

# TO CALL OR NOT TO CALL? AN ANALYSIS OF CURRENT CHARITABLE TELEMARKETING REGULATIONS

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The telemarketing business has experienced substantial growth in the United States over the past few decades.<sup>1</sup> Recent studies have shown that on any given day there are more than 300,000 solicitors working on behalf of telemarketing companies to contact over 18 million people.<sup>2</sup> As many of us are aware, consumers often feel bothered by the intrusion of the solicitation call, and harassed by the operator who is attempting to sell a service or product.<sup>3</sup> While the telemarketing business is dominated by sales companies conducting business over the phone, charitable organizations have also taken advantage of technological advances to solicit monetary donations from a larger pool of consumers.<sup>4</sup> However, many contributors are later outraged when they learn that only a small portion of their donations actually reach the intended charity, and an even smaller amount is given to the individuals which the charity purports to serve.<sup>5</sup>

Charitable telemarketing was placed in the hot seat following the tragic events of September 11, 2001, when many sham organizations preyed upon the vulnerabilities of the American people

by claiming to raise money for the victims of the terrorist attacks.<sup>6</sup> Eliot Spitzer, the New York State Attorney General, was so concerned with these fraudulent activities that he demanded accountability and reform in fundraising activities.<sup>7</sup> Congress also responded by adding an eleventh hour amendment to the Uniting and Strengthening America by Providing Adequate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act")<sup>8</sup> that increased the Federal Trade Commission's ("FTC") regulatory power over charitable telemarketing.<sup>9</sup> Despite these efforts, questions still remain as to whether charitable telemarketing should continue, and whether the industry should be regulated further.

This Comment will address the current landscape in regulating charitable telemarketing. Part I will provide background information on telemarketing and will discuss how it has evolved into a multi-million dollar industry. Experiences in New York will be used as an example to demonstrate how fraudulent behavior may be coupled with this legitimate business. Additionally, the discussion of New York will briefly explore the con-

<sup>1</sup> Michael E. Shannon, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 385 (2001).

<sup>2</sup> Edwin L. Klett & Rochelle L. Brightwell, *Exercise in Free Speech or Just a Pain in the Neck?*, 24 PA. LAW. 38 (2002).

<sup>3</sup> Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (citing statistics that indicate 0.1% of the population enjoy receiving unsolicited calls and 69% find telemarketing to be offensive).

<sup>4</sup> See generally, Consuelo Landa Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029 (1992) (discussing how technological advances in telephone equipment have aided in expanding the telemarketing industry).

<sup>5</sup> See, e.g., *People ex rel. Ryan v. Telemarketing Associates, Inc.*, 763 N.E.2d 289, 293 (Ill. 2001), discussed *infra* Part IIIA. "[Forty-four] VietNow donors . . . assert that they would not have given money to the charity had they known how little of

their donation was to be directed to the intended cause." *Id.*

<sup>6</sup> FRAUD SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT ON POSSIBLE FRAUD SCHEMES—SOLICITATIONS OF DONATIONS FOR VICTIMS OF TERRORIST ATTACKS, at <http://www.udoj.gov/criminal/fraud/WTCPent-SpecRpt.htm> (last modified Sept. 27, 2001) [hereinafter SPECIAL REPORT ON POSSIBLE FRAUD].

<sup>7</sup> Press Release, Office of New York State Attorney General Eliot Spitzer, Report Shows How Fundraisers Profit From Charitable Giving, at [http://www.oag.ny.us/press/2002/dec/dec23b\\_02.html](http://www.oag.ny.us/press/2002/dec/dec23b_02.html) (Dec. 23, 2002) [hereinafter Press Release, How Fundraisers Profit].

<sup>8</sup> USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>9</sup> *Id.* at §1011; see also COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, CHANGES TO TELEMARKETING SALES RULE IN THE ANTI-TERRORISM LEGISLATION, at [www.case.org/issueswatch/telemarketing.cfm](http://www.case.org/issueswatch/telemarketing.cfm) (last modified June 2002) [hereinafter CASE].

cern with for-profit telemarketing companies working on behalf of charitable organizations that retain a large percentage of the contributions they solicit. Part II will outline the development of federal laws that currently regulate this field and will demonstrate how charities have been excluded from these regulations because of the unique First Amendment protections afforded to charitable organizations. Part III will discuss the FTC's response to the Congressional delegation of power within the USA PATRIOT Act, focusing on the amended definition of fraud that now incorporates for-profit organizations working on behalf of a charity. This section will also address the Supreme Court's response to percentage-based regulations, which limit the percentage of contributions that telemarketing companies may retain, and will analyze whether the retention of fees by the telemarketing company is fraudulent behavior. Part IV analyzes the constitutionality of the national "do-not-call" list and lays the legal framework for the conclusion that for-profit organizations should be restricted from unsolicited telemarketing by the national database.

## I. THE EVOLUTION OF TELEMARKETING

Telemarketing<sup>10</sup> is not a new sales technique in this country.<sup>11</sup> This phenomenon emerged dur-

ing World War II when sales companies were forced to find alternate means of reaching consumers.<sup>12</sup> Many companies elected to use telephone operators to expand their business, beginning what would ultimately become a multi-billion dollar industry by the 1990s.<sup>13</sup> The practice has continued to grow since its inception, particularly in the 1970s when the oil crisis made door-to-door sales more difficult, and in the 1980s when technological growth hit a new high.<sup>14</sup> Telemarketing has become a legitimate form of business in this country<sup>15</sup> because the telephone is one of the most convenient and cost-effective ways for organizations to make contact with potential customers. The telemarketing industry stimulated the economy by generating sales totaling more than \$274 million dollars in 2001 alone.<sup>16</sup> In addition, in this same year, four million workers were employed by the telemarketing industry,<sup>17</sup> which often provides services to those not able to leave their home easily.<sup>18</sup>

However, even with the benefits of telemarketing, "92 percent of adults in the United States reported receiving fraudulent telephone offers."<sup>19</sup> The United States Department of Justice ("DOJ")<sup>20</sup> calculates that each year one out of every six consumers is taken advantage of by fraudulent telemarketing schemes.<sup>21</sup> The DOJ concluded that "there are at least several hundred

<sup>10</sup> The Electronic Privacy Information Center defines telemarketing as:

a practice where a business initiates a phone call in order to propose a commercial transaction . . . . Business to consumer telemarketing takes place in two different ways: first, inbound telemarketing is the business use of a telephone to accept consumer calls regarding a product. Inbound telemarketing usually occurs where a consumer responds to direct mail or a television advertisement. Second, outbound telemarketing is the practice of placing calls to consumers for sales purposes.

ELECTRONIC PRIVACY INFORMATION CENTER, TELEMARKETING AND THE TELEPHONE CONSUMER PROTECTION ACT, at <http://www.epic.org/privacy/telemarketing> (last modified Jan. 8, 2003) [hereinafter EPIC]. The definitions used by the FCC and FTC will be discussed *infra* sections II and III.

<sup>11</sup> See Hebe R. Smythe, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347, 349-50 (1994).

<sup>12</sup> *Id.*

<sup>13</sup> See generally Patrick E. Michela, "You May Have Already Won. . .": *Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 PEPP. L. REV. 553 (1994) (discussing generally how a typical telemarketing company operates).

<sup>14</sup> Smythe, *supra* note 11, at 349-50; see Kertz & Burnette, *supra* note 4, at 1055.

<sup>15</sup> Smythe, *supra* note 11, at 349 n.2 (citing *Telemarketing Fraud: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong.

4 (1992)).

<sup>16</sup> Ian H. Gershengorn, *Telemarketing Restrictions and the First Amendment*, 20 COMM. LAWYER 3 (2002).

<sup>17</sup> *Id.*

<sup>18</sup> Ann Marie Arcadi, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991"*, 1991 COLUM. BUS. L. REV. 417, 423-24 (1991) (quoting Joan Mullen, President of American Telemarketing Association) ("[T]he negative perception that outbound telemarketing is an intrusion . . . are magnified by the fact that outbound telemarketing provides a service to the consumer and is profitable as a business. It provides a service to people who are housebound—they are able to conduct businesses, purchase items, and get information via telephone.").

<sup>19</sup> Klett & Brightwell, *supra* note 2, at 38 (citing a Louis Harris survey conducted for the National Consumers League).

<sup>20</sup> The DOJ defines telemarketing fraud as "any scheme to defraud in which the persons carrying out the scheme use the telephone as their primary means of communicating with prospective victims and trying to persuade them to send money to the scheme." FRAUD SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WHAT IS TELEMARKETING FRAUD?, at <http://www.usdoj.gov/criminal/fraud/telemarketing/whatis.htm> (last modified Sept. 25, 1998) [hereinafter FRAUD DEFINITION].

