DO-NOT-CALL: TELEMARKETING LEGISLATION REVIEW AND STATUS

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The government's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order in a free and civilized society.[1]

I. INTRODUCTION

They will never give up. Telemarketers have called us in the morning, in the afternoon, and in the evening. They have interrupted our meals, our sleep, and our showers. No matter how many requests we made, no matter how rude we were, they kept calling.[2] Our state[3] and federal legislators wrote statutes; our agencies wrote regulations, but they still kept calling. Finally, in 2003, the Federal Trade Commission (FTC) set up a do-not-call registry[4], but they challenged its' constitutionality.[5] After some initial success in the district court, they lost on appeal in the Tenth Circuit.[6] Some of the telemarketers have now withdrawn their challenges, but others apparently intend to take it to the Supreme Court. They will never give up.

The purpose of this article is to examine the constitutional challenges to the establishment and maintenance of the do-not-call registry. The first section lays the foundation, reviewing the pertinent statutes and regulations in place before the establishment of the do-not-call registry. The second section discusses the constitutional challenges and the current status of the litigation. Our thesis, and conclusion, is that the constitutional challenges are without merit and most likely will not succeed with the Court. Although the telemarketing issue may soon be moot, the larger issues involved

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[1] Frisby v. Schultz, 487 U.S. 474, 484 (1988).

[2] No matter how frequently and loudly people complain, there is evidence that telemarketing is a very profitable activity. It generates $275 billion annually and employs approximately 5.4 million persons in the United States. *See* Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 284 F.Supp. 2d 1266 (D. Colo., 2003). If all telemarketing were unwelcome and unprofitable, economic activity of this magnitude could not persist. *See,* Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation – A Whole Lotta Law Goin' On!,* 3 WYO. L. R. 168, 171 (2003).

[3] In an effort to curb telemarketing practices all but 5 state legislatures enacted statutes, *see* Pattison & McGann, *Id.*

[4] 16 C.F.R. §310.4(b).

[5] *See,* U.S. Security v. Fed. Trade Comm'n, 282 F.Supp. 2d. 1285 (W.D. Okla., 2003); Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 284 F.Supp. 2d 1266 (D. Colo., 2003).

[6] Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228 (10th Cir. 2004).

will continue to be litigated when First Amendment rights come into conflict with privacy rights. The court decisions and discussions reviewed here will become a valuable part of the literature for future constitutional litigation.

II. STATUTORY AND REGULATORY BACKGROUND

The goal of the federal legislation is to protect consumers against unwanted telephone solicitations. Congress, by delegating authority to the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), sought to protect the privacy of the American home.

A. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

The Telephone Consumer Protection Act (TCPA)[7] defined telephone solicitation as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person…."[8] Three kinds of calls were specifically prohibited: (1) auto dialed calls to emergency service providers, cellular and paging numbers, and to a patient room in a medical facility, (2) pre-recorded calls to a residence without consent, and (3) unsolicited advertising to a fax machine.[9]

The definition exempted several categories of calls, including non-commercial calls from charitable or political organizations. It also did not include calls to persons who have given prior express invitation or permission to call,[10] persons with whom the caller has an established business relationship,[11] or a tax-exempt nonprofit organization.[12] The meaning of "established business relationship" has been recently litigated. The issue was if a customer had maintained an "established business relationship" after requesting to be placed on the business do-not-call list, but continuing to receive limited services.[13] The court answered in the negative, "Maintaining some limited commercial tie to a business should not leave consumers at the mercy of unbridled telemarketing efforts."[14]

The TCPA delegated rule-making authority to the FCC to secure privacy interests[15] by prescribing regulations to implement the requirements.[16] The FCC then created the first do-not-call list, a mechanism by which consumers could "opt out" of the telephone solicitors' lists.[17] The FCC required sellers to keep an internal "do-not-call"

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[7] Telephone Consumer Protection Act of 1991, 47 U.S.C. §§ 227(c)(I)(A}-(E), (cX3) (West 2001 & Supp. 2003).
[8] *Id.* § 227 (a) (3).
[9] *Id.* § 277 (b)(1).
[10] *Id.* § 227 (a) (3)(A).
[11] *Id.* § 227 (a) (3)(B).
[12] *Id.* § 227 (a) (3)(C).
[13] Charvat v. Dispatch Consumer Servs., No. 99AP-1368, 2000 WL 1180258 (Ohio App. 10 Dist. Aug. 22, 2000), *rev'd* 769 N.E.2d. 829 (Ohio 2002).
[14] *Id.* at 834.
[15] 47 U.S.C. § 227(c).
[16] *Id.* § 277 (b)(2).
[17] 47 C.F.R. § 64.1200(e)(2) (2002).

list that was generated from consumer requests.[18] The FCC also required the solicitors to train their telemarketers to understand and comply with the requirement.[19]
The TCPA provided numerous remedies for violation of the act. A claim could be brought in state court with a remedy of $500, or the actual monetary loss, whichever is greater.[20] The TCPA also created a private cause of action for people who received a prohibited call or who were called within twelve months of a "do-not-call" request.[21] Specifically the Act provided:

> A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, *if otherwise permitted by the laws or rules of court of a State* bring in an appropriate court of that State (emphasis added) [22]

As indicated by the frequency of litigation, this section could have been written less ambiguously. In several instances when private parties attempted to pursue their rights under the TCPA, subject matter jurisdiction of the state courts had been questioned. Because of the words emphasized in the quote above, it has been asserted that the TCPA did not grant private right of action without the express authorization of state law.[23] Many defendants have argued that each state legislature must have affirmatively "opted-in" before state courts could have subject matter jurisdiction over TCPA private actions. Only one court in Texas agreed with the defendant's argument.[24] All other courts that have considered the issue have determined that the clause recognizes that states may "opt-out" or refuse to exercise the jurisdiction authorized by the statute.[25] Treble damages were available for a knowing or willful violation of the act. State Attorney Generals could seek injunctive relief in a federal court and recover $500 fines and treble damages.

