IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N, | ) | No. 03-1429 |
| Plaintiffs-Appellees, | ) | ON APPEAL FROM THE |
| v. | ) | U.S. DISTRICT COURT, |
| FEDERAL TRADE COMMISSION, | ) | DISTRICT OF COLORADO |
| Defendant-Appellant. | ) | |
| UNITED STATES OF AMERICA, | ) | The Honorable Edward W. Nottingham |
| Intervenor. | ) | D.C. No. 03-N-0184 (MJW) |
| U.S. SECURITY, CHARTERED BENEFIT SERVICES, INC., GLOBAL CONTACT SERVICES, INC., INFOCISION MANAGEMENT CORP., and DIRECT MARKETING ASS'N, INC., | ) | No. 03-6258 |
| Plaintiffs-Appellees, | ) | ON APPEAL FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA |
| v. | ) | |
| FEDERAL TRADE COMMISSION, | ) | The Honorable Lee R. West |
| Defendant-Appellant. | ) | D.C. No. 03-122-W |
| UNITED STATES OF AMERICA, | ) | |
| Intervenor. | ) | |
| MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N, | ) | No. 03-9571 |
| Petitioners, | ) | ON REVIEW OF ORDER OF THE |
| v. | ) | FEDERAL COMMUNICATIONS |
| FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, | ) | COMMISSION |
| Respondents. | ) | CG Docket No. 02-278 |
| COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, | ) | No. 03-9594 |
| Petitioner, | ) | ON REVIEW OF ORDER OF THE |
| v. | ) | FEDERAL COMMUNICTIONS |
| FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA | ) | COMMISSION |
| Respondents. | ) | CG Docket No. 02-278 |

# CONSOLIDATED OPENING BRIEF OF APPELLANT FEDERAL TRADE COMMISSION, RESPONDENT FEDERAL COMMUNICATIONS COMMISSION, AND RESPONDENT-INTERVENOR UNITED STATES OF AMERICA

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## RELATED APPEAL

U.S. Security, et al. v. FTC, No. 03-6276 (10th Cir.)

## JURISDICTION

On January 29, 2003, plaintiffs U.S. Security; Chartered Benefit Services, Inc.; Global Contact Services, Inc.; Infocision Management Corp.; and Direct Marketing Association, Inc., ("U.S. Security plaintiffs"), and plaintiffs Mainstream Marketing Services, Inc.; TMG Marketing, Inc.; and American Teleservices Association ("Mainstream plaintiffs") filed separate actions challenging various provisions of the Telemarketing Sales Rule ("Rule"), which the Federal Trade Commission ("FTC") promulgated on January 29, 2003, pursuant to 5 U.S.C. § 553. The district court's jurisdiction in both cases arises from 5 U.S.C. §§ 702, 704 and 28 U.S.C. § 1331.

Each district court entered a final judgment, enjoining or declaring invalid provisions of the Rule creating and implementing a national do-not-call registry for telemarketers. This Court has jurisdiction over both appeals, pursuant to 28 U.S.C. § 1291.

The U.S. Security judgment was entered on September 23, 2003, and the FTC filed its notice of appeal on September 24. The Mainstream judgment was entered on September 25, 2003, and the FTC filed its notice of appeal on September 26.

On July 3, 2003, the FCC issued its Report and Order ("FCC Order") adopting rules requiring telemarketers to comply with the do-not-call registry. A summary of the FCC Order was published in the Federal Register on July 25, 2003. 68 Fed. Reg.

44144. The Mainstream plaintiffs filed a petition for review of the FCC Order in this Court the same day, and refiled their petition on August 4, 2003. On September 23, 2003, petitioner Competitive Telecommunications Association filed a petition for review of the FCC Order in the District of Columbia Circuit, which transferred that proceeding to this Court on October 3, 2003. This Court has jurisdiction over both petitions pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.

## STATEMENT OF THE ISSUES PRESENTED[1]

1. Whether the nationwide do-not-call registry jointly implemented by the FTC and the FCC violates the First Amendment rights of commercial telemarketers to place calls to consumers who have indicated, by signing up for the registry, that they do not want such calls.

2. Whether the FTC's Fee Rule violates the First Amendment.

3. Whether the FTC had authority to promulgate those provisions of its Rule that pertain to the do-not-call registry.

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[1] Because the FCC is a respondent in Case Nos. 03-9571 & 03-9594, and the issues presented in those cases will depend to a degree on the arguments petitioners make in their October 31, 2003, briefs, the FCC reserves the right to identify additional issues in the government's November 7, 2003, filing.

## STATEMENT OF THE CASE

### A. Nature of the Case, the Course of Proceedings, and the Disposition Below

Plaintiff/petitioner telemarketers brought these actions challenging the FTC's and FCC's joint implementation of a nationwide do-not-call registry. The FTC created the registry as part of its Telemarketing Sales Rule. The Rule prohibits telemarketers and sellers from calling phone numbers that consumers have listed on the registry. Subsequently, the FCC amended its rules implementing the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to prohibit persons from making telephone solicitations to residential telephone subscribers who have registered their telephone numbers on the registry. Since June 27, 2003, when the registry opened, consumers have registered more than 50 million phone numbers.

The U.S. Security plaintiffs filed their complaint in the Western District of Oklahoma, challenging the registry on statutory and constitutional grounds. JA 152.[2] The Mainstream plaintiffs raised similar challenges in the District of Colorado. JA 8.

