

“DO-NOT-CALL LIST” TESTIMONY
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION*

TESTIMONY BY: TIMOTHY J. MURIS**

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Mr. Chairman, thank you for the opportunity to present testimony on the status of the FTC’s National Do Not Call Registry.¹

As you know, the Commission adopted the Registry as one of the amendments to the Telemarketing Sales Rule (TSR) announced December 18, 2003, and formally promulgated in the Federal Register on January 29, 2003. On March 11, 2003, President Bush signed into law the Do Not Call Implementation Act (DNCIA), which provides for the FTC to collect fees from sellers and telemarketers to fund the establishment and maintenance of the National Do Not Call Registry. Congress enacted this legislation, and provided complementary appropriations,² to support the FTC’s decision to establish such a Registry (conditioned on funding) as part of its amendment of the TSR.³ The DNCIA also set a short deadline for the FCC to finish a rulemaking proceeding, already in progress, reviewing that agency’s telemarketing regulations (originally promulgated in 1992) pursuant to the Telephone Consumer Protection Act (TCPA), and required the FCC to maximize consistency with the FTC’s Do Not Call rules. Accordingly, the FCC announced its adoption of complementary do not call regulations on June 27, 2003, and formally promulgated them in the Federal Register on July 25, 2003.

Both sets of regulations prohibit companies subject to the respective agencies’ jurisdiction from calling consumers who enter their phone numbers on the National Do Not Call Registry database established and maintained by the FTC. Both agencies set October 1, 2003 as the date when they would begin enforcing the Do Not Call Registry provisions, and when telemarketers and sellers would be required to refrain from calling consumers who had placed their numbers in the Registry.

The Registry opened to accept consumer registrations on June 27, 2003, and within three days more than ten million phone numbers had been registered. Fourteen states have shared the contents of their registries with the National Do Not Call Registry, contributing over nine million phone numbers.⁴ As of September 28, 2003, there were more than 51.5 million phone numbers in the Registry.

On September 2, 2003, the Registry became available to telemarketers who wished to gain access to the database so that they could refrain from calling consumers who had expressed a preference not to receive telemarketing calls. Since then, over 13,000 organizations have subscribed, and of those, more than 400 have accessed and paid for the entire Registry.

Shortly after the FTC promulgated the amended TSR, two telemarketing trade associations filed separate legal challenges to various provisions of the amended Rule, including the

National Do Not Call Registry provisions. The Direct Marketing Association and several of its members brought suit in federal district court in Oklahoma City,⁵ and the American Teleservices Association and several of its members sued in the federal district court in Denver.⁶ The American Teleservices Association also challenged the FCC's revised telemarketing rules in a separate lawsuit.⁷ Regrettably, a decision in the American Telemarketing Association's challenge to the FTC's Rule may leave the FTC unable to put into effect the Registry, even though it has received overwhelming support from consumers and from Congress.

On September 23, 2003, Judge West in Oklahoma City issued a summary judgment order invalidating the Registry provisions on the grounds that the FTC lacked statutory authority to establish such a Registry. Congress acted with unprecedented speed to pass a new law eliminating the problem that Judge West had perceived. We are grateful to Chairman McCain, Senator Hollings, Chairman Tauzin and Congressman Dingell, and all the other members of Congress who acted so fast and so overwhelmingly to demonstrate their support for the Registry. The President signed this legislation into law on Monday, September 29.

Nevertheless, Congress had barely finished its work when U.S. District Judge Nottingham in Denver ruled that the Do Not Call Registry offends the First Amendment because it makes a content-based distinction between its treatment of commercial telemarketing calls to sell goods or services and noncommercial calls soliciting charitable contributions. We believe that as a matter of law this decision is incorrect, and are therefore confident of ultimate success on appeal. Nevertheless, this legal dispute could take years to resolve. In the meantime, the status of the Registry is unsettled.