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[18] *Id.*
[19] *Id.* § 64.1200(e)(2)(ii).
[20] 47 U.S.C. § 227(c)(5)(b).
[21] 47 U.S.C. § 227(b)(3).
[22] 47 U.S.C. § 227(c)(5).
[23] *See* Zelma v. Total Remodeling, Inc., 756 A.2d 1091 (N.J. Super. Law Div. 2000); Zelma v. Market U.S.A., 778 A.2d 591 (N.J. Super. App. Div. 2001); Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000); Kaplan v. Democrat and Chronicle, 698 N.Y.S. 2d 799 (N.Y. App. Div. 1999); Kaplan v. First City Mortgage, 701 N.Y.S.2d 859 (N.Y. City Ct. 1999); Adamo v. AT&T, 2001 WL 1382757 (Ohio App. 8 Dist. 2001); Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc., 16 W.W.3d 815 (Tex. App. 2000).
[24] Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc., 16 W.W.3d 815, 817 (Tex. App.. 2000).
[25] *See* Zelma v. Total Remodeling, Inc., 756 A.2d 1091 (N.J. Super. Law Div. 2000); Zelma v. Market U.S.A., 778 A.2d 591 (N.J. Super. App. Div. 2001); Schulman v. Chase Manhattan Bank, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000); Kaplan v. Democrat and Chronicle, 698 N.Y.S. 2d 799 (N.Y. App. Div. 1999); Kaplan v. First City Mortgage, 701 N.Y.S.2d 859 (N.Y. City Ct. 1999); Adamo v. AT&T, 2001 WL 1382757 (Ohio App. 8 Dist. 2001).

B. TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT OF 1994

The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA)[26] strengthened the authority of the Federal Trade Commission to protect consumers from deceptive telemarketing. Congress specifically found that consumers were being increasingly victimized by telemarketing fraud and other abuses. It required the FTC to prescribe rules that included; (1) a requirement that telemarketers not undertake a pattern of unsolicited telephone calls that a reasonable consumer would consider coercive or abusive of the right to privacy, (2) a restriction on the hours of the day and night when unsolicited telephone calls could be made to consumers; and (3) a requirement that any person engaged in telemarketing for the sales of goods and services promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services.[27]

C. FTC TELEMARKETING SALES RULE, 1996

The Telemarketing Sales Rule (TSR), [28] promulgated according to the Congressional mandate in the TCFAPA, required prompt disclosures by telemarketers to contacted parties and provided for enforcement and stiff penalties to those who didn't comply.

First, no calls could be made before 8 am and after 9 pm. But, if people have requested not to be called by telemarketers they may not be contacted at any time. Second, the TSR required telemarketers to disclose four things: (1) it was a sales call, (2) the nature of the goods or services being offered, (3) no purchase was necessary to win any prizes being offered, and (4) the price of the goods or services before money is requested.[29] In addition, express, verifiable authorization must have been obtained before any checking account could be charged. The TSR also prohibited credit card laundering and threatening or repetitive calls.

D. PRE REGISTRY CONSTITUTIONAL CHALLENGES

Congress recognized that individuals' rights to privacy must be balanced with commercial freedom of speech. The analysis used to determine the constitutionality of the TCPA was the four-part test designed by the Supreme Court to determine the lawfulness of restrictions on commercial speech,[30] Under the test a court must determine if (1) the speech deserves first amendment protection (must not be unlawful or misleading), (2) the asserted governmental interest is substantial, (3) the limitation

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[26] The Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 USCA § 6101-6108 (1994).
[27] *Id.*
[28] Federal Trade Commission Telemarketing Sales Rule of August 16, 1995, 16 CFR 310.1 *et seq.*, 60 Fed. Reg. 43842 (August 16, 1995.).
[29] *Id.* at § 310.4.
[30] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

directly advances the asserted governmental interest, and (4) the limitation is not more extensive than necessary to serve the governmental interest.[31]

Courts have generally responded favorably to telemarketing regulations.[32] The TCPA has been held constitutional in both jurisdictions where it has been challenged.[33] In the first case the telemarketers argued that the FCC impermissibly distinguished speech based on the basis of commercial content.[34] In the second case, even though content neutrality existed, the telemarketers argued that the entire statute should be declared constitutionally invalid because a portion of it distinguishes between commercial and noncommercial speech.[35] Finding the TCPA to be content neutral and applying the time, place or manner test,[36] the telemarketers' arguments were rejected. The courts concluded that privacy of the home was a significant interest and recognized that the telephone is a uniquely invasive technology that allows solicitors to come into the home. Therefore, the TCPA and its resulting regulations are tailored to reasonably fit a goal of protecting privacy.