The parties in both district court proceedings filed cross-motions for summary judgment. On September 23, the court in U.S. Security (per Judge West) entered judgment for plaintiffs, holding that the FTC lacked authority to promulgate those

[2] "JA" refers to the Joint Appendix of Appellant FTC, Respondent FCC, and Respondent-Intervenor United States.

provisions of the Rule that pertain to the registry. Congress subsequently overruled this decision by statute. See P.L. 108-82, 117 Stat. 1006 (2003). On September 25, 2003, the court in Mainstream (per Judge Nottingham) entered judgment for plaintiffs there, holding that the registry violated the First Amendment and enjoining the FTC from enforcing the rule provisions creating and implementing the registry. On October 7, 2003, this Court stayed the Mainstream decision, and the following day, granted the United States' motion to intervene.

The Mainstream plaintiffs and the Competitive Telecommunications Association filed petitions for review of the FCC Order. The Mainstream plaintiffs sought a stay pending appeal, which this Court denied on September 26, 2003.

By orders of October 7 and 8, 2003, this Court consolidated all four of these matters and directed the governmental parties to submit a single opening brief. In this consolidated proceeding, the FTC seeks reversal of the portions of both lower court rulings invalidating the do-not-call registry, and the dismissal of plaintiffs' challenges.[3] The FCC seeks denial of both petitions for review.

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[3] Both district courts upheld, against plaintiffs' challenges, other portions of the FTC's Rule, which affect telemarketing but are distinct from the do-not-call registry. See JA 78, 184. The U.S. Security plaintiffs have appealed from such portions of that court's opinion. That appeal (No. 03-6276) is not part of this consolidated proceeding.

## B. Facts and Proceedings Below

### 1. Background

In the past two decades, telemarketing to consumers has become a multi-billion dollar business -- and a growing intrusion into everyday life. As early as 1991, Congress recognized that "[u]nrestricted telemarketing * * * can be an intrusive invasion of privacy," and that "many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." TCPA, 47 U.S.C. § 227 note. Since that time, matters have only gotten worse -- the volume of telemarketing calls, and the public outcry, have both increased. According to information received in the FTC's rulemaking record, commercial telemarketers complete over 16 *billion* calls a year. 68 Fed. Reg. at 4630 n. 591; JA 341. The FCC likewise estimated that telemarketing calls, completed and abandoned, could amount to as many as 104 million calls a day -- a "fivefold" increase in the last decade. FCC Order, 18 FCC Rcd. 14014, 14054 ¶ 66 (2003), JA 894.

#### a. The TCPA and the FCC's Original Rule

The TCPA, enacted in 1991, directs the FCC to prescribe rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1). In adopting such regulations, the FCC was to "compare and evaluate alternative methods and

procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do-not-call' systems * * *) for their effectiveness in protecting such privacy rights, and in terms of their costs and other advantages and disadvantages." 47 U.S.C. § 227(c)(1)(A). The TCPA specifically authorized the FCC to "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. § 227(c)(3).

Under the TCPA, a "telephone solicitation" means "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." 47 U.S.C. § 227(a)(3). Besides calls to "any person with that person's prior express permission," or "to any person with whom the caller has an established business relationship," the definition of telephone solicitation does not include "a call or message * * * by a tax exempt nonprofit organization." Id. The legislative history explains that Congress excluded tax-exempt organizations because the record before it did "not contain sufficient evidence to demonstrate that calls from [such] organizations should be subject to the [statute's] restrictions." H.R. Rep. No. 102-317 at 16 (1991). On the contrary, "[c]omplaint statistics show[ed] that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations."

Id. (citing poll conducted by National Association of Consumer Agency Administrators). "In addition to the relative low volume of non-commercial calls," the House Committee concluded "that such calls are less intrusive to consumers because they are more expected." Id. "Consequently," the Committee stated, "the two main sources of consumer problems -- high volume of solicitations and unexpected solicitations – are not present in solicitations by nonprofit organizations." Id. Nonetheless, Congress directed the FCC to "consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under [the telephone solicitation definition]." 47 U.S.C. § 227(c)(1)(D).

In 1992, the FCC adopted rules implementing the TCPA. Among other things, the agency established company-specific "do-not-call" requirements, according to which persons or companies engaged in telephone solicitation are required to create, maintain, and honor a list of residential telephone subscribers who do not wish to be called by the telemarketer. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd. 8752 ¶¶ 23-24 (1992); see 47 C.F.R. § 64.1200(c)(2). The FCC decided not to create a national do-not-call database at that time, however, emphasizing that such a database "would be costly and difficult to establish and maintain in a reasonably accurate form," and that

the company-specific do-not-call lists appeared to provide "an effective alternative." 7 FCC Rcd. 8760-61 ¶¶ 14-15.

**b. The TCFPA and the FTC's Original Rule**

Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFPA"), 15 U.S.C. §§ 6101 et seq., in 1994. At that time, it noted the "magnitude" of the problem of "[i]nterstate telemarketing fraud," and recognized that "[c]onsumers are victimized by other forms of telemarketing deception and abuse." 15 U.S.C. § 6101. Accordingly, Congress ordered the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," 15 U.S.C. § 6102(a)(1), and further directed that the FTC "shall include in such rules respecting other abusive telemarketing acts or practices -- a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," 15 U.S.C. § 6102(a)(3)(A). The TCFPA defined telemarketing as "a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. § 6106(4).[4] It further provides

[4] In 2001, the USA PATRIOT Act, P.L. 107-56, § 1011, expanded