<sup>21</sup> Klett & Brightwell, *supra* note 2, at 39.

fraudulent telemarketing operation—some of them employing as many as several dozen people—in North America that routinely seek to defraud consumers.”<sup>22</sup> This type of fraudulent activity costs North Americans an estimated \$400 billion annually.<sup>23</sup>

Unfortunately, these fraudulent tendencies have also spread into the business of charitable telemarketing.<sup>24</sup> It is estimated that over 70% of American households make charitable donations every year and seldom are they provided information regarding where their money goes or how their contribution is spent.<sup>25</sup> This is problematic for both the legitimate charities that collect money for worthy causes and the victims of fraud.<sup>26</sup>

New York serves as an interesting case study for charitable contributions due to the Attorney General’s yearly report on charitable solicitations<sup>27</sup> and the enormous influx of donations following the terrorist attacks of September 11, 2001.<sup>28</sup> Major concerns with charitable solicitation were addressed publicly in the aftermath of September 11th,<sup>29</sup> such as the speed in which the government and charities distributed monetary contributions,<sup>30</sup> reports of individuals pretending to be

victims by falsifying documents in order to collect from charitable organizations,<sup>31</sup> and groups that held themselves out as legitimate charities but, in reality, were scamming people out of money.<sup>32</sup> However, perhaps the most significant trend in charitable telemarketing has become the increasingly high fees retained by professional telemarketing companies.<sup>33</sup>

Charitable organizations often hire telemarketing companies to conduct fundraising campaigns on their behalf, but the for-profit telemarketing companies often retain a large percentage of the donation as profit.<sup>34</sup> In New York alone there were 588 fundraising campaigns in 2001.<sup>35</sup> These campaigns solicited contributions totaling approximately \$184.7 million, but only \$58.9 million of the total amount raised was subsequently transferred to the charities.<sup>36</sup> These figures demonstrate that only 31.9% of donations were given to the charitable organizations.<sup>37</sup> In fact, only eight campaigns gave 80% or more of their gross receipts to the charities.<sup>38</sup> Perhaps most troubling is the fact that some charities lost money by hiring professional telemarketing companies because the business contract did not guarantee a specific dollar amount in return for the services of the

<sup>22</sup> FRAUD DEFINITION, *supra* note 20.

<sup>23</sup> UNITED STATES-CANADA WORKING GROUP, UNITED STATES-CANADA COOPERATION AGAINST CROSS-BORDER TELEMARKETING FRAUD 1 (1997) (“Telemarketing fraud has become one of the most pervasive and problematic forms of white-collar crime in Canada and the United States, accounting for as much as 10 percent of the total volume of telemarketing [\$400 billion per year].”); Sarah Reznick, *Fraudulent Telemarketing: Crime and Punishment*, 77 MICH. B.J. 1210, 1210 n.1 (1998).

<sup>24</sup> *Charity Fraud*, SENIORMAG.COM, at <http://www.seniormag.com/legal/charity%20fraud.htm> (2002).

<sup>25</sup> *Charitable Contributions for September 11: Protecting Against Fraud, Waste, and Abuse: Hearing Before the Subcomm. on the Oversight and Investigations of the House Comm. on Energy and Commerce*, 107th Cong. 1 (2001) (statement of Rep. Greenwood, Chairman, House Comm. on Energy and Commerce) [hereinafter *Charitable Hearing*].

<sup>26</sup> See, e.g., Jeffrey L. Bratkiewicz, “Here’s a Quarter, Call Someone who Cares”: Who is Answering the Elderly’s Call for Protection From Telemarketing Fraud?, 45 S.D. L. REV. 586 (2000) (examining the problem of telemarketing companies that specifically target and victimize the elderly in their quest to make a profit). “While individuals of all ages are susceptible to the guile of unscrupulous con-artist, fraudulent consumer practices have a devastating impact on senior citizens.” *Id.*

<sup>27</sup> STATE OF NEW YORK OFFICE OF ATTORNEY GENERAL, CHARITIES, at <http://www.oag.state.ny.us/charities/charities.html> (last modified Jan. 2003) (containing copies of these reports).

<sup>28</sup> CHARITIES BUREAU, STATE OF NEW YORK OFFICE OF AT-

TORNEY GENERAL, SEPTEMBER 11TH CHARITIES RELIEF: AN OVERVIEW AT ONE YEAR, at [http://www.oag.state.ny.us/charities/september11\\_charitable\\_report/sept11\\_report.html](http://www.oag.state.ny.us/charities/september11_charitable_report/sept11_report.html) (last modified Sept. 2002) (listing the organizations that collected money and the amount they had received after one year).

<sup>29</sup> See *Charitable Hearing*, *supra* note 25.

<sup>30</sup> See *Report: U.S. Slow to Pay 9/11 Aid*, MSNBC.COM, at <http://stacks.msnbc.com/news/853236.asp?cp1=1> (Dec. 30, 2002); *Did Contributions Reach Destinations?*, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2002/09/09/earlyshow/printable521331.shtml> (Sept. 10, 2002).

<sup>31</sup> See Jonathon Wald, *Men Charged with Defrauding 9/11 Charities*, CNN.COM, at <http://www.cnn.com/2002/LAW/12/20/attacks.theft> (Dec. 24, 2002).

<sup>32</sup> SPECIAL REPORT ON POSSIBLE FRAUD, *supra* note 6.

<sup>33</sup> Press Release, *How Fundraisers Profit*, *supra* note 7.

<sup>34</sup> “60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations.” Gershengorn, *supra* note 16, at 3 (quoting the Not-for-Profit and Charitable Coalition’s response to the FTC’s proposed amendments).

<sup>35</sup> CHARITIES BUREAU, NEW YORK STATE DEPARTMENT OF LAW, PENNIES FOR CHARITY, WHERE YOUR MONEY GOES: TELEMARKETING BY PROFESSIONAL FUND RAISERS, at <http://www.oag.state.ny.us/charities/pennies02/penintro.html> (last modified Dec. 2002).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

telemarketing company.<sup>39</sup> The telemarketing companies justify retaining such a large percentage of the donations as a fee for their services and as "other costs"<sup>40</sup> associated with raising the money.<sup>41</sup>

The current New York State Attorney General, Eliot Spitzer, has voiced his concern regarding this trend in professional telemarketing on several occasions.<sup>42</sup> For example, in December of 2001, he stated, "This is a critical moment for the nation's charities. These organizations will not be able to maintain the trust of the American people if they continue to use telemarketers that keep the lion's share of the donations."<sup>43</sup> These sentiments have been echoed by Ronna D. Brown, President of the Metro NY Better Business Bureau Wise Giving Alliance,<sup>44</sup> who stated, "Donors deserve a full and accurate accounting of what portion of their donation is going to pay for fundraising expenses . . . . Accountability starts with good governance and we support all measures that help Boards understand their responsibilities."<sup>45</sup> In response to the increase in the number of telemarketing campaigns, the rise in reports of fraudulent activity, and concern expressed at both the state and national levels, there has been con-

siderable activity in the legislative arena to regulate telemarketing practices.<sup>46</sup>

## II. FEDERAL REGULATIONS

Despite the frustrations expressed by the public about the telemarketing business,<sup>47</sup> legislators nevertheless acknowledge the interests and constitutional rights of telemarketers as well as those of their constituents.<sup>48</sup> Congress has announced that an "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."<sup>49</sup> Thus, the telemarketer's First Amendment rights must be weighed against the privacy concerns of the consumer when evaluating regulation of the practice.<sup>50</sup>

Two main pieces of federal legislation, the Telephone Consumer Protection Act of 1991 ("TCPA")<sup>51</sup> and the Telemarketing Sales Rule ("TSR"),<sup>52</sup> govern the field of telemarketing. Even though 40 states had already placed restrictions on telemarketing practices,<sup>53</sup> the TCPA was

<sup>39</sup> *Id.*

<sup>40</sup> Press Release, How Fundraisers Profit, *supra* note 7.

<sup>41</sup> In *Telemarketing Associates*, 763 N.E.2d 289, 297, discussed *infra* Part IIIA, the Illinois Supreme Court noted, "in exchange for its fee, Telemarketing agreed to supply and pay the salaries of all marketing personnel, as well as pay all costs for an office and phones. In addition, Telemarketing agreed to be responsible for producing, publishing, editing and paying all costs for the annual publication of more than 2,000 copies of an advertising magazine which would 'increase community awareness of [VietNow].'" It is important to note that the retained fee is not always 100% profit.

<sup>42</sup> NATIONAL FEDERATION OF NONPROFITS, INC., LITIGATION AND LEGISLATION AFFECTING NONPROFITS, at <http://www.thedma.org/nonprofitfederation/litigate.htm>.

<sup>43</sup> Press Release, Office of New York State Attorney General Eliot Spitzer, Spitzer Calls for Reforms in Charitable Fundraising: AG Considers Suits Against For-Profit Companies that Take Advantage of Charitable Donors, at [http://www.oag.state.ny.us/press/2001/dec/dec19a\\_01.html](http://www.oag.state.ny.us/press/2001/dec/dec19a_01.html) (Dec. 19, 2001) [hereinafter Press Release, Calls for Reforms].

<sup>44</sup> The Better Business Bureau Wise Giving Alliance reports on nationally soliciting charitable organizations. See COUNCIL OF BETTER BUSINESS BUREAUS, INC., CBBB STANDARDS FOR CHARITABLE SOLICITATION, at <http://www.give.org/standards/cbbbstds.asp> (1992) for overview of the standards it uses to evaluate charitable solicitations.