III. FEDERAL DO-NOT-CALL REGISTRY AND ITS AFTERMATH

Following the adoption of the Telephone Consumer Protection Act of 1991 and the subsequent addition in 1994 of the Telemarketing and Consumer Fraud And Abuse Prevention Act, it became apparent that continued problems were being created through the use of telemarketing. From the inception of the telemarketing rules, Congress had found action was necessary to prevent deceptive and abusive telemarketing acts or practices.[37] By 2000, however, it was becoming increasingly clear that the rules in place were unsatisfactory to provide the protection from telemarketing practices that was desired by the public. In that year the Federal Trade Commission began its review of its telemarketing rules.

A. PRELUDE TO THE LIST

With the inception of the review of the telemarketing rules, the FTC solicited comments from both the public and industry. Approximately 64,000 responses were received by the FTC, roughly 49,000 from individuals or organizations, and 14,700 as customers of "Gottschalks" in its supplemental comment. Of those responses, 33,000 of the individual comments favored a "national registry" and 13,700 opposed the registry.

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[31] *Id.*
[32] Joseph R. Cox, *Telemarketing, the First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL'Y 403, 419 (1996).
[33] *See* Moser v. FCC, 811 F. Supp. 541 (D. Or. 1992), *rev'd*, 46 F.3d 970 (9th Cir. 1995); Szefczek v. Hillsborough Beacon, 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995).
[34] Moser, 811 F. Supp. 541 (D. Or. 1992), *rev'd*, 46 F.3d 970, 973 (9th Cir. 1995).
[35] Szefczek, 668 A.2d 1099, 1103 (N.J. Super. Ct. Law Div. 1995).
[36] Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989).
[37] 16 U.S.C.A §6102.

Of the Gottschalks customers, 11,500 supported the registry while 1,800 were in opposition.[38]

Of special interest was the effectiveness of the prior rule allowing a consumer to specifically notify a telemarketer of their desire to be removed from the telemarketer's list. Upon such notice by the consumer the telemarketing entity was prohibited from further contact with the requesting consumer. The telemarketing industry maintained the position, as one would expect, that the "company-specific" system was adequate to protect the consumer and not unduly burdensome on the industry. The comments from consumer and law enforcement reflected different sentiments. Noted problems were:

- that a consumer would have to repeatedly request removal with each telemarketer call;
- the do-not-call requests were often ignored;
- there was no way for consumers to verify that their names had been removed;
- that the enforcement procedure was confusing and time consuming, with the evidentiary burden on the consumer requiring detailed lists of calls received; and,
- the difficulty of enforcement of judgments achieved by consumers.[39]

Moreover, it was observed that even the first call was an intrusion into the privacy and seclusion of the consumer, and with an estimated 16 billion telemarketing calls per year[40] that call volume was rapidly escalating.

After notice and review, in January 2003 the Federal Trade Commission issued its amended rules incorporating an "abusive telemarketing act…initiating any outbound telephone call to a person when the person's telephone number is on the 'do-not-call' registry . . . to induce the purchase of goods or services. . . . "[41]. Following approval of the amended rules by the FTC, Congress passed the Consolidated Appropriations Act Resolution[42] in February 2003, and Do-Not-Call Implementation Act[43] on March 11, 2003. The Consolidated Appropriations Act authorized the FTC utilize up to 18.1 million dollars derived from fees for institution and operation of the do-not-call provisions of the telemarketing act. The Implementation Act authorized the FTC to promulgate regulations to enforce the "do-not-call" provisions and instructed the FCC to issue within 180 days its' final rules with regard to implementation, and to coordinate with the FTC to achieve consistency between the two agencies. On July 25, 2003 the FCC finalized its rules, essentially the same as those of the FTC, however adding coverage of those entities not subject to FTC regulation such as banks, insurance

[38] 68 Fed. Reg. 4580 at 4629, nn. 574-575.
[39] *Id* at 4629.
[40] *Id* at 4630 n. 591.
[41] 16 C.F.R. §310.4(b).
[42] Pub. L.No. 108-7, 117 Stat.11 (2003)
[43] 15 U.S.C. §1601 (2003).

companies, and common carriers.[44] On July 31, 2003 the FTC promulgated its' rules establishing the fee structure for access to the do-not-call registry.

B. THE TELEMARKETING SALES RULE, 2003

Both the FTC and FCC rules relating to telemarketing activities have been modified in implementing the do-not-call provisions, although the FTC rules have received the most notice.[45] The primary emphasis in review of the adopted rules will be on the FTC version, and specifically as to the do-not-call provisions, although other modifications were made.

Generally under the FTC rules it is a violation to engage in a "pattern of calls" which constitutes an "abusive telemarketing act or practice."[46] Included in the list under §310.4(b) (1) of prohibited practices are those acts by a telemarketer, or a seller engaging a telemarketer:

> (i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with the intent to annoy, abuse or harass any person at the called number;[47]
> (ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with §310.4(b)(1)(iii);
> (iii) Initiating any outbound telephone call to a person when:
> (A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of a charitable organization for which a charitable contribution is being solicited; or,
> (B) that person's telephone number is on the 'do-not-call' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services . . . .[48]

As used in the TSR, "telemarketer" refers to the person who "initiates or receives" telephone calls to or from a customer or donor,[49] whereas a "seller" intends "any person, who is in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer. . . . "[50] Of interest in

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[44] Mainstream Marketing Services, Inc. v. Federal Trade Comm'n, 283 F. Supp. 1151 at 1157-1158. (D. Colo. 2003), *rev.* 358 F.3d.1228 (10th Cir. 2004).
[45] The FTC rules may be generally found 16 C.F.R. §§310.1-310.9, and the FCC rules at 47 C.F.R. §64.1200.
[46] 16 C.F.R. §310.4(b)(1).
[47] *Id,* at §310.4(b)(1)(ii).
[48] *Id* ,at §310.4(b)(1)(i)-(iii).
[49] *Id,* at §310.2(bb).
[50] *Id,* at §310.2(z).

these definitions is the concept that the telemarketing activity does not pertain only to outgoing calls, but also includes incoming calls. Additionally, an intermediary could find themselves implicated as a "seller" even though they did not directly convey the goods or services.

