict scrutiny analysis, it may be hard for the FTC to justify its regulatory scheme in which telephone consumers can receive no privacy protection when called by volunteer telemarketers; their "do not call" requests only must be honored by the charity using a paid telemarketing firm.

One state court pointed out the illogic of placing restrictions on a limited group of professional solicitors when solicitation by charity volunteers and political organizations went unrestricted. The court struck down such a restriction on professional solicitation, stating that it did "virtually nothing" to protect privacy.[92] The Federal Communications

Commission discussed this constitutional problem of commercial versus nonprofit solicitation when it considered and rejected adopting a national do not call registry in the 1980s.[93]

The FTC seems to beg the question when it addresses this issue. The Commission asserts that the amended TSR treats all calling by ***commercial telemarketers*** the same. "The company specific 'do not call' provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions,. . ."[94] As such, the list-keeping requirement is content-neutral and there is no dichotomy in the speech restriction created by the mandate according to the FTC. The Maryland federal district court has accepted this interpretation.

This analysis, however, ignores that regulations for charitable contributions are protected under a stricter first amendment analysis than applies to the solicitation for goods and services. And this stricter standard applies when a commercial party calls on behalf of a nonprofit agency, the same as if the nonprofit party were speaking itself. Under the new TSR, if the nonprofit party were speaking for itself, it would be totally unregulated. Thus, the TSR arbitrarily restricts the free speech of certain charities based on the agents they hire to make their calls.

Further, the FTC seems to want to have it all ways when it defends this provision on the grounds that the in-house 'do not call' provisions apply equally to all ***for-profit*** solicitors. In support of the national do not call registry (from which nonprofit solicitation is exempt), the FTC and the 10th Circuit strongly relied on the qualitative and quantitative differences between commercial and noncommercial solicitation.[95] Thus, when it argues that the in-house 'do not call' provisions apply equally to all for-profit solicitors, the Commission's ignores the commercial/charitable bifurcation prevalent throughout this docket.

The North Dakota Supreme Court addressed a similar statutory provision in its state charitable solicitation law.[96] The law established a state do not call list that solicitors were prohibited from calling. Exempt from the prohibition were calls made by volunteers or employees of charitable organizations.[97] Accordingly, the statute was similar to the federal TSR in that its provisions only applied to charitable solicitation performed by an outside firm or individual, likely to be a paid commercial solicitor. The North Dakota Court held that the regulation was not content neutral because it "prevents charities from hiring professional telemarketers to solicit funds for them."[98] As such, the law imposes a direct and substantial limitation on the charity's solicitation activity. Accordingly, the court applied the strictest free speech scrutiny.

The court concluded that the regulation was not narrowly tailored to satisfy either the anti-fraud or privacy interests. The court explained that state criminal fraud laws directly protect the fraud interest. On the contrary, the do not call law blocked all calls by paid solicitors to numbers on the list. Because not every professional telemarketer will commit fraud, the law targets and eliminates more than the "exact source of the evil it seeks to remedy."[99]

Regarding the privacy interest, the North Dakota court held that the unrestricted charitable solicitation calls from volunteers or employees of the charity proved that the restrictions on other calls was not narrowly drawn to serve the privacy interest.[100]

For the same reasons and more, the TSR's organization-specific do not call list fails as a narrowly-tailored regulation that protects the in-home privacy interest of consumers. The Commission spoke at length of the failures of the existing TSR do not call provisions: "The record in this matter overwhelmingly shows . . . that the company-specific approach is seriously inadequate to protect consumers' privacy. ..."[101] These failures justified the Commission's decision to create the new national do not call registry for commercial telemarketers. Thus, it is hard to understand how such a flawed regulatory approach as the in-house rule now becomes a legitimate privacy-protection vehicle, especially under the strict scrutiny for charitable speech.