<sup>45</sup> Press Release, Calls for Reforms, *supra* note 43.

<sup>46</sup> Rita M. Cain, *Call Up Someone and Just Say 'Buy' - Telemarketing and the Regulatory Environment*, 31 AM. BUS. L.J. 641, 641-42 (1994).

<sup>47</sup> See EPIC, *supra* note 10.

<sup>48</sup> Shannon, *supra* note 1, at 383.

<sup>49</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §2(9), 105 Stat. 2394, 2394.

<sup>50</sup> See Brook Dambacher, *Hanging Up on the First Amendment: An Analysis of Contemporary Telemarketing Regulations*, 14 LOY. CONSUMER L. REV. 325, 331 (2002).

<sup>51</sup> 47 U.S.C. §227 (2000) (granting power to the FCC to regulate telemarketing practices).

<sup>52</sup> 16 C.F.R. pt. 310 (2003) (granting power to the FTC to regulate fraudulent behavior within the telemarketing field).

<sup>53</sup> See Cain, *supra* note 46, at 655-62 (discussing the various methods that states employed prior to the enactment of the TCPA and outlining the code sections of each individual state in Appendix A); Michela, *supra* note 13, at 580-597.

Today, there are only seven states that have not yet acted to regulate telemarketing within their states: Iowa, Massachusetts, Nebraska, New Hampshire, South Carolina, and Vermont. Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin' On!*, 3 WYO. L. REV. 167, 176-92 (2003) (analyzing state telemarketing legislation and discussing its ineffectiveness). Many states have already enacted "do-not-call" lists within their state thus raising the difficult question of how the new federal regulations will interact with those already implemented within the states.

At this time, the [FTC] does not intend the [TSR] provisions establishing a national 'do-not-call' registry to preempt state 'do-not-call' laws. Rather, the [FTC's] intent is to work with those states that have enacted 'do-not-call' registry laws . . . to articulate requirements and procedures during what it anticipates will be a relatively

the first piece of federal legislation to regulate the field.<sup>54</sup>

#### A. The Telephone Consumer Protection Act of 1991

When enacted in 1991, the TCPA amended Title II of the Communications Act of 1934<sup>55</sup> by placing restrictions on the use of certain telephone equipment in the telemarketing business and by granting authority to the Federal Communications Commission ("FCC") to regulate telephone solicitations.<sup>56</sup> One of the motivating factors for Congressional action was that "residential telephone subscribers consider[ed] automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy."<sup>57</sup> Thus, under the TCPA, it is unlawful for automatic dialing systems to place calls to emergency or medical facilities or to any number that is charged per telephone call, such as a cellular phone.<sup>58</sup> Additionally, telemarketing companies are banned from using prerecorded voice messages to contact private residences unless the company had received the resident's consent prior to placing the call.<sup>59</sup> Moreover, telemarketers are precluded from sending advertisements via telephone facsimiles.<sup>60</sup>

Due to concerns that a blanket ban on live operator calls would be challenged on free speech grounds, Congress choose instead to grant the

FCC power to regulate live telemarketing calls as it deemed necessary.<sup>61</sup> The TPCA also authorized the FCC to create a national "do-not-call" list.<sup>62</sup> However, the FCC declined to establish the national database at that time, choosing instead to require each company to keep a record of individuals who did not wish to be called.<sup>63</sup>

The TCPA provides two main remedies for consumers that receive calls in violation of the Act.<sup>64</sup> An individual, or the state, may file a right of action for injunctive relief, or they may file a right of action to collect monetary damages.<sup>65</sup> However, this legislation exempts non-profit organizations from its definition of telephone solicitation, thereby excluding suits against telemarketing companies that provide services for charities.<sup>66</sup> Because all non-profit organizations are exempted, Congress determined that further legislation was required to encompass problems associated with charitable telemarketing.

#### B. The Telemarketing Sales Rule

In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAP"),<sup>67</sup> which supplemented the TCPA by authorizing the FTC to regulate abusive telemarketing behavior.<sup>68</sup> Under this Act, Congress chose to give specific powers to the FTC, supplementing the general jurisdiction of the FCC, because of the FTC's prominent role in curbing consumer abuse.<sup>69</sup> Congress found that

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short transition period leading to one harmonized 'do-not-call' registry system and a single set of compliance obligations. The [FTC] is actively consulting with the individual states to coordinate implementation of the national registry to minimize duplication and maximize efficiency for consumers and business.

Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4638 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). See also *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, paras. 12-13 (2003) [hereinafter *Report and Order*] (discussing the FCC's approach to integrating a national "do-not-call" list with pre-existing state databases). The constitutionality of state telemarketing regulations is determined by the same standards used to evaluate federal restrictions. See *supra* Part IVA.

<sup>54</sup> Gershengorn, *supra* note 16.

<sup>55</sup> 47 U.S.C. §201 *et. seq.*

<sup>56</sup> *Id.* at §227.

<sup>57</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §2(10), 105 Stat. 2394.

<sup>58</sup> 47 U.S.C. §227(b)(1)(A)(i)-(iii).

<sup>59</sup> *Id.* at §227(b)(1)(B).

<sup>60</sup> *Id.* at §227(d)(1)(D).

<sup>61</sup> Dambacher, *supra* note 50, at 327-28.

<sup>62</sup> 47 U.S.C. §227(c)(1)(A) and (c)(3). For further discussion of the "do-not-call" list, see *supra* Part IV.

<sup>63</sup> Dambacher, *supra* note 50, at 327-28.

<sup>64</sup> 47 U.S.C. §227 (b)(3) and (f)(1).

<sup>65</sup> *Id.*

<sup>66</sup> Telemarketing solicitation is defined 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, but such term does not include a call or message . . . by a tax exempt nonprofit organization." *Id.* at §227(a)(3).

<sup>67</sup> 15 U.S.C. §§6101-6108 (1998).

<sup>68</sup> Dambacher, *supra* note 50, at 328.

<sup>69</sup> See *Aronberg v. Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942).

[T]he buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied . . . . The [Federal Trade Commission Act] is not made for experts but to protect the public—that vast multitude including the ignorant, the unthinking and the credulous, who, in making purchases,

"[i]nterstate telemarketing fraud [had] become a problem of such magnitude that the resources of the [FTC before this Act were] not sufficient to ensure adequate consumer protection from such fraud."<sup>70</sup> Subsequent to this grant of additional power, the FTC passed the TSR.<sup>71</sup>

In an effort to reduce deceptive telemarketing practices, the TSR requires that certain disclosures be made to the consumer during every telephone call.<sup>72</sup> For example, an operator is required to identify who is selling the product, to state he is calling with the intention of making a sale, and to describe the product being sold or depict accurately the prize being won.<sup>73</sup> Additionally, before a telemarketing operator may collect money, the operator must announce the total cost, all applicable conditions to the sale, and the company's refund policy.<sup>74</sup> Finally, the telemarketer must receive express authorization from the consumer to complete the sale.<sup>75</sup> More generally, the TSR prohibits residential calls from being made before 8 a.m. or after 9 p.m., unless the resident consents to receiving calls at other times.<sup>76</sup> Finally, the TSR requires companies to maintain proper records of its advertisements, promotions, and customers.<sup>77</sup>

However, the TSR as originally enacted does not apply to certain forms of telemarketing, such as those conducted by banks, federal financial institutions, common carriers, insurance companies, and non-profit organizations.<sup>78</sup> These exemptions exist because of the limited jurisdiction of the FTC.<sup>79</sup> The FTC operates as an independent agency under the authority of the Federal Trade Commission Act ("FTC Act").<sup>80</sup> However,

the FTC Act specifically limits jurisdiction to "profit-making corporations."<sup>81</sup> As a result, telemarketing companies providing services on behalf of charities do not have to follow the TSR's requirements with respect to telemarketing practices, thereby leaving consumers open to fraud. Therefore, if Congress intended to regulate charitable telemarketing, further legislation was required.

### III. THE FTC RESPONSE TO THE CONGRESSIONAL DELEGATION OF POWER WITHIN THE USA PATRIOT ACT

The USA PATRIOT Act extends the FTC's authority to regulate, amongst other things, charitable telemarketing fraud by providing it with "an additional tool to address charitable fraud."<sup>82</sup> In effect, section 1011 of the USA PATRIOT Act extends the reach of the TSR to for-profit companies working on behalf of a charitable organization.<sup>83</sup> This has been accomplished by expanding the definition of telemarketing within the TCFAP to cover any "plan, program, or campaign which is conducted to induce . . . a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones which involves more than one interstate telephone call."<sup>84</sup> This refined definition stems from Congress' concern over sham organizations that disguised themselves as charities and took advantage of generous donors after the events of September 11th.<sup>85</sup>

The FTC responded to the USA PATRIOT Act

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do not stop to analyze but too often are governed by appearances and general impressions.

<sup>70</sup> Telemarketing And Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, §2, 108 Stat. 1545 (1994).

<sup>71</sup> 16 C.F.R. §310 (1995).

<sup>72</sup> *Id.* at §310.4.