The primary novelty of the amended FTC rules is the inclusion of the availability of the "do-not-call registry." The registry allows persons to request their telephone number be included in the registry as an effective prohibitive notice to telemarketers. Under the current system, a telemarketer is required to check the registry no less than once every three months and to remove, or "scrub", from their call lists those listed in the registry.[51] But note that placing a number on the list does not restrict charitable or political solicitations, since the registry only restricts calls relating to the purchase of goods or services. This differentiation in treatment based on content has served as the primary basis for suits contesting the validity of the TSR.

Whereas charitable solicitations were not covered in prior iterations of the telemarketing rules, due to the PATRIOT Act[52], charitable solicitations were added to the "company-specific" provisions which allow the recipient of the call to request exclusion. Specifically, the PATRIOT Act required, among other things, that the definition of telemarketing and the Telemarketing Act be amended to include charitable solicitations by for-profit fundraisers within the definition of telemarketing.[53] Not surprisingly, however, there is not currently any provision which would allow exclusion, either generally or by specific request, from political solicitations.

In order to provide some comfort zone for telemarketers the TSR incorporates both exemptions from application of the rule and a "safe harbor" provision restricting liability. Telemarketers may find exemption from the registry provision if there is:

- an express written agreement, including signature and designating the telephone number, of the person to be called;[54]or,
- an established business relationship with the recipient of the call, designated as purchase, rental or lease of goods, services or financial transaction with the customer within 18 months before the call, or an inquiry by the consumer within 3 months before the call.[55]

Reflecting concerns expressed by the industry during the rule making procedures, the "safe harbor" provisions of the TSR in essence treat the plight of the telemarketer who can show good faith attempts at adherence to the rule. To qualify for safe harbor protection from the do-not-call provisions, the seller or telemarketer must show that they have as a routine part of their business:

- written procedures to comply with the do-not-call registry and company-specific requests;

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[51] *Id,* at §310.4(b)(3)(iv).
[52] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), P.L. 107-56 §1011, 115 Stat. 272, 275.
[53] *Id.*
[54] 16 C.F.R. §310.4(b)(1)(ii)(B)(i).
[55] *Id,* at §310.4(b)(1)(ii)(B)(ii). "Established business relationship" defined 16 C.F.R. §310.2(n).

- trained affected personnel in their procedures;
- maintained and recorded a list of numbers the seller or organization may not contact;
- instituted a process to avoid calling registry numbers and uses a version of the registry obtained from the FTC no more than three months old;
- a system which monitors compliance with the provision addressing annoyance or harassment calls; and
- the call is the result of error.[56]

In order to obtain access to the do-no-call registry, the seller or telemarketer must register with the FTC. The list is organized by area code and the data for the first five area codes obtained by the seller or telemarketer are free of charge. Thereafter the annual charge is $25 per area code, for a maximum of $7,375.[57] The FTC has given notice of rulemaking, however, proposing increasing the charge to $29 per area code on an annual basis. In order to frustrate "sharing" of the data, the TSR specifically makes it an abusive telemarketing practice to "sell, rent, lease, purchase, or use" the list for any purpose other than compliance[58], and simply prohibits acts to share the cost of access or divide the cost among clients of the telemarketer or service provider.[59]

C. THE INDUSTRY RESPONDS – MAINSTREAM MARKETING, ET. AL.

Quite literally with the stability of their livelihood at stake, the telemarketing industry fired their initial salvos in response to the new FTC and FCC rules. Plaintiffs U.S. Security, Chartered Benefit Services, Inc., Global Contact Services, Inc., Infocision Management Corp., and Direct Marketing Assoc. (generally referred to collectively as "U.S. Security") filed suit in the U.S. District Court, Western District of Oklahoma, basing their action on a lack of authority by the FTC to promulgate the do-not-call registry aspects of the telemarketing sales rule. On the same day, plaintiffs Mainstream Marketing Services, TMG Marketing, Inc., and American Teleservices Association (generally referred to collectively as "Mainstream Marketing") filed their action in the U.S. District Court, Colorado asserting as their primary cause a violation of the First Amendment's guarantee of free speech by the enacted rules. Subsequently similar assertions regarding the FCC's enacted rules involving the do-not-call registry were also filed. In both the *U.S. Security* and the *Mainstream Marketing* cases the respective courts ruled in favor of the plaintiffs, enjoining implementation of the rules.[60] In addressing the *U.S. Security* decision, the United States Congress promptly acted by specifically authorizing the adoption and implementation of the do-not-call registry rule[61]. Appeal was taken by the FTC in all actions and the cases were joined in a single action before the

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[56] *Id*, at §310.4(b)(3)(i)-(iv).
[57] *Id*, at §310.8.
[58] *Id*, §310.4(b)(2).
[59] *Id*, at §310.8(c).
[60] *See*, U.S. Security v. Federal Trade Commission, 282 F.Supp. 2d. 1285 (W.D. Okla., 2003); Mainstream Marketing, Inc. v. Federal Trade Commission, 284 F.Supp. 2d 1266 (D. Colo. 2003).
[61] *See*, P.L. 108-82, 117 Stat. 1006 (2003).