The Commission is acting to comply with Judge Nottingham's order "enjoining the FTC from enforcing the amended Rules (issued in December 2002) creating and implementing a federal Do Not Call Registry." This is not a simple or straightforward matter, because the decision may have far reaching repercussions beyond its impact on the FTC.

As noted, the FCC has revised its TCPA regulations to prohibit any company under that agency's jurisdiction from calling consumers' numbers that appear on the National Do Not Call Registry. Chairman Powell of the FCC has announced that the FCC will enforce its do-not-call rules against telemarketers that have obtained the Do-Not-Call list from the FTC, beginning October 1.⁸ He noted that the recent court cases have not disturbed the FCC rules, and that the 10th Circuit Court of Appeals had refused to block the FCC's rules pending review – as the telemarketing industry had urged – citing the strong public interest of leaving the rules in place. Chairman Powell stated that the FCC intends to continue to administer and enforce its rules to the fullest extent possible as the litigation proceeds. These steps are made more difficult because it is unclear the extent to which Judge Nottingham's decision permits the FCC to access the Registry for enforcement or companies under FCC jurisdiction to access the Registry for compliance with the FCC's rules.

Similarly, Judge Nottingham's ruling threatens the ability of the states with do not call laws to enforce them. The TCPA prohibits any state that has a do not call registry from enforcing its do not call law unless its registry includes the phone numbers of consumers from that state who

are on the National Do Not Call Registry, which the FCC has established as a single national do not call database as part of its revised TCPA regulations.⁹ Because it is unclear the extent to which Judge Nottingham's decision permits the states to access the Registry for purposes of enforcement of state law, the decision casts doubt on the ability of states to enforce their do not call laws.

We believe that the FTC is likely to succeed on the merits of its appeal because the district court's decision reached an unprecedented conclusion that telemarketers have a constitutional right to continue telemarketing calls to consumers who have indicated that they do not want these calls. This holding is at odds with the relevant Supreme Court cases. Specifically, the court erred in its application of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹⁰ Under *Central Hudson*, a regulation of truthful nondeceptive commercial speech will survive First Amendment scrutiny if 1) the government asserts a substantial interest; 2) the regulation directly advances that interest; and 3) the regulation is reasonably tailored to serve that interest.

With respect to the first prong of the *Central Hudson* test, the Denver court recognized that the interest the Registry is designed to advance, protecting consumers from unwanted telemarketing calls, is a substantial one. Millions of consumers have signed up for the Registry in the hope that it would shield them from unwanted telemarketing calls. As the district court noted, "[t]he 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."¹¹

We disagree, however, with the court's analysis of the second prong of the *Central Hudson* test, the requirement that the Registry must materially advance the government's interest in protecting consumers from unwanted telemarketing calls. The court conceded that the Registry "might eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe, a substantial amount of unwanted calls."¹² Indeed, as a result of the FCC's complementary TCPA regulations, the Registry will likely shield consumers from as many as eighty percent of unwanted calls. Because the Registry would put a halt to a substantial percentage of unwanted telemarketing calls, it materially advances the government's interest.¹³

Nevertheless, the court ruled that the Registry could not pass muster under *Central Hudson* because the Registry does not also apply to charitable solicitations – even though charitable solicitation constitutes fully protected speech.¹⁴ The court criticized the TSR's accommodation of protected charitable solicitation as "content based," and therefore - in its view - as impermissible under *City of Cincinnati v. Discovery Network, Inc.*¹⁵ The court appears to have ruled out any distinction between commercial and non-commercial speech in the regulation of telemarketing. In fact, the court's decision puts the FTC in an awkward position – in order to protect consumers from unwanted commercial calls, the FTC would run the risk of creating an impermissible infringement on fully protected speech. The court's reasoning is erroneous, for three reasons.