<sup>73</sup> *Id.* at §310.4(d).

<sup>74</sup> *Id.* at §310.3.

<sup>75</sup> *Id.* at §310.3(3).

<sup>76</sup> *Id.* at §310.4 (c).

<sup>77</sup> *Id.* at §310.5.

<sup>78</sup> 15 U.S.C. §45(a)(2).

<sup>79</sup> It is important to note that the FCC does regulate these industries. DIRECT MARKETING BUSINESS INTELLIGENCE, FTC UNVEILS DO-NOT-CALL PLAN AND TOUGH NEW TELEPHONE RULES, at [http://www.directmag.com/ar/marketing\\_ftc\\_unveils\\_donotcall/](http://www.directmag.com/ar/marketing_ftc_unveils_donotcall/) (last modified Dec. 18, 2002).

<sup>80</sup> 15 U.S.C. §§41-51. As the FTC's own mission statement states,

the [FTC] enforces a variety of federal antitrust and con-

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sumer protection laws. The Commission seeks to ensure that the nation's markets function competitively, and are vigorous, efficient, and free of undue restrictions. The Commission also works to enhance the smooth operations of the marketplace by eliminating acts or practices that are unfair or deceptive.

FEDERAL TRADE COMMISSION, VISION, MISSION & GOALS, at <http://www.ftc.gov/ftc/mission.htm> (last modified June 17, 1999).

<sup>81</sup> 15 U.S.C. §44; see generally *Community Blood Bank v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

<sup>82</sup> FEDERAL TRADE COMMISSION, PREPARED STATEMENT OF FEDERAL TRADE COMMISSION ON CHARITABLE SOLICITATION FRAUD, at <http://www.ftc.gov/opa/2001/11/charitable solicitation fraud.htm> (Nov. 6, 2001).

<sup>83</sup> USA PATRIOT Act, Pub. L. No. 107-56, §1011, 115 Stat. 272 (2001).

<sup>84</sup> *Id.* §1011(b)(3).

<sup>85</sup> CASE, *supra* note 9.

amendment by announcing a proposed rule change to the TSR.<sup>86</sup> The FTC explained “that it is necessary to amend the original Rule to ensure that the Telemarketing Act’s goals are met—that is, encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive and deceptive.”<sup>87</sup> The FTC has been careful to make the distinction that they *have not* been given blanket authority to regulate charitable telemarketing, but *have* been given the authority to regulate deceptive acts by charitable organizations and to require for-profit telemarketing companies working on behalf of a charitable organization to comply with the TSR.<sup>88</sup>

The amended rules seek to prevent scam organizations from soliciting over the telephone by requiring the operator to give more information than is required under the original TSR.<sup>89</sup> The major addition to section 310 of the TSR, which regulates the disclosures required prior to a sale, is the requirement that every statement be made “truthfully.”<sup>90</sup> This raises the standard from merely requiring that the disclosures be made, to requiring that they be made honestly.<sup>91</sup> Additionally, it is no longer sufficient simply to give the odds of winning a prize promotion; the telemarketer must disclose that a purchase will not enhance the chance of winning.<sup>92</sup> Furthermore, to reduce unauthorized billing, the telemarketer must disclose “the limits on a cardholder’s liability for unauthorized use of a credit card.”<sup>93</sup> Finally, telemarketers are prohibited from “abandoning” callers,<sup>94</sup> and they are required to transmit Caller-Id information so that a recipient is aware of who is calling before answering.<sup>95</sup>

Specific to charitable telemarketing, the amended rules prohibit the use of a false or misleading statement “to induce any person to pay for goods or services or to induce a charitable contribution.”<sup>96</sup> Charitable solicitors are also required to identify the charitable organization for which they are calling,<sup>97</sup> and they must state that the purpose of the call is to solicit a monetary donation.<sup>98</sup> The reason for this announcement is to “ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion.”<sup>99</sup> However, the FTC does not require a telemarketing organization, soliciting on behalf of a charity, to identify itself as a for-profit organization, nor does the FTC require the telemarketer to announce the percentage of the donation that will be retained by the for-profit company.<sup>100</sup> The FTC has determined that a failure to state the percentage retained by the for-profit telemarketing company does not satisfy the definition of fraudulent behavior.<sup>101</sup>

This FTC determination is consistent with Supreme Court precedent that strikes down percentage-based regulations and prohibits fraud claims against telemarketing companies solely because they retain a large percentage of the charitable donations.<sup>102</sup> Three cases in the 1980s struck down state regulation of the percentage of fees that charities could pay to raise funds: *Village of Schaumburg v. Citizens for a Better Environment*,<sup>103</sup> *Secretary of State of Maryland v. Joseph H. Munson*,<sup>104</sup> and *Riley v. National Federation of the Blind of North Carolina, Inc.*<sup>105</sup> These landmark cases established the standards that govern charitable solicitation

<sup>86</sup> Telemarketing Sales Rule, 67 Fed. Reg. 4492 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310); Press Release, Federal Trade Commission, FTC Proposes National “Do-Not Call” Registry: Commission Seeks Comment on Registry and Other Proposed Changes to the Telemarketing Sales Rule, at <http://www.ftc.gov/opa/2002/01/donotcall.htm> (Jan. 22, 2002).

<sup>87</sup> Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4583 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (2002).

<sup>88</sup> *Id.* at 4586.

<sup>89</sup> *See id.* at 4580.

<sup>90</sup> 16 C.F.R. §310.3(a)(1).

<sup>91</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4599.

<sup>92</sup> 16 C.F.R. §310.3(a)(1)(iv).

<sup>93</sup> *Id.* at §310.3(a)(1)(vi).

<sup>94</sup> “An outbound telephone call is ‘abandoned’ under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2)

seconds of the person’s completed greeting.” *Id.* at §310.4(b)(1)(iv).

<sup>95</sup> *Id.* at §310.4(a)(7).

<sup>96</sup> *Id.* at §310.3(a)(4).

<sup>97</sup> *Id.* at §310.4(e)(1).

<sup>98</sup> *Id.* at §310.4(e)(2).

<sup>99</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4650; *See Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 799 n.11 (1988).

<sup>100</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4650.

<sup>101</sup> *See* discussion of *Telemarketing Associates*, *infra* text accompanying notes 129-147.

<sup>102</sup> Seth Perlman, *Overview of Government Regulation of Charitable Solicitations*, 1330 PRACTICING LAW INST. 123, 129 (2002).

<sup>103</sup> 444 U.S. 620 (1980).

<sup>104</sup> 467 U.S. 947 (1984).

<sup>105</sup> 487 U.S. 781 (1988).

today, and paved the way for the Supreme Court's recent decision in *Illinois v. Telemarketing Associates*.<sup>106</sup>

#### A. Percentage-Based Regulations

The statute challenged in *Village of Schaumburg* required organizations that solicit in the community to apply for a permit.<sup>107</sup> To be eligible for a permit, the organization had to first demonstrate that "at least seventy-five per cent [sic] of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."<sup>108</sup> The respondent in this case, Citizens for a Better Environment, was a non-profit organization that had been denied a permit and thereafter filed a constitutional challenge based on the First and Fourteenth Amendments.<sup>109</sup>

The Court outlined precedent prior to *Village of Schaumburg*, which collectively held that charitable solicitations are within the protections of the First Amendment but may be subject to limitation.<sup>110</sup>

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that 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, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.<sup>111</sup>

The issue in *Village of Schaumburg*, therefore, turns on whether the government regulation unduly intruded upon the solicitor's free speech rights.<sup>112</sup>

The Court held that the 75% limitation was "a direct and substantial limitation on protected

activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect." By concluding that the government improperly justified the regulation based on fraud prevention, the Court determined that the blanket prohibition was not the least intrusive means to prohibit fraud.<sup>113</sup> Further, the Court concluded that it is unlikely that "organizations devoting more than one-quarter of their funds to salaries and administrative costs are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations."<sup>114</sup> In striking down the law, the Supreme Court believed that the penal law should be used to regulate fraudulent activity.<sup>115</sup>

In *Munson*, the Court examined its decision in *Village of Schaumburg* by evaluating whether a statute will overcome the constitutional bar to percentage-based regulations by allowing an exception for charitable organizations that demonstrate a need for the additional funding.<sup>116</sup> Despite the statute's "flexibility," the *Munson* Court concluded that the Maryland statute in question<sup>117</sup> was unconstitutional,<sup>118</sup> stating, "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud."<sup>119</sup> While the possibility of waiver will assist some organizations that are improperly silenced by the blanket prohibition, the Court held that the statute was not narrowly drawn to prevent interference with the solicitor's First Amendment rights.<sup>120</sup>

The North Carolina statute evaluated in *Riley* contained a three-tiered definition of a "reasonable fee" that a solicitor may retain while working on behalf of a charity. If the fund-raising fee was less than 20%, the retention was reasonable; if the fee was between 20% and 35% of gross receipts, the classification was reasonable or unreasonable depending on whether the group was working for

<sup>106</sup> 123 S.Ct. 1829 (2003).

<sup>107</sup> 444 U.S. at 622-23 (citing Art. III of Chapter 22 of the Schaumburg Village Code (1975)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 624-25.