United States District Court, District of Colorado in the case *Mainstream Marketing Services, Inc. v. Federal Trade Commission*. [62] The injunction to the implementation of the rules was stayed by the United States Tenth Circuit Court, and thereafter in a recent decision the Tenth Circuit reversed the District Courts in favor of the FTC.[63]

The U.S. Tenth Circuit considered four primary issues on the appeal of *Mainstream* decision:

1. First Amendment free speech challenge to the do-not-call registry provision;
2. First Amendment challenge to the do-not-call registry access fees;
3. The FCC's "established business relationship" exemption; and,
4. The lack of authority of the FTC in enacting the do-not-call legislation.

The Tenth Circuit, in deciding in favor of the FTC gave the greatest consideration to the free speech defense. In its opinion the latter three factors were treated as "other issues."

1. Free Speech and the Do-Not-Call Registry

In the most powerful argument against the do-not-call registry provision, the plaintiffs in *Mainstream* challenged the registry provision based upon alleged interference with free speech as guaranteed and protected by the First Amendment,[64] and in particular as a content based differentiation. *Mainstream* asserted that the do-not-call rule was first essentially a rule based on faulty reasoning in that the FTC and FCC has never effectively enforced the "opt-out" provision which would allow the recipient of a telemarketing call to request they be removed from the caller's list and prohibit further calls. *Mainstream* argued that the opt-out provisions were little known and little understood by the public and, therefore, to say that they were ineffective was premature.[65] Citing a survey submitted to the FTC, *Mainstream* gave weight to the data that of the 1,000 consumers surveyed, only one-third knew of the opt-out provision, and of that "almost two-thirds who did so reported the requests stopped unwanted calls."[66] Unknown is what *Mainstream* considers "almost two-thirds" and the corollary assumption that the opt-out provision was, at best, successful only 66% of the time, and then only as to the merchants who had individually been notified.

The real meat of the *Mainstream* argument is the differential treatment of commercial vs. non-commercial calls. The do-not-call rules principally relate only to those entities making commercial telemarketing calls. The do-not-call rules do not apply to charitable or political enterprises, except as to the provisions resulting from the PATRIOT Act which incorporated charitable solicitations represented by for-profit telemarketers. Thus an impermissible distinction was asserted between the value of commercial and non-commercial speech.

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[62] Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228 (10th Cir. 2004).
[63] *Id*.
[64] U.S. Const., amend I. "Congress shall make no law. . . abridging the freedom of speech. . . ."
[65] Brief for Mainstream Marketing, Inc. at 9-10, Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228 (10th Cir. 2004).
[66] *Id.* at 13.

It is clearly settled by prior case law that commercial speech may be given a lower degree of protection under the First Amendment.[67] But that lower level of protection is not subject to the arbitrary whims of government.[68] Commercial speech that is fraudulent or deceptive has long been determined to be subject to regulation.[69] That commercial speech which is both lawful and truthful then slides into the thorny, and at best, subjective grey area of constitutional tests.

A controlling authority in the *Mainstream* case, as recognized by the parties and the courts involved, is *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*.[70] The *Central Hudson* case involved a state regulatory scheme which would prohibit electric utilities from promotional advertising. The stated purpose for the ban was to foster conservation of energy resources. The ban, however, did not apply to other energy users or competitors of the electric industry. Recognizing that commercial speech does not retain the same protections of other forms:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[71]

Thus, *Central Hudson* is cited as the source of the test to determine if regulation of commercial speech is available and appropriate. Specifically, the reviewing court must determine:

1. is the expression protected by the First Amendment;
2. is the governmental interest substantial;
3. does the regulation directly advance the governmental interest asserted; and,

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[67] Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 1817 (1977).
[68] "Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).
[69] "The First Amendment's concern for commercial speech is based on the informational function of advertising…. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it." Central Hudson Gas and Electric Corporation v. Public Service Comm'n of New York. 447 U.S. 557, 563 (1980); *See also*, Friedman v Rogers, 440 U.S. 1 (1979).
[70] Central Hudson Gas and Electric Corporation v. Public Service Commission of New York. 447 U.S. 557, (1980).
[71] *Id* at 564.

4. is the regulation more extensive than necessary to serve that interest?[72]

The Tenth Circuit in the *Mainstream* case reduced the test to the latter three points, effectively assuming the expression was one otherwise protected as free speech. The final two factors were further summarized as the "reasonable fit" between the regulation and the government's interest necessary to validate the regulation.[73]

a. Substantial Government Interest?