Again the FTC's answer was that the nature of charitable solicitation is qualitatively different than commercial telemarketing because the call is not just about the contribution but "the cause." To ignore the "do not call" requests of consumers in such a context potentially alienates the called party against the cause, not just the caller. Such a difference in calling motive would render the charity-specific list-keeping mandate more effective, according to the FTC. [102]

Notwithstanding the support of a lone commenter in the rulemaking process, the Commission's reliance on this alleged fundamental difference between commercial and nonprofit solicitation flies in the face of contemporary marketing research. For over 30 years, marketing scholars have contended that classic marketing concepts apply equally to nonprofit solicitation.[103] Regardless of the commercial or non-commercial nature of the speaker, marketing proposes an exchange.[104] In fact, some nonprofit organizations may be seeking to exchange goods or services for money just like for-profit organizations.[105]

Further, while the marketing literature acknowledges the unique difficulty nonprofits have in persuading individuals to exchange old ideas or behaviors for new ones,[106] studies do not support the FTC's assumption that nonprofits are more customer-oriented than commercial sector marketers.[107] "In fact, existing entities are still seen to be content with their nonprofit offer, irrespective of what their beneficiaries or those whom they sustain economically may think. This attitude is justified by the maxim `we know better than you what is good for you'."[108]

Courts can set aside the factual conclusions of an administrative agency if those fact-findings are arbitrary, capricious or unsupported by substantial evidence.[109] In this case the FTC's factual conclusions about nonprofit telemarketing activities could be vulnerable considering that the FTC has no experience regulating nonprofit operations. Further, the Commission never gave the public an opportunity to comment on the effects of a do not call list-keeping obligation on nonprofit fundraising. When the nonprofit sector response was overwhelmingly critical of the proposed

national registry,[110] the FTC opted for the organization-specific list-keeping mandate without any further investigation. Accordingly, the Commission's sweeping conclusions about nonprofit telemarketing are based on little factual support and contradict decades of marketing research.[111]

Finally, the new TSR requires that all telemarketers, including nonprofit solicitors, not interfere with caller ID technology to enable telephone consumers to use that technology as intended to self-select what calls to receive or ignore.[112] The 10th circuit was not persuaded that this technology was a reasonable alternative for handling the glut of commercial solicitation calls. When the caller ID rule is applied to the much smaller volume of nonprofit solicitation, however, consumer privacy may be sufficiently protected without preemptively blocking every nonprofit message to a phone line. The caller ID technology allows for individual residents to chose to answer or not, and allows that choice on a call-by-call basis. By contrast, the 'do not call' mandates (national registry and in-house list) ban all future messages from an organization to all residents at the designated phone number—for 5 years. [113]

Caller ID enforcement protects the unquestioned right not to engage in a telephone conversation, (and at least half of all telephone consumers subscribe to it).[114] The Commission's action regarding enforcement of caller ID technology may be a narrowly tailored remedy to the privacy concern that obviates the need for the do not call list-keeping requirement for nonprofit organizations under the strict scrutiny that applies to this free speech.

CONCLUSION

Marketing and legal research shows that across-the-board regulation may not provide the best internet consumer protection,[115] or be the best public policy.[116] Nevertheless, momentum appears to be pointing toward a newly intensified regulatory environment, including a national opt out registry for email. For this, the internet economy has a decade of unbridled telemarketing abuses to thank. After *Mainstream Marketing*, the industry has a weaker commercial speech position to deflect this regulatory freight train.