<sup>110</sup> *Id.* at 628-32.

<sup>111</sup> *Id.* at 632.

<sup>112</sup> *Id.* at 633.

<sup>113</sup> *Village of Schaumburg*, 444 U.S. at 637.

<sup>114</sup> *Id.* at 638.

<sup>115</sup> *Id.* at 637.

<sup>116</sup> 467 U.S. at 962.

<sup>117</sup> MD. ANN. CODE art. 41, §103A *et. seq.* (1982).

<sup>118</sup> *Munson*, 467 U.S. at 970.

<sup>119</sup> *Id.* at 966.

<sup>120</sup> "[T]he means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech." *Id.* at 968.



the public good; and finally, if the fee was more than 35%, it was automatically classified as unreasonable.<sup>121</sup> The Court dismissed these distinctions in the North Carolina statute. Citing *Village of Schaumburg* and *Munson*, the Court held that a percentage-based regulation, however crafted, is not narrowly tailored to overcome a constitutional challenge.<sup>122</sup>

The statute in *Riley* also required professional fundraisers to disclose the percentage of the donation that would actually be relayed to the charity.<sup>123</sup> The state justified this disclosure requirement by stressing the "importance of informing donors how the money they contribute is spent in order to dispel the alleged misconception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity."<sup>124</sup> The Court rejected the claim that this was an appropriate justification for compelling speech.<sup>125</sup> The Court relied on several principles in making this determination: a professional fundraiser may assist the charity in other ways than collecting monetary donations, such as getting a name or message out;<sup>126</sup> donors are aware that there are costs associated with professional fundraising and have the right to inquire into the specific amount if they are concerned that their donation will not reach the charity;<sup>127</sup> and the required disclosure would cause more cautious giving thus harming the charitable organization's

likelihood of continued success.<sup>128</sup>

## B. Claims of Fraud

The Supreme Court again discussed the issue of percentage-based restrictions for telemarketers working on behalf of a charitable organization in its Fall 2003 term<sup>129</sup> in *Illinois v. Telemarketing Associates*.<sup>130</sup> The case "concerns the amenability of for-profit fundraising corporations to suit by the Attorney General of Illinois for fraudulent charitable solicitations."<sup>131</sup> This case was appealed after the Illinois Supreme Court held that the Attorney General's fraud claim was "constitutionally deficient" based on the United States Supreme Court's rulings in *Village of Schaumburg*, *Munson*, and *Riley*.<sup>132</sup>

Telemarketing Associates is a for-profit telemarketing company that solicits donations on behalf of VietNow, a charitable organization that works to provide assistance to Vietnam veterans.<sup>133</sup> However, only 3% of the charitable contributions raised by Telemarketing Associates actually reached the veterans, 13% was used by VietNow, and 85% was retained by Telemarketing Associates as a collector's fee.<sup>134</sup> The American Institute of Philanthropy estimates that VietNow "spent \$91 to raise \$100."<sup>135</sup> In response to these statistics, the Illinois Attorney General filed<sup>136</sup> a civil fraud suit against the for-profit company

<sup>121</sup> *Riley*, 487 U.S. at 784 n.2.

<sup>122</sup> *Id.* at 803.

<sup>123</sup> *Id.* at 786. Note this case is distinct from *Village of Schaumburg* and *Munson* in that the statute specifically addresses professional for-profit fundraisers and not the charity.

<sup>124</sup> *Id.* at 789.

<sup>125</sup> This was a content-based restriction which was not sufficiently tailored to the state objective. See discussion of content-based verses content-neutral restrictions, *infra* note 215.

<sup>126</sup> *Riley*, 487 U.S. at 798-99.

<sup>127</sup> *Id.* at 799.

<sup>128</sup> *Id.* at 799-800; See Arcadi, *supra* note 18, at 426-28 (discussing the impact of telemarketing regulations on small businesses).

<sup>129</sup> Certiorari granted Nov 4, 2002 and oral arguments heard March 4, 2003. UNITED STATES SUPREME COURT, DOCKET FOR 01-1806, at <http://www.supremecourtus.gov/docket/01-1806.htm>.

<sup>130</sup> *Ryan v. Telemarketing Associates* and *Illinois v. Telemarketing Associates* are the same case. James E. Ryan was Attorney General of Illinois in 2001 when the case was before the Illinois Supreme Court. Lisa Madigan was the Attorney General of Illinois when the Supreme Court of the United States granted certiorari and handed down its opinion.

<sup>131</sup> *Telemarketing Associates*, 123 S.Ct. at 1832

<sup>132</sup> *Telemarketing Associates*, 763 N.E.2d 289, 363 (Ill. 2001).

<sup>133</sup> Brief for Respondant at 1, *Ryan v. Telemarketing Associates*, 2003 WL 183812 (No. 01-1806).

<sup>134</sup> "[F]rom July 1987 until the end of 1995, defendants' fundraising efforts on behalf of VietNow resulted in collection of \$7,127, 851. Of that amount, \$6,073,887 was retained by defendants, netting VietNow \$1,053,964, an amount just under 15% of the gross receipts." *Telemarketing Associates*, 763 N.E.2d at 291. Karen Branch-Briosio, *U.S. Justices Hear Illinois Case Against Charity Fund-Raiser Today*, SLTODAY.COM, at <http://www.sltoday.com/stltoday.news/stories.nsf/News?D9664> (March 3, 2003).

<sup>135</sup> Jane Vaughn, *On the Docket - Medill School of Journalism*, at [http://supreme.usatoday.findlaw.com/supreme\\_court/docket/2002/march.html](http://supreme.usatoday.findlaw.com/supreme_court/docket/2002/march.html) (2002).

<sup>136</sup> Another issue stemming from *Telemarketing Associates* is what role a state attorney general should play in regulating telemarketing. See, e.g., Robert M. Langer, *Point: State Attorneys General Should Have Broad Powers to Enforce a Federal Telemarketing Fraud Law*, 5 ANTITRUST 36 (1991) (discussing the state attorneys general role in bringing suit in federal court for violations of telemarketing regulations). In addition to granting power to the FTC to regulate fraudulent telemarketing, the TCPA authorizes a state attorney general to file suit. 15 U.S.C. §6103.

claiming that they were misleading customers by misrepresenting the amount of the donation that was retained by the telemarketing company.<sup>137</sup> Illinois hoped to overcome Supreme Court precedent by relying on the legal definition of fraud<sup>138</sup> instead of a percentage-based regulation.<sup>139</sup> However, the Illinois Supreme Court refused to accept the state's distinction that it's "complaint utilizes the 'less intrusive' measures for attacking fraud suggested by the [*Village of Schaumburg*] Court," by focusing on an individual fraud suit rather than a broad percentage-based restriction.<sup>140</sup>

The Supreme Court of Illinois held that "the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation. This is the same regulatory principle that was rejected in *Schaumburg, Munson and Riley*."<sup>141</sup> In his brief to the Supreme Court, the Attorney General stressed the importance of anti-fraud laws and argued that his claim was not based wholly on percentage of fees and therefore should not be dismissed by precedent.<sup>142</sup> Telemarketing Associates relied on the Court's previous rulings that fraud cannot be determined by the costs of fundraising and further argued that petitioner's claim, in effect, would create an affirmative disclosure requirement that is prohibited by the First Amendment.<sup>143</sup>

On appeal, the Supreme Court in *Telemarketing Associates* first reiterated its position in *Village of Schaumburg, Munson, and Riley* that "certain regulations of charitable subscriptions, barring fees in excess of a prescribed level, effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment."<sup>144</sup> The Court proceeded to draw a distinction between percentage-based regulations and suits for

fraud that use the amount of money actually distributed to the charity as one factor in determining whether the company misrepresented its position.<sup>145</sup> The holding, therefore, focuses on the actual representations made by the telemarketer, and not the percentage retained by the for-profit telemarketer, which alone is not sufficient to establish fraud.<sup>146</sup> The Court concluded,

[s]o long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitor's fees *per se*, such actions need not impermissibly chill protected speech . . . . Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.<sup>147</sup>

Consequently, the Supreme Court has armed states with a mechanism for protecting its citizens against fraudulent misrepresentations made by for-profit companies working on behalf of charitable organizations.

While this opinion is an important step toward the prevention of fraudulent behavior in charitable telemarketing, the ruling is limited to actions by the state. Nonetheless, consumers may now take an affirmative step to curb fraudulent behavior on their own initiative by registering for the national "do-not-call" list.

#### IV. THE CONSTITUTIONALITY OF THE NATIONAL "DO-NOT-CALL" LIST

The most dramatic amendment to the TSR is the creation of a national "do-not-call" database.<sup>148</sup> This database allows households to place their telephone number on a list signifying that they do not wish to be called for telemarketing purposes.<sup>149</sup> Telemarketing companies are required to "scrub" their list of potential callers per-

<sup>137</sup> It is worth noting that Telemarketing Associates satisfied the terms of its contract with VietNow, and VietNow did not express any dissatisfaction with the work of Telemarketing Associates. *Telemarketing Associates*, 763 N.E.2d at 291.