In satisfaction of substantial interest requirement of *Central Hudson*, the FTC put forth the justification of "1) protecting the privacy of individuals in their home, and 2) protecting consumers against the risk of fraudulent and abusive solicitation."[74] In promptly finding the existence of the substantial interest, the Court placed stress on the sanctity of the home and the expectation of privacy, in essence quite enjoyment, the protection of which would be a proper objective of governmental regulation. Referenced in the *Mainstream* opinion, and of particular note in the briefing of all parties, were the cases of *Rowan v. United States Post Offices Dep't.*[75] and *Frisby v. Schultz.*[76]

In *Rowan* the contest involved the Postal Revenue and Federal Salary Act of 1967 under which the recipient of mail could require a mailer to remove the recipient's name from their mailing lists and stop all future mailing to the recipient, and specifically under Section 4009 those mailings the "addressee in his sole discretion believes to be erotically arousing or sexually provocative."[77] Upon notice by an addressee of the receipt of objectionable material, the Postmaster would direct the mailer to cease mailing to the addressee and the deletion of the addressee's name from their lists. Should the Postmaster be notified or have reason to believe the directive had been violated, the Postmaster would, after investigation and opportunity for hearing, be authorized to seek a court order for compliance. The Court, in an opinion replete with commentary extolling the concept of privacy, determined that the regulation was constitutional, irrespective of its impact on commercial speech.

> In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . .
> . . . .
> Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not

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[72] *Id* at 556.
[73] "As we have said, "[t]he last two steps of the Central Hudson analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." United States v. Edge Broad Co., 509 U.S. 418, 427-428. Citing Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986).
[74] Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228 (10th Cir. 2004).
[75] Rowan v. United States Post Offices Dep't, 397 U.S. 728 (1970).
[76] Frisby v. Schultz, 487 U.S. 484 (1988).
[77] 39 U.S.C. s 4009(a) (1964 ed., Supp. IV).

> want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. . . .
> . . . .
> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. . . . In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. . . .
> . . . .
> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.[78]

The novel aspect of *Rowan* from the perspective of *Mainstream* is that, in spite of the result being contrary to the telemarketing industry position and its commentary obviously being slanted to that of regulation, the telemarketing industry sought to use *Rowan* as authority for its position by interpreting *Rowan* as support for company specific notice as opposed to the blanket do-not-call system. Seizing on the individual election of Rowan, the telemarketing industry asserted the unconstitutionality of the do-not-call provision "because the government decides which calls to block and which calls to permit. . . . "[79] Reaching even further, the telemarketing brief postulated that the do-not-call provision would even allow third parties to list numbers without verification of the right to do so.[80] The telemarketing position ignores the construction that the do-not-call registry provision does allow individual decision making by simply providing another, and for many more efficient choice, to prevent virtually all commercial sales calls. Should an individual wish to proceed on a case by case basis, the opt-out provision would still be available to those so wishing.

Granted, should the do-not-call registry provision have been one forced upon all households without their consent, the provision would likely be in violation of free speech rights. Governmental entities generally do not have the right or power to decide what messages are available to the public and which are not. The Court in *Martin v. City of Struthers Ohio*[81] was faced with a city ordinance which prohibited any person from ringing the bell or calling the occupant of a household to the door for the purpose of distributing handbills, circulars, or other advertising. The ordinance had no feature reflecting individual choice as with the do-not-call registry. It was simply the city "attempt[ing] to make this decision for all its inhabitants. . . .[82]substitut[ing] the judgment

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[78] Rowan, 397 U.S. at 736-738.
[79] Brief for Mainstream Marketing, Inc., *supra* note 65 at 19.
[80] *Id*.
[81] Martin v. City of Struthers Ohio, 319 U.S. 141 (1943).
[82] *Id*.

of the community for the judgment of the individual householder."[83] Recognizing that such ordinances have a legitimate aim, such as preventing annoyance, intrusion on the hours of rest, and commission of crime, [84] the ordinance was found excessive.

But even with the facts of *Martin*, Justice Reed of the Court dissented. Although not likely to hold sway anymore now than then, Justice Reed found no violation of free speech or religion (often the circulars were deemed to be religious in nature.) According to the dissent by Justice Reed, "no ideas [were] suppressed. . . . [n]o censorship [was] involved. . . . [t]he freedom to teach or preach by word or book [was] unabridged, save only the right to call a householder to the door."[85]

b. Reasonable Fit

In determining a "reasonable fit" by the regulation under review, the Court must determine that it directly advances the interest sought to be protected and that it is "narrowly tailored" to fit the purpose. The interest sought to be protected by the do-not-call registry is that of the privacy and tranquility of the recipient of calls and their interest in avoiding unwanted intrusion into that privacy. The brunt of the applicable argument by the industry was that the do-not-call registry was not sufficiently tailored; that there were numerous less restrictive methods which could have been used; and that the opt-out provisions were largely unknown and therefore untried. The Tenth Circuit effectively brushed the industry position aside in its decision, noting that the "standard does not require the government's response to protect substantial interests be the least restrictive measure available."[86]

c. Effectiveness of the List

Because the do-not-call registry provision applies only to commercial calls, industry alleged an "underinclusiveness" which represented a content based distinction. Central in the industry argument was *City of Cincinnati v. Discovery Network*.[87] Cincinnati had adopted a city ordinance which prohibited the distribution of commercial handbills by use of "news racks" on public property for the ostensible purpose of safety and attractiveness. In finding that there was not a "reasonable fit" the Court recognized that Cincinnati had required the removal of only the "commercial handbill" news racks which accounted for approximately 62 of some 1500-2000 news racks located on public property.[88] Although dissemination of news may be considered a higher calling, the ill sought to be stopped remains the same for both types of publications. It can hardly be said that a newspaper rack is safer or more attractive than those that contain handbills.