First, the court erred in supposing that there is "no doubt" that calls soliciting charitable contributions are equally as invasive as commercial calls.¹⁶ On the contrary, as the Eighth

Circuit recognized in *Missouri v. American Blast Fax, Inc.*, Congress itself, in enacting the TCPA, concluded that “non-commercial calls . . . are less intrusive to consumers because they are more expected.”¹⁷

In this regard, the Court also failed to note that reasons directly related to the abuses the Do Not Call rules seek to remedy compelled the FTC’s determination to exempt charitable solicitation calls from the National Do Not Call Registry Requirements (while subjecting them to the company-specific do not call provisions). For eight years, the Rule has contained a company-specific do-not-call provision, which was intended to shield consumers from unwanted telemarketing calls, but until March 31, 2003, this provision applied only to commercial telemarketers.¹⁸ Although the record shows that this provision failed to achieve its goal with respect to commercial telemarketing calls because those telemarketers frequently ignored consumers’ requests to be put on company-specific lists, there was no comparable evidence that for-profit telemarketers who solicit on behalf of charities will ignore the company-specific provision. There is also no record evidence that, with respect to charitable solicitors, the company-specific provision will not achieve the FTC’s goal of protecting consumers from unwanted telemarketing. In fact, evidence on the record indicates that the different incentives that govern charitable solicitations as compared to commercial solicitations may make the company-specific approach more workable and effective with respect to charitable solicitations. Accordingly, the record provides ample reason, directly related to the abuses the Registry is aimed at, for treating charitable solicitations differently.

Second, the district court ignored the context in which the Supreme Court addressed the issue in *Discovery Network*. In that case, the ordinance’s exception for non-commercial newsracks made the ordinance ineffective in addressing the public purpose in question - preventing the clutter and disruption on city sidewalks engendered by newsracks - because commercial newsracks comprised only a very small proportion of newsracks overall.¹⁹ By contrast, the TSR’s Do Not Call Registry provisions cover the vast majority of telephone solicitations, especially in light of the FCC’s complementary rule. This fact distinguishes *Discovery Network*.²⁰

Third, in assessing the “fit” of the Do Not Call Registry under *Central Hudson*, the court failed to take into account the minimal nature of any governmental intrusion on speech. Unlike the ordinance in *Discovery Network*, the National Do Not Call Registry does not ban any speech; it only facilitates consumer choice whether particular speech is welcome. Even assuming the district court was correct in concluding that the Registry nevertheless imposes some level of burden on speech, the degree of any such restriction is relevant to an assessment of whether the measure is “narrowly tailored to achieve the desired objective.”²¹ The Do Not Call Registry has been carefully tailored, allowing commercial telemarketing to be directed at all consumers except those who have specifically requested that they be spared such intrusions. Such a system is consonant with the underlying purpose of the commercial speech doctrine - i.e., enhancing consumer welfare by ensuring the availability of information consumers value.²²

More than fifty million telephone numbers are now in the Registry. All these consumers have stated that they want an end to telemarketing calls. The Rule’s Do Not Call Registry provisions that protect consumers were scheduled to take effect on October 1, 2003. The FTC has moved

for a stay of the district court's order, but if the stay is not granted, tens of millions of consumers will continue, after that date, to receive those telemarketing calls.²³ By contrast, if a stay is granted, telemarketers will be restrained from calling only those consumers who have signed up for the registry and who have declared their lack of interest in telemarketing sales calls. Indeed, the Direct Marketing Association, a telemarketing industry trade association, has recently stated that it "remains committed to respecting . . . the wishes of all consumers no matter how those wishes have been expressed."²⁴ We believe we have a strong argument for success in our motion for a stay, and we are hopeful that a stay will be granted.

It is hard to imagine a more graphic expression of public interest than the Congressional response to Judge West's September 23, 2003, decision holding that the FTC lacked statutory authority to create the registry. Within only forty-eight hours of that decision, both houses of Congress passed legislation expressly ratifying the registry. We hope that the strong public interest embodied in Congress's recent enactment will not be thwarted.

For over two years, the highest priority of the FTC has been simple: to allow consumers to choose whether to accept unsolicited telemarketing calls in their homes. Even before the National Do Not Call Registry was to become effective, Americans registered more than fifty million phone numbers with the FTC. Millions have also registered with similar state lists.