<sup>138</sup> Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILL. COMP. STAT. ANN 505/1 *et seq.* (West 1996)) and section 2 of Uniform Deceptive Trade Practices Act (815 ILL. COMP. STAT. ANN 510/2 (West 1996)).

<sup>139</sup> CHARLES LANE, *Will Telemarketer's Claims Ring True?*, WASH. POST, Mar. 3, 2003, at A17.

<sup>140</sup> *Telemarketing Associates*, 763 N.E.2d at 296-97 (quoting *Village of Schaumburg*, 444 U.S. at 637).

<sup>141</sup> *Id.* at 297.

<sup>142</sup> "*Schaumburg, Munson, and Riley* held that the percentage of donations devoted to fundraising expenses cannot, by itself, be used to declare charitable solicitations fraudulent.

These decisions did not hold that the share of donations used for fundraising expenses is categorically irrelevant to whether a fundraiser commits fraud." Brief for Petitioner, *supra* note 131, at 10-11. Forty-five additional states signed onto an amicus brief in support of the Illinois Attorney General.

<sup>143</sup> See Brief for Respondent, *supra* note 133.

<sup>144</sup> *Telemarketing Associates*, 123 S.Ct. at 1833.

<sup>145</sup> *Id.* at 1839 ("there are differences critical to First Amendment concerns between fraud actions trained on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high.").

<sup>146</sup> *Id.* at 1840.

<sup>147</sup> *Id.* at 1840, 1842.

<sup>148</sup> 16 C.F.R. §310.4(b)(1)(iii)(B).

<sup>149</sup> Press Release, Federal Trade Commission, FTC An-

riodically to remove any names that have been added to the database since the company last updated their list.<sup>150</sup> In addition, legal action can be initiated against any company that continues to place calls to restricted numbers.<sup>151</sup>

The national "do-not-call" proposal, which required separate Congressional approval to become effective, received almost unanimous support in the House.<sup>152</sup> Subsequently, President Bush signed the Do-Not-Call Implementation Act ("Do-Not-Call Act") into law on March 12, 2003.<sup>153</sup> Congress agreed to cover a portion of the cost of the database, which will require an estimated \$16 million over its first year to implement,<sup>154</sup> and authorized the FTC to collect the remainder of the cost from the telemarketers in the form of registration fees.<sup>155</sup> The FTC's final amended rule became effective March 31, 2003.<sup>156</sup>

While many welcomed the national database,<sup>157</sup> opponents expressed concern over the limitations placed upon charitable telemarketing companies, the jurisdiction of the FTC, and the infringement upon the First Amendment rights of the telemarketers.<sup>158</sup> During the comment period of the FTC proposed "do-not-call" regulation, several charitable organizations submitted statements criticizing the reach of the proposal into charitable solicitation.<sup>159</sup> Despite the fact that charitable

organizations are "exempt" from utilizing this national database,<sup>160</sup> they are now required to maintain entity-specific databases to avoid repetitive calls to those who do not wish to contribute.<sup>161</sup> However, perhaps the main concern of charitable organizations stems from the requirement that for-profit organizations working on behalf of a charitable organization are forced to comply with the "do-not-call" list.<sup>162</sup> They found this requirement to be problematic because it penalizes those charitable organizations that have decided to hire a telemarketing company, and it exempts charities that place the call themselves.<sup>163</sup>

This apparent double standard that exempts charities, banks, insurance companies, and telecommunications carriers, yet binds the private telemarketing companies working on their behalf, has caused some critics to contend that the FCC may be better suited to regulate a national "do-not-call" list.<sup>164</sup> This argument is founded on the larger jurisdiction granted to the FCC by the Communications Act of 1934<sup>165</sup> and by the TCPA. The FCC is "charged with regulating interstate and international communications by radio, television, wire, satellite, and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions."<sup>166</sup> Therefore, it would seem that the FCC would have greater authority

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nounces Final Amendments to Telemarketing Sales Rule, including National "Do Not Call" Registry, at <http://www.ftc.gov/opa/2002/12/donotcall.htm> (Dec. 18, 2002) [hereinafter FTC Announces Final Amendments].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> David Ho, *House OKs National Do Not Call List*, WASHINGTONPOST.COM, at <http://www.washingtonpost.com/wp-dyn/articles/A1697-2003Feb13.html> (Feb. 13, 2003) (explaining the House vote was 418-7 in favor of the national "do-not-call" list) [hereinafter *House OKs List*]. "The program will not need separate Senate approval under an agreement [reached in Congress] late Wednesday." *Id.*

<sup>153</sup> Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), to be codified at 15 U.S.C. §6101; *Do Not Call List Now Law*, WASH. POST, Mar. 12, 2003, at E2.

<sup>154</sup> *House OKs List*, *supra* note 153.

<sup>155</sup> David Ho, *House Approves Telemarketing 'Do Not Call' List: Deal in Senate Would Give FTC Money to Set Up Registry This Fiscal Year*, WASH. POST, Feb. 13, 2003, at E7.

<sup>156</sup> Kristin A. K. Hickerson, *Overview of Amendments to FTC's Telemarketing Sales Rule*, 6 PRIVACY & INFO. L. REP. 1 (2003) (analyzing the FTC's amendment to the TSR).

<sup>157</sup> FTC Announces Final Amendments, *supra* note 149 (quoting FTC Chairman Timothy J. Muris) ("These amendments [to the TSR] redefine the nature of telemarketing for both consumers and businesses . . . . They protect consumers' privacy, give them a choice about whether to receive

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most telemarketing call, and provide enhanced protections against fraudulent telemarketers.").

<sup>158</sup> See generally, Telemarketing Sales Rule, 68 Fed. Reg. 4580 (responding to all critical comments received during the comment period).

<sup>159</sup> *Id.* at 4583.

<sup>160</sup> 16 C.F.R. §310.6(1).

<sup>161</sup> The recipient of a solicitation telephone call may request that the charity remove their number from their caller list, and by placing their name on the "entity-specific list," the charity is precluded from calling again. DIRECT MARKETING BUSINESS INTELLIGENCE, FTC UNVEILS DO-NOT-CALL PLAN AND TOUGH NEW TELEPHONE RULES, at [http://www.directmag.com/ar/marketing\\_ftc\\_unveils\\_donotcall/index.htm](http://www.directmag.com/ar/marketing_ftc_unveils_donotcall/index.htm) (last modified Dec. 18, 2002).

<sup>162</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4583.

<sup>163</sup> See *id.*

<sup>164</sup> Elizabeth C. Yen, *New Federal Telemarketing Proposals – Moving One Step Closer to a National "Do Not Call" Registry?*, 120 BANKING L.J. 161, 163 (2003) (discussing the distinction that banks would be exempt from the FTC proposed "do-not-call" list, but would be bound by an FCC database).

<sup>165</sup> The Communications Act of 1934, as amended, 47 U.S.C. §151.

<sup>166</sup> FEDERAL COMMUNICATIONS COMMISSION, ABOUT THE FCC, at <http://www.fcc.gov/aboutus.html> (last modified Nov. 25, 2002).

than the FTC to obligate industries to comply with the database.<sup>167</sup> Consequently, the FCC announced its intention to revise its existing telemarketing regulations in an attempt to implement a national "do-not-call" list.<sup>168</sup>

As originally enacted, the TCPA authorizes the FCC to establish a national database compiled of a "list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."<sup>169</sup> The FCC chose not to implement a national system in 1992, but due to a growing number of consumer complaints and technological advances that make telemarketing more intrusive, the FCC determined a "do-not-call" list was needed.<sup>170</sup> The FCC issued the following order,

we establish with the [FTC] a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls . . . [Consumers] 'want something done' about unwanted solicitation calls, and the vast majority of them support the establishment of a national do-not-call registry. Congress, too, has responded by enacting the [Do-Not-Call Act], authorizing the establishment of a national do-not-call registry, and directing this Commission to issue final rules in its second major TCPA proceeding that maximize consistency with those of the FTC.<sup>171</sup>

The Do-Not-Call Act requires that the FTC and FCC work in concert to "maximize consistency."<sup>172</sup> For the most part, the agencies have accomplished this goal. However, "Congress has recognized that because the FCC is bound by the TCPA, it would not be possible for the FCC to adopt rules that are identical to those of the FTC in every instance."<sup>173</sup> One major difference noted thus far is the inconsistent treatment of for-profit telemarketers working on behalf of charitable organizations.