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[83] *Id* at 144.
[84] *Id* at 144.
[85] *Id* at 154.
[86] Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228,1238 (10th Cir. 2004), *citing* Board of Trs. of State Univ. of N.Y. v Fox, 492 U.S. 469, 480 (1989).
[87] City of Cincinnati v. Discovery Network, 507 U.S. 410 (1992).
[88] "The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it." City of Cincinnati at 407-418.

Moreover newspapers by their nature are commercial and contain numerous advertisements, which was considered the hallmark of a commercial handbill within the definition of the ordinance, and solicitations which would be common to handbills.[89] Although recognizing that the government does not have to use the "least restrictive means" available, "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."[90]

Turning to the probable effectiveness of the do-not-call registry, the FTC and in turn the Tenth Circuit found solace in divergent data. Seemingly of particular note to the Tenth Circuit was the fact that, at the time of hearing, approximately 50 million telephone numbers had registered for protection. Given that number, the estimated annual number of telemarketing calls which would be otherwise made to those numbers would have been 6.85 billion.[91] The industry asserted that no conclusions could be drawn because not all of the calls would be commercial in nature; that charitable and political calls would not be prohibited by the do-not-call registry. Interestingly, the FTC used industry testimony as to the possible/probable effect (50% lay offs) on the industry to bolster its argument of the likely effectiveness of the new rule.[92]

In addressing the content based distinction in application of the do-not-call registry, the Tenth Circuit relied on the FTC position that, at this time, they do not have adequate data to determine the need to regulate charitable and political calls. As was pointed out by the FTC, charitable calls were not subject to any regulation until 2001 with the inclusion of for-profit fundraising due to the PATRIOT Act. On that basis, it was decided to allow an opt-out provision to apply to charitable solicitations and to reserve judgment pending later determinations. Obviously the "socially redeeming" character of the omitted charitable communications would be much more problematic to prohibit.

Turning to "narrow tailoring" and the issue of whether or not there "are numerous and obvious less-burdensome alternative"[93] the Tenth Circuit determined that, although there were several industry supported alternatives, the do-not-call registry was sufficiently targeted, particularly in view of the difficulties of the other alternatives.

Again, a primary complaint of industry was the perceived lack of confidence by the government in the effectiveness of the company specific or "opt-out" system then in place. As noted above, the industry cited various data to support its position that the system was not, in fact, broken but merely unknown and unused. The FTC reached the determination, however, that there was widespread dissatisfaction with the system requiring additional measures.[94] The Tenth Circuit found that the company-specific system, even if known, had serious flaws: 1) it was extremely burdensome of consumers

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[89] The City Manager of Cincinnati determined "newspapers" were published daily or weekly and "primarily presen[t] coverage of, and commentary on, current events." *Id* at 420.
[90] *Id* at 418.
[91] Mainstream Marketing, Inc. v. Fed. Trade Comm'n, 358 F.3d.1228 (10th Cir. 2004).
[92] "The telemarketers asserted before the FTC that they might have to lay off up to 50 percent of their employees if the national do-not-call registry came into effect. . . . .It is reasonable to conclude that the telemarketer's planned reduction in force corresponds to a decrease in the amount of calls they will make. Mainstream Marketing, Inc. 358 F.3d.1228,1240.
[93] *Id.* at 1241.
[94] *Id* at 1243.

who had to repeat their request to each telemarketer, 2) experience indicated that opt-out requests were often ignored by solicitors and there was no way to verify being placed on the company-specific lists, and 3) the company's specific rules were difficult to enforce since it required the consumers to maintain detailed records of when and who called in the order to carry the burden of proof.[95]

Additionally industry promoted the concept that, even if there was the perceived dissatisfaction, other measures less severe than the do-not-call registry could correct the difficulty. Specifically industry suggested that caller ID systems, call rejection systems, and other electronic methods for satisfying the need for privacy. The Tenth Circuit was wholly unimpressed with the concept of shifting the economic burden to the consumer by requiring them to obtain the products or services necessary to meet the industry's suggestion. The court observed that as the technology evolves it would be likely that telemarketers would simply find a way around the obstructions used by consumers, "forcing consumers to compete in a technological arms race with the telemarketing industry. . . . "[96]

2. OTHER ISSUES

Three other issues were raised on appeal and were treated by the Tenth Circuit. First, are the fees due to access the registry constitutional? Second, is it arbitrary and capricious for the FCC to utilize the established business relationship exception? And third, did the FTC have statutory authority to enact the do-not-call rules?

The Tenth Circuit recognized that fees cannot generally be charged "for the enjoyment of free speech."[97] Such a fee in the nature of a license tax was stricken down in *Murdock v. Pennsylvania*[98] wherein religious groups were required to pay a fee to distribute materials door-to-door. However, precedent supports the position that license fees not used as revenue fees, but rather to offset the administration of an act or the maintenance of public order are viable.[99] The fee structure attendant to accessing the do-not-call registry was based on estimates of the cost of administration of the registry and expected numbers accessing the database. The Implementation Act specifically makes the funds derived from the access fees available only for implementation and enforcement. The fees are not in the nature of a revenue tax, but rather a deferral of costs associated with the program.