This simple concept has been surprisingly difficult to implement. The FTC spent a year reviewing the rule and another year soliciting and considering comment from sellers, telemarketers, and consumers. Every effort was made to accommodate the industry's concerns about the original proposal, refining and revising it, for example, to permit a company to call consumers on the registry if they have an established business relationship with that company.

Despite our efforts, the telemarketers have used every weapon in their formidable arsenal to deprive consumers of choice. The FTC will continue to make every effort to give consumers an effective choice about stopping unwanted and intrusive telemarketing calls.

* The *Richmond Journal of Law & Technology* has not verified the accuracy of these remarks. The *Journal* has verified the accuracy of the author's endnotes.

** Mr. Muris is the Chairman of the Federal Trade Commission.

¹ The views expressed in this statement represent the views of the Commission. My oral statements and responses to any questions are my views, not necessarily the views of the Commission or any other Commissioner.

² The Omnibus Appropriations Act, Public Law No. 108-7 (enacted Feb. 21, 2003).

³ 16 C.F.R. pt. 310.

⁴ The states are Alabama, Arkansas, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, and Oklahoma.

⁵ *U.S. Security v. FTC*, No. CIV 03-122-W (W.D. Okla. 2003) (unpublished opinion).

⁶ *Mainstream Marketing v. FTC*, 284 F. Supp. 2d 1266 (D. Col. 2003).

⁷ *Mainstream Marketing v. FCC*, No. 03-9571 (D. Col. 2003) (unpublished opinion).

⁸ See Federal Communications Commission, Press Release, *FCC Do-Not-Call Rules Remain in Force*, Sept. 29, 2003, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239219A1.pdf.

⁹ 47 U.S.C. § 227(e)(2) (2003).

¹⁰ 447 U.S. 557, 564 (1980).

¹¹ Order at 19-20 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

¹² Order at 22.

¹³ See *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 431 (upholding regulation that restricted lottery ads from only 11% of radio listening time in the affected area).

¹⁴ See *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 787-88 (1988).

¹⁵ 507 U.S. 410 (1993).

¹⁶ Order at 24.

¹⁷ 323 F.3d 655 (8th Cir. 2003) (quoting H.R. Rep. No. 102-317, at 16 (1991)).

¹⁸ On October 25, 2001, the USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001), became effective, which, in relevant part, expanded the coverage of the TSR to reach not only calls to solicit sales of goods and services, but also calls soliciting charitable contributions.

¹⁹ *Discovery Network*, 507 U.S. at 418.

²⁰ See *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995). In that case, the court upheld a prohibition on unsolicited faxes that applied only to commercial faxes. The court held that *Discovery Network* did not require the FCC to distinguish the harm caused by commercial and noncommercial faxes because it was undisputed that commercial faxes caused the bulk of the problem. *Id.* at 55. Whereas, as here, the regulation furthers the government's goal, *Discovery Network* does not prevent the government from regulating commercial speech merely because it has not also regulated fully protected speech. This is what the Supreme Court meant in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), when it said that there is no constitutional requirement that the government "make progress on every front before it can make progress on any front."

²¹ *Board of Trs. of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989); *cf.* *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1515-16 (10th Cir. 1994) (where restriction entails "an indirect barrier to commercial speech," "the 'reasonable fit' test of *Fox* is more easily satisfied").

²² See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995).

²³ See *Mainstream Marketing v. FCC*, No. 03-9571, 2003 U.S. App. LEXIS 20067 (10th Cir. Sept. 26, 2003) (Order denying stay, recognizing “the strong expectation interest of the many millions of Americans who have registered” on the do-not-call Registry).

²⁴ See The Direct Marketing Association, *The DMA Commits to Resolve Constitutional and Statutory Issues Raised by Federal Courts*, Sept. 26, 2003, at <http://www.the-dma.org/cgi/dispnewsstand?article=1494>.