As discussed in Part III, Congress has expanded the regulatory powers of the FTC to restrict the telemarketing practices of for-profit telemarketers working on behalf of a charitable organization by amending its definition of telemarketing.<sup>174</sup> Conversely, the FCC has taken the position that pro-

fessional telemarketers that work for a charitable organization are not required to comply with the national "do-not-call" list and other provisions of the TCPA.<sup>175</sup> The FCC reasons that roughly 60% of charitable organizations use the "experience" and "expertise" of for-profit telemarketers to advance their cause, and thus, professional telemarketers should be able to assist these charities promote their cause.<sup>176</sup>

Congress has announced that the FCC and FTC have two options for correcting the inconsistencies in their enforcement of the national "do-not-call" list: they may administratively resolve the difference or allow for legislative resolution.<sup>177</sup> The FCC has announced it intends to work with the FTC regarding this matter.<sup>178</sup> However, it seems unlikely that the FTC will change its position. Based on the recent amendment to the TSR, it appears that Congress supports the FTC's position to restrict all for-profit telemarketers. Requiring professional telemarketers that work on behalf of a charity to comply with the national "do-not-call" list will, in effect, uphold the stated goals of telemarketing legislation—"encouraging the growth of the legitimate telemarketing industry, while curtailing those practices that are abusive or deceptive."<sup>179</sup>

Restricting the practices of telemarketing companies that work on behalf of charitable organizations offers consumers a means to distinguish between solicitation calls made by the charity itself and solicitation calls made by third parties on behalf of a charitable organization. By signing up for the database, a consumer would provide himself with a mechanism for determining whether calls made to his home were made by the charity or a professional telemarketer, who may retain a percentage of the donation.<sup>180</sup> The "do-not-call" list could increase the number of charitable contributions made over the phone because consumers would have more confidence in the calls they receive. Thus, to limit properly the intrusion of

<sup>167</sup> *Id.*

<sup>168</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 17 FCC Rcd. 17459 (2002).

<sup>169</sup> 47 U.S.C. § 227(c)(3).

<sup>170</sup> *Report and Order*, *supra* note 53, at paras. 16-41.

<sup>171</sup> *Id.* at paras. 1, 2.

<sup>172</sup> Do-Not-Call Implementation Act, Pub. L. No. 108-10, §3, 117 Stat. 557 (2003) (to be codified at 15 U.S.C. §6101).

<sup>173</sup> *Report and Order*, *supra* note 53, at para. 15.

<sup>174</sup> See text associated with footnotes 82-101.

<sup>175</sup> *Report and Order*, *supra* note 53, at para. 28.

<sup>176</sup> *Id.*

<sup>177</sup> H.R. REP. NO. 108-8, at 4 (2003).

<sup>178</sup> *Report and Order*, *supra* note 53, at para. 15.

<sup>179</sup> 68 Fed. Reg. 4580, 4583.

<sup>180</sup> Kenneth Bredemeier, *Groups Check to See if Charities Measure Up*, WASH. POST, Oct. 26, 2003, at F11.

telephone solicitations and to increase consumer confidence in charitable telemarketing, the FCC should work in concert with the FTC to preclude *all* professional telemarketing companies, regardless of their purpose, from calling those consumers that do not wish to be called.

While the FTC and FCC continue to work together to implement one national system, they are additionally fighting legal battles in the courtroom. The "do-not-call" list has undergone significant challenges on the grounds that the national database violates the First Amendment and that the FTC list violates the authority granted the agency by the TCPA.<sup>181</sup> The Tenth Circuit recently announced that the FTC and the FCC may enforce the "do-not-call" list pending its ruling on the constitutionality of the national database.<sup>182</sup>

#### A. First Amendment Analysis

The major obstacle to regulating unsolicited telemarketing is the telemarketer's First Amendment right to communicate with consumers.<sup>183</sup> Professional telemarketers have challenged the constitutionality of the "do-not-call" list on the theory they are unjustly prohibited from freely communicating with consumers.<sup>184</sup> Charitable organizations, despite exemption from the TSR, are concerned with the constitutionality of the database because the companies they hire to solicit donations on their behalf are restricted from unsolicited telemarketing by the amended TSR.<sup>185</sup> Because the TSR applies only to for-profit organizations, the constitutionality of the national "do-not-call" list must be analyzed by commercial

speech standards.<sup>186</sup>

The Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>187</sup> held that commercial speech is not outside the protection of the First Amendment.<sup>188</sup> The Court stated that speech will be protected "even though it may involve a solicitation to purchase or otherwise pay or contribute money."<sup>189</sup> At issue in this case was whether a provision of the Virginia Code, which prohibited pharmacists from advertising the price of prescription drugs, was unconstitutional.<sup>190</sup> Despite the State's interest in promoting professionalism among its pharmacists, the Court concluded that the statute could not be upheld because "[a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless the dissemination of information as to who is producing and selling what product, for what reason, and at what price . . . the free flow of commercial information is indispensable."<sup>191</sup> Therefore, telemarketers receive First Amendment protection despite the fact that their communications are motivated by profit.<sup>192</sup> However, the government does have the right to limit telemarketers' speech in certain situations.<sup>193</sup>

The validity of a government restriction on commercial speech is governed by the test originally mandated in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*.<sup>194</sup> In this case, the Court developed a four-part analysis when reviewing commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>184</sup> See discussion of court cases, *supra* note 181.

<sup>185</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4583.

<sup>186</sup> See Cain, *supra* note 46, at 642-49 (distinguishing free speech protection for non-commercial solicitation from free commercial speech).

<sup>187</sup> 425 U.S. 748 (1976).

<sup>188</sup> *Id.* at 761.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 749-50.

<sup>191</sup> *Id.* at 765.

<sup>192</sup> *Id.*

<sup>193</sup> For example, "[f]alse or deceptive advertising is not protected under the First Amendment and is permissibly policed by the Federal Trade Commission and state authorities." Cain, *supra* note 46, at 645 n.24 (citing 15 U.S.C. §45 (1986)).

<sup>194</sup> 447 U.S. 557 (1980).

<sup>181</sup> Two groups of telemarketers have filed suit challenging the constitutionality of the national "do-not-call" list. They claim the provision violates established free-speech laws. Linda Rosencrance, *Telemarketers Sue to Stop National Do-Not-Call List*, COMPUTERWORLD.COM, at <http://www.computerworld.com/governmenttopics/government/story/0,10801,78023,00.html> (Jan. 30, 2003). The first suit was filed in an Oklahoma federal court by the NY DMA, Global Contact Services, Infocision Management Corp., U.S. Security Inc., and Chartered Benefit Services. The second suit was brought by American Teleservices Association, Mainstream Marketing Services, Inc., and TMG Marketing Inc. in a Colorado federal court. *Id.*

<sup>182</sup> *Mainstream Marketing Services, Inc. v. FTC*, No. 03-9571 (10th Cir. 2003). See also Paul Davidson, *FTC Told to Enforce Do-not-call List*, USA TODAY, Oct. 8, 2003, at B1; Lous Romano, *Judges Hear Do-Not-Call Registry Case*, WASH. POST, Nov. 11, 2003, at E1.

<sup>183</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>195</sup>

Accordingly, the "do-not-call" list must be analyzed according to these four criteria to determine whether the database would be an appropriate limitation on the telemarketer's protected speech.

### 1. Rights of Free Speech and Privacy

The first prong of the *Central Hudson* test is satisfied when it can be demonstrated that the First Amendment protects the speech in question.<sup>196</sup> To be protected by the First Amendment, the speech must not be misleading or unlawful.<sup>197</sup> The required telemarketing procedures outlined in the TCPA and TSR are designed to prevent fraudulent activity during sales calls. Therefore, if the telemarketer follows the required disclosures, the speech is not misleading.<sup>198</sup> Additionally, because solicitation is considered commercial speech, and as stated above in the discussion of *Virginia State Board*, commercial speech is protected by the First Amendment, then it follows that telemarketing sales calls are lawful.<sup>199</sup>

The protection of individual privacy rights in the home is an established government interest,<sup>200</sup> and therefore, the second prong of the test is also satisfied.<sup>201</sup> The Supreme Court has held that "[i]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom."<sup>202</sup> Therefore, the first two prongs of the *Central Hudson* test clearly pass constitutional scrutiny, and the constitutionality of the national "do-not-call" list thus

depends on the satisfaction of the final two prongs of the commercial speech test.

### 2. Direct Proportionality Requirement

Prohibiting calls to consumers who have stated that they do not wish to be called would directly advance the state interest in protecting personal privacy.<sup>203</sup> In fact, the national "do-not-call" list is designed to cure the inadequacies with the company-specific databases previously used to protect the privacy interests of citizens.<sup>204</sup> Experience has shown that calls do not subside with entity-specific lists because every telemarketing company is still entitled to interrupt a consumer at least once. The consumer is then responsible for taking the time to specifically request that each individual company not call again.<sup>205</sup> The enacted national "do-not-call" list allows a consumer to take one action to prevent all unwanted calls.<sup>206</sup>

Moreover, it has been argued that the telemarketing companies may actually be advantaged by the database because they now have a list of consumers who would refuse their calls.<sup>207</sup> If a company knows that a consumer will reject a sales pitch or hang up before hearing an explanation of what is being sold, the company saves time and money by avoiding calls to disinterested consumers. Further "the existence of a no-call list also serves to identify individuals who could be approached alternatively by direct mail initiatives, perhaps a better and more palatable way to gain their attention."<sup>208</sup> Thus, the companies may also be able to maximize their resources by distinguishing between those customers who wish to receive telephone calls and those better served with printed solicitations.<sup>209</sup>

<sup>195</sup> *Id.* at 566.

<sup>196</sup> *Id.* at 563.

<sup>197</sup> *Id.* at 566.

<sup>198</sup> See *supra* Part II for discussion of TCPA and TSR.