The FCC established business relationship exception came under scrutiny based on the complaint of anti-competitive bias such an exception would establish. For example, a consumer's current cell telephone provider could market new services to the consumer, but other providers would be prohibited from marketing their services. In its review the Tenth Circuit analyzed the actions the FCC had taken in considering the effects of such an exception, and the alternatives which were available. The result was based on administrative review. The Court determined that the FCC had made a reasoned policy decision and that the Court was "not empowered to substitute [their]

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[95] *Id* at 1245.
[96] *Id* at 1246.
[97] *Id* at 1246.
[98] Murdock v. Pennsylvania, 319 U.S. 105 (1943)
[99] *See*, Cox v. New Hampshire, 312 U.S. 569 (1941); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

judgment for that of the [agency] under the arbitrary and capricious standard of review."[100]

The least of the objections by industry, and one somewhat summarily dismissed by the Tenth Circuit, was that of a lack of authority by the FTC to enact the do-not-call registry. The initial attack was that pressed in the U.S. District Court, Western District of Oklahoma, in which the FTC was found to have lacked of authorization. Finding authority existed in the first instance, the Tenth Circuit rationally pointed out that, even assuming absent authority, Congress had, following the Oklahoma case, enacted special legislation approving the FTC action. And what could be clearer to substantiate the authority to promulgate rules than "An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry."[101] Need anything else be said?

D. THE FTC, FCC AND CHARITIES

Although the FTC and FCC rules are largely parallel, they diverge when considering the application of the telemarketing sales rule to charitable solicitations. At first glance the FTC rule seems sufficient to cover those solicitations made by charitable organizations in that the restricted parties, identified as telemarketers and sellers, run to "persons" defined as "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity." [102] The breadth of the coverage is limited, however, by the FTC interpretation that it may regulate only for-profit business activity, and therefore charitable organizations, as such, are beyond its jurisdiction. Given the interpretation, the FTC limited its regulation of charitable solicitations to those activities engaged in by for-profit entities on behalf of nonprofit organizations wherein at least one interstate call is made.

The FCC, on the other hand, is not hampered by either the distinction of nonprofit or for-profit organizations. However, in its rule making the FCC determined that the TCPA, from which it derives its rulemaking authority, exempted tax-exempt nonprofit activities. The Commission had previously extended this interpretation to those entities soliciting on behalf of nonprofit organizations and chose not to revisit the issue. On that basis the FCC rule does not contain a provision similar to the FTC rule applying the opt-out notice to for-profit entities soliciting for nonprofit organizations.[103] The assumed result is that nonprofits which conduct their own solicitations are not subject to the restrictions of the no-call-list or opt-out notices under the federal scheme.

In the first test of the extension of the rule to nonprofit solicitations, the FTC was successful in obtaining a summary judgment in defense of the rule. In *National Federation of the Blind v. Federal Trade Commission*[104] the National Federation of the Blind challenged the FTC telemarketing sales rule as it applies to nonprofit solicitations on constitutional grounds including First and Fifth Amendment arguments. In its

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[100] Mainstream, 358 F.3d. 1128,1248, *citing* City of Albuquerque v. Browner, 97 F.3d. 415 (10th Cir., 1996).
[101] Pub. L. 108-82, 117 Stat. 1006 (2003).
[102] 16 C.F.R. §310.2(v).
[103] 68 Fed. Reg. 143, Synopsis Point 69, Final Rule revising Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991 (codification effecting 47 C.F.R. Parts 64 and 68).
[104] National Federation of the Blind v. Federal Trade Commission, 303 F.Supp.2d. (D.Md. 2004).

decision for the FTC the District Court rejected arguments of under inclusiveness, prior restraint, and denial of equal protection, thereby approving the dichotomy between those nonprofits who solicit for themselves, and those who employ for-profit solicitors.

IV. CONCLUSION

As of the date of writing, the *Mainstream* case has not requested Writ of Certiorari to be heard before the United States Supreme Court. Reports indicate that the Direct Marketing Association (DMA), one of the larger telemarketing associations, has elected to cease its appeal, whereas the American Teleservices Association (ATA) has stated it intends to request further review by the Supreme Court.

Perhaps the most basic view of the do-not-call registry is that of a police power regulation in the nature of a barrier to trespass or nuisance. It is unlikely that even the most ardent supporter of telemarketing would espouse the "right" of the salesperson to enter a home over the objection of the resident; or deny the ability of government to provide a method by which property owners could prohibit unwanted persons from coming on their property and to punish violators. And in a real sense the unwanted telephone call is a trespass. Unlike the past when the telephone company "owned" the household telephone wiring and the telephone instruments used in the home, today that same wiring has been abandoned to the homeowner and telephone instruments are rarely leased from the telephone company. It is not the government who impedes the telemarketing call. It is the consumer who exercises their ability under the do-not-call registry to, in essence, erect an electronic "no trespassing" sign. Those consumers who wish can extend their invitation to all such calls by continuing the status quo. Those consumers who desire to receive some, but not all, can use the opt-out aspect of the company-specific provisions. The telemarketer is simply placed in the position of having to be observant for the notice posted.

The Court in *Rowan* captured the sentiment of the American Public, if one is to judge by the response to the do-not-call registry:

> "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that 'a man's home is his castle into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another. . . .[105]

[105] Rowan v. United States Post Offices Dep't, 397 U.S. 728, 737-738 (1970).