FOOTNOTES

[1] Mainstream Marketing Services, Inc. v. FTC, 358 F. 3d 1228 (10th Cir. 2004).
[2] FTC Telemarketing Sales Rule, Final Amended Rule, 68 F.R. 4580 (2003).
[3] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).
[4] See generally, Augusta Meacham, "To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations," 12, COMMLAW CONSPECTUS 61 (2004); See also Stephen M. Worth,. "'Do Not Call' Laws and the First Amendment: Testing the Limits of Commercial Free Speech Protection," 7 J. SMALL & EMERGING BUS. L. 467 (2003).
[5] See, Meacham, Augusta "To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations," 12, COMMLAW CONSPECTUS 61 (2004). See also Joseph Lewczak, and Sofia Rahman, "Practical Suggestions For Complying With The National Do Not Call Registry," THE METROPOLITAN CORPORATE COUNSEL, (February 18, 2004).
[6] Case No. 03-1429 was appealed from the District of Colorado, which held that the FTC's do-not-call rules were unconstitutional. In that case, the district court enjoined the FTC from implementing the do-not-call registry. The 10th Circuit stayed the injunction in FTC v. Mainstream Mktg. Servs., Inc., 345 F.3d 850(10th Cir. 2003). Case No. 03-9571, a direct appeal of the FCC rule, also challenged the constitutionality under the first amendment.Case No. 03-6258 was appealed from the Western District of Oklahoma, which held that the FTC lacked the statutory authority to enact its do-not-call rules. Case No. 03-9594 challenged the FCC rule's established business relationship exception on administrative law grounds and was directly appealed from the FCC order.
[7] U.S. West v. FCC, 182 F. 3d 1224 (10th Cir. 1999).
[8] *Id*. at 1240.
[9] 358 F. 3d at 1236, citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. 447 U.S. 557(1980).
[10] Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J. dissenting).
[11] Hill v. Colorado, 530 U.S. 703 (2000); Frisby v. Schultz, 487 U.S. 474 (1988); Rowan v. United States Post Office Dept., 397 U.S. 728 (1970).
[12] 358 F. 3d 1228 at 1237.
[13] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 771-72 (1976).
[14] U.S. v. Edge Broad. Co., 509 U.S. 418, 427-28 (1993).
[15] 358 F.3d at 1238.
[16] City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993).
[17] 358 F. 3d at 1245-46.
[18] *Id*. at 1240.
[19] Id. at 1237.
[20] *Id*. at 1238.

[21] Rowan v. United States Post Office Dept., 397 U.S. 728 (1970).
[22] 358 F. 3d at 1244.
[23] *Id*. at 1244-45.
[24] *Id.* at 1245.
[25] *Id.*
[26] Rita Marie Cain, "Call Up Someone and Just Say 'Buy' -- Telemarketing and the Regulatory Environment," 31AMERICAN BUSINESS LAW JOURNAL 641 (1994).
[27] Teinowitz, Ira, "Critics fear do-not-call curbs for e-mail, faxes, TV," 8 ADVERTISING AGE 75 (February 23, 2004).
[28] 358 F. 3d at 1243.
[29] "Telemarketers Fight Call Registry, Planning Supreme Court Appeal," WALL STREET JOURNAL (Eastern edition) D.6 (March 4, 2004).
[30] "US DMA concedes defeat in fight to halt Do Not Call," 9 PRECISION MARKETING (March 12, 2004).
[31] David L. Hudson, Jr., "Privacy Trumps Speech in Ruling," 3 ABA JOURNAL EREPORT 7 (2004).
[32] See David L. Hudson Jr., "Essay: Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector," CREIGHTON L. REV. 35 (April) 485-501 (2002). See also Aaron Schmoll, "COMMENT: Sobriety Test: The Court Walks the Central Hudson Line Once Again in 44 Liquormart, but Passes on a New First Amendment Review," 50 FED. COMM. LAW JOURNAL 753 (1998).
[33] James Sweet , "Opting-out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry," 70 TENN. L. REV. 921, 963 (2003).
[34] Telemarketing Sales Rule Fees, Final rule, 68 Fed. Reg. 45134 (July 31, 2003).
[35] Murdock v. Pennsylvania, 319 U.S. 105 (1943).
[36] Cox v. New Hampshire, 312 U.S. 569 (1941).
[37] 358 F.3d at 1247-48.
[38] Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, Pub. L. No. 103-297 108 Stat. 1545 (1994) (Telemarketing Act), 15 U.S.C. §§6101-08 (2004).
[39] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).
[40] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996).
[41] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).
[42] 358. F.3d at 1250.
[43] *Id.*
[44] FTC Telemarketing Sales Rule, Final Amended Rule, 68 F.R. 4580 (2003).
[45] Patricia Pattison & Anthony F. McGann, "State Telemarketing Legislation: A Whole Lotta Law Goin' On!," 3 WYO. L. REV. 167, 176-92 (2003).
[46] Jonathan Bick, "Congress Has Come to Control Spam, Not to Bury I," LEGAL TIMES (February 16, 2004).
[47] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187). 117 Stat. 2699 (2003) (to be codified at 15 U.S.C. 7701-13; 18 U.S.C. 1001, 1037; 28 U.S.C. 994; and 47 U.S.C. 227).
[48] 47 U.S.C. § 7704 (a)(4) (2004).
[49] 47 U.S.C. § 7704 (a)(1)-(2) (2004).
[50] 47 U.S.C. § 7704 (a)(3)(A) (2004).
[51] 47 U.S.C. § 7704 (a)(3)(A)(ii) (2004).
[52] 47 U.S.C. § 7704 (a)(3)(A)(i) (2004).
[53] 47 U.S.C. § 7704 (a)(4)(A)(iv) (2004).
[54] 47 U.S.C. § 7704 (a)(5)(A)(iii) (2004).
[55] 47 U.S.C. § 7708 (2004).
[56] 47 U.S.C. § 7702 (17) (A) (2004).
[57] 47 U.S.C. § 7704 (b) (2004).
[58] Cal. Bus. & Prof. Code 17529 (2003).
[59] 47 U.S.C. § 7704 (b) (2) (2004).
[60] 47 U.S.C. § 7706 (2004).
[61] *Id*.
[62] 47 U.S.C. § 7712 (2004).
[63] See supra note 10 and accompanying text.
[64] Paul M. Schwartz, "Property, Privacy and Personal Data," 117 HARV. L. REV. 2055, 2073 (2004); Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1423-28 (2000); Pamela Samuelson, Privacy as Intellectual Property?, 52 STAN. L. REV. 1125, 1143 (2000).
[65] Rita Marie Cain, "Global Privacy Concerns and Regulation -- Is the United States a World Apart?" 16 INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY 23 (2002).