<sup>199</sup> See *Telemarketing Fraud: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 4 (1992).

<sup>200</sup> See Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1137-40 (2002) (analyzing the right to privacy within one's home).

<sup>201</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>202</sup> *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

<sup>203</sup> See *Central Hudson*, 447 U.S. at 566.

<sup>204</sup> Telemarketing Sales Rule, 68 Fed. Reg. at 4628.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Klett & Brightwell, *supra* note 2, at 38.

<sup>208</sup> *Id.*

<sup>209</sup> Pattison & McGann, *supra* note 53, at 168 ("[T]he shrill and imperious ring of the telephone demands immediate attention. Unlike the unsolicited bulk mail advertisements found in the mail collected at one's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding upon the intimacy of the bedroom . . . Unlike the radio or the television, whose delivery of speech, either commercial or non-commercial, depends on the listener's summons, the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself.").

### 3. Reasonable Relationship Requirement

The final prong to the *Central Hudson* test requires a reasonable relationship between the restriction and the protected right.<sup>210</sup> Subsequent to its ruling in *Central Hudson*, the Supreme Court in *Board of Trustees of the State University of New York v. Fox*<sup>211</sup> clarified that the fourth requirement of *Central Hudson* was satisfied when the “means [were] narrowly tailored to achieve the desired objective.”<sup>212</sup> The holding in *Fox* “broadened the scope of restrictions that the government can place on commercial speech without violating the speaker’s First Amendment rights.”<sup>213</sup> Therefore, it must be demonstrated that the database is not more extensive than necessary.<sup>214</sup> As discussed, the entity-specific restrictions do not properly curb telemarketing calls so a more restrictive regulation is needed. Further, the national database is more beneficial to a telemarketing company than an outright ban.<sup>215</sup>

The type of restriction placed upon telemarketers by the establishment of a national “do-not-call” list is similar to several restrictive activities that the Supreme Court has previously held constitutional against First Amendment challenges. These activities include the blocking of offensive mail from certain addresses<sup>216</sup> and the posting of a “No Solicitation” sign on one’s front door.<sup>217</sup> The common distinguishing feature of these regulations is that the consumer is required to take an affirmative step to inform the business that they do not want to receive the company’s in-

formation.<sup>218</sup>

In *Rowen v. Post Office Department*,<sup>219</sup> the Court upheld a regulation allowing homeowners to remove themselves from company mailing lists.<sup>220</sup> Title III of the Postal Revenue and Federal Salary Act of 1967 permitted homeowners to request that a company not send them offensive solicitations.<sup>221</sup> The Court upheld the constitutionality of the statute against a First Amendment challenge and concluded that the regulation sufficiently protects an individual’s right to determine what speech flows in and out of his home. The Court held,

[w]e 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.<sup>222</sup>

In the same manner, and for the same reasons, that a homeowner may notify the Postmaster General that he does not want to receive mailings, a homeowner should be able to notify telemarketers through a national “do-not-call” database that he does not wish to receive solicitation telephone calls in his home.

The Supreme Court has also determined that cities may prevent door-to-door sales persons from approaching a home that has a “No Solicitation” sign posted.<sup>223</sup> In *Martin v. City of Struthers*,<sup>224</sup> the Court held that a complete ban

<sup>210</sup> 447 U.S. at 566.

<sup>211</sup> 492 U.S. 469 (1989).

<sup>212</sup> *Id.* at 480.

<sup>213</sup> Kertz & Burnette, *supra* note 4, at 1044.

<sup>214</sup> 492 U.S. at 480.

<sup>215</sup> It is important to note at this time that the restrictions placed upon telemarketers in the TSR are content-neutral. In addition to the *Central Hudson* four prong test, commercial speech is governed by the “time, place, or manner” test defined in *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993). “Essentially, the time, place, or manner test’s only significant difference from the commercial speech test is the application of an initial additional prong: the restriction cannot be based on the content of the regulated speech.” Joseph R. Cox, *Telemarketing, The First Amendment, And Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL’Y 403, 407-408 (1996). See also, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Therefore, it is not necessary to address this additional test in detail because the restrictions are not content-based.

The FTC defends its position of content neutrality by explaining that “[t]he 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, and regardless of what may be expressed in the solicitation calls themselves or the viewpoints of the organizations on whose behalf the solicitation was made.” Telemarketing Sales Rule, 68 Fed. Reg. at 4636. Further, “the ‘do-not-call’ registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.” *Id.* at n.678.

<sup>216</sup> See *Rowen v. Post Office Dep’t*, 397 U.S. 728 (1970).

<sup>217</sup> See *Martin v. City of Struthers*, 319 U.S. 141 (1943).

<sup>218</sup> *Rowen*, 397 U.S. at 737 (“[T]he 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.”).

<sup>219</sup> 397 U.S. 728 (1970).

<sup>220</sup> *Id.* at 740.

<sup>221</sup> *Id.* at 729.

<sup>222</sup> *Id.* at 738.

<sup>223</sup> Shannon, *supra* note 1, at 383-84.

<sup>224</sup> 319 U.S. 141 (1943).

on door-to-door solicitation is an inappropriate restriction on the freedom to disseminate information<sup>225</sup> because it "makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away."<sup>226</sup> However, the Court also discussed a proposed regulation that would make it unlawful for a sales person to approach a home when the homeowner has indicated he is unwilling to be disturbed.<sup>227</sup> The Court's discussion implies that a similar restriction allowing telephone callers to place a "No Call" sign on their phone is a reasonable restriction on a telemarketer's right to communicate with consumers.<sup>228</sup>

In *Village of Schaumburg*, the Court refers to posting of "No Solicitation" signs as an appropriately balanced limitation on a solicitor's business. The Court states, "[o]ther provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from the property by posting signs reading 'No Solicitors or Peddlers Invited' suggest the availability of less intrusive and more effect measures to protect privacy."<sup>229</sup> Therefore, it is reasonable that a statute which requires a consumer to affirmatively refuse a solicitation is also an appropriately balanced regulation.<sup>230</sup>

The aforementioned cases demonstrate that a person has the right to decide what speech comes in and out of their home. In fact, "the Supreme Court has suggested that individual blocking of speech is an acceptable way to balance the rights of the speaker, the willing recipients, and the unwilling recipients without unconstitutionally restricting the speech."<sup>231</sup> The national "do-not-call" list similarly balances the individuals right to privacy with the telemarketer's right to communicate his idea by requiring a household to affirmatively block calls.<sup>232</sup> This solution ultimately allows the

consumer to decide whether to receive the information into their household, and allows the government to regulate without intruding upon the telemarketer's First Amendment rights.

## V. CONCLUSION

The problems associated with telemarketing have been expressed by consumers, legislators and government agencies, and it is time to take action to protect the privacy rights of an individual in his home. Homeowners have the freedom to place a "No Solicitation" sign on their door to prevent sales persons from visiting their home. Citizens have a right to place a "No Trespassing" sign on their property with the expectation that no one will enter upon their land. Technological advances, however, have made it possible for telemarketers to stand at the edge of one's property, whether protected by a "No Solicitation" sign or not, and place a call into the home. Therefore, to maintain the established standard of privacy, it is imperative that a homeowner is provided with the means to place a "Do Not Call" sign on his telephone to combat technological advances in solicitation techniques. The national "do-not-call" database provides this avenue for further protection.

The amended TSR is an appropriately balanced regulation that considers both the First Amendment rights of professional telemarketers and the privacy rights of homeowners. Furthermore, the TSR's exclusion of for-profit telemarketing companies working on behalf of charitable organizations upholds the goal of the "do-not-call" list better than the FCC's waiver. The stated goal of the database is to prevent unwanted commercial speech from entering the home. Therefore, charitable organizations may continue to solicit donations for their cause over the telephone because

<sup>225</sup> *Id.* at 149.

<sup>226</sup> *Id.* at 148.

<sup>227</sup> *Id.* ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers.")

<sup>228</sup> Shannon, *supra* note 1, at 383 n.22 ("Similar to these no-solicitation ordinances, do-no-call legislation enables a governmental body to punish solicitors who telephone homeowners in defiance of their previously expressed will. Under the Court's logic in *Martin*, do-not-call proposals aimed at curbing telephone solicitation appear reasonable.")

<sup>229</sup> *Village of Schaumburg*, 444 U.S. at 639 (citations omit-

ted).

<sup>230</sup> Jennifer L. Radner, *Comment, Phone, Fax and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 384 (1993) ("The Court appears to be extremely vigilant in shielding the sanctity of the home from unwanted communications . . . as long as the statutorily approved method of preventing the communication involves some affirmative action by the home owner.")

<sup>231</sup> Kertz & Burnette, *supra* note 4, at 1050.

<sup>232</sup> See Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99 (1986) (suggesting that blocking services are the most appropriate manner in which to regulate).



their intention is not commercial but professional telemarketers must be bound by the “do-not-call” list. The national “do-not-call” list will assist consumers in distinguishing between charitable orga-

nizations and the for-profit companies working on behalf of a charity, thereby allowing consumers to make a more informed decision before contributing money over the telephone.