[66] Svetlana Milina, "Note: Let the Market Do its Job: Advocating an Integrated Laissez-faire Approach to Online Profiling Regulation," CARDOZO ARTS & ENT. LJ 21 (Winter/Spring) 257 (2003); Kalinda Basho, "COMMENT: The Licensing of Our Personal Information: Is It a Solution to Internet Privacy?" CALIF. L. REV. 88 (2000).
[67] Paul M. Schwartz, "Property, Privacy and Personal Data," supra note 64 at 2122-26 (2004); Ian Ayers and Matthew Funk, "Marketing privacy," 20 YALE J. ON REG. 77 (2003); Ross D. Petty, "Wireless Advertising Messaging: Legal Analysis and Public Policy Issues," 22 J.OF PUBLIC POLICY & MARKETING 71 (2003).
[68] Andrew J. McClurg, "A Thousands Words are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling, NW. U.L. REV. 8 63 (2003); John R. Aguilar, "Over the Rainbow European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution," 4 INT'L J. COMM. L. & POL'Y 1-57 (1999/2000).
[69] David M. Katz, "Privacy in the Private Sector: Use of the Automotive Industry's 'Event Data Recorder' and Cable Industry's 'Interactive Television' in Collecting Personal Data," 29 RUTGERS COMPUTER & TECH. L.J., 163 (2003).
[70] Joseph Turow, Annenberg Pub. Policy Ctr. of the Univ. of Pa., Americans and Online Privacy: The System Is Broken 4 (2003), available at http://www.asc.upenn.edu/usr/jturow/internet-privacy-report/36-page-turow-version-9.pdf
See also, Schwartz, supra note 64 at 2076-82.
[71] See supra notes 27 through 28 and accompanying text.
[72] 16 C.F.R. § 310.4(b)(1)(iii)(B), § 310.6(a) (2004); 47 C.F.R. § 64.1200(c)(2), § 64.1200(f)(9) (2004).
[73] 16 C.F.R. § 310.4(e) (2004).

[74] National Federation of the Blind v. FTC, 303 F. Supp. 2d 707 (D. Md. 2004).
[75] Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).
[76] *Id*. at § 1011(b).
[77] 15 U.S.C. § 45 (a) (2) (2004).
[78] FTC Telemarketing Sales Rule, Final Amended Rule, (TSR) 68 F.R. 4580, 4584-85 (2003).
[79] National Association of State Charity Officials, Public Comments In the Matter of Telemarketing Review FTC File No. R411001 at 3-5 (April 16) (2002).
[80] FTC Notice of Proposed Rulemaking (NPRM) 67 F.R. 4492, 4516 (2002).

[81] DMA Nonprofit Federation, Public Comments In the Matter of Telemarketing Review, FTC File No. R411001 at 4 (April 15, 2002); Not-for-Profit and Charitable Coalition (2002) Public Comments In the Matter of Telemarketing Review, FTC File No. R411001at 21 (April 15, 2002).
[82] 68 FR 4580, 4585 (Jan. 29, 2003).
[83] Nat'l Fed. for the Blind v. FTC, 303 F. Supp. 2d 707 (D. Md. 2004).
[84] *Id*. at 714.
[85] *Id.*at 714 n. 3.
[86] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).
[87] *Id.*
[88] Riley v. National Federation for the Blind of North Carolina, Inc., 487 U.S. 781, 801(1988).
[89] U.S. v. American Library Assoc., Inc., 539 U.S. 194 (2003).
[90] Madigan v. Telemarketing Assoc. Inc., 538 U.S. 600 (2003).
[91] Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, p. 312 (1976).
[92] Planned Parenthood League v. Attorney General, 464 N.E.2d 55, 61 (Mass. 1964).
[93] Nadel, Mark S., "Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy," 4 YALE J. ON REG. 99, 110 (1986).
[94] FTC Telemarketing Sales Rule, Final Amended Rule, (TSR) 68 F.R. 4580, 4636 (2003).
[95] See supra notes 17 through 20 and accompanying text.
[96] Fraternal Order of Police v. Stenehjem, 287 F. Supp. 1023 (D. N.D. 2003).
[97] *Id.* at 1025.
[98] *Id*. at 1029.
[99] *Id.*
[100] *Id.*
[101] FTC Telemarketing Sales Rule, Final Amended Rule, (TSR) 68 F.R. 4580, 4631 (2003).
[102] *Id*. at 4637, quoting Hudson Bay-Goodman Public Comments in the Matter of Telemarketing Review, FTC File No. R411001, 6-7 (2002).

[103] Philip Kotler, & Sidney Levy, "Broadening the Concept of Marketing, " 33 J. OF MARKETING, 10 (1969).
[104] Philip Kotler, & Alan Andreasen, Strategic Marketing for Nonprofit Organizations, 3rd ed. p.25 (1987).

[105] *Id. at 30.*
[106] Michael L. Rothschild, "Marketing Communications in Nonbusiness Situations or Why It's So Hard to Sell Brotherhood Like Soap", 43 J. OF MARKETING 11 (1979).
[107] John Hanson, "Breaking the Cycle of Marketing Disinvestment: Using Market Research to Build Organisational Alliances," 6 INTERNATIONAL JOURNAL OF NONPROFIT AND VOLUNTARY SECTOR MARKETING, 33 (2001); Mike Riley, & Jim McCullough, "A Survey of Marketing Activity in Nonprofit Organizations," in F. Kelly Shuptrine & Peter Reingen, eds. Nonprofit Marketing: Conceptual and Empirical Research, 40 (1982).
[108] Luis, Ignatio, et.al. "The Market Orientation Concept in the Private Nonprofit Organization Domain," (2002) INTERNATIONAL JOURNAL OF NONPROFIT AND VOLUNTARY SECTOR MARKETING 55, 67 citing Hayden, V. "How to Increase Market Orientation," 7 JOURNAL OF MANAGEMENT IN MEDICINE, 29 (1993).
[109] Administrative Procedures Act, 5 U.S. C. § 706 (2004).
[110] FTC Telemarketing Sales Rule, Final Amended Rule, (TSR) 68 F.R. 4580, 4634 (2003).
[111] None of these issues were examined in the Maryland district court opinion upholding the nonprofit TSR provisions.
[112] FTC Telemarketing Sales Rule, Final Amended Rule, (TSR) 68 F.R. 4580, 4626 (2003).
[113] *Id*. at 4640.
[114] *Id.* at 4626 n. 533.
[115] John R Aguilar, "Over the Rainbow European and American Consumer Protection Policy and Remedy Conflicts on the Internet and a Possible Solution," 4 INT'L J. COMM. L. & POL'Y 1 (1999/2000); Donna Hoffman, Thomas P., Novak, Ann E. Schlosser, "Locus of control, Web use, and consumer attitudes toward Internet regulation," 22 JOURNAL OF PUBLIC POLICY & MARKETING, 41 (2003).
[116] Ross D. Petty, "Wireless Advertising Messaging: Legal Analysis and Public Policy Issues," 22 J.OF PUBLIC POLICY & MARKETING 71 (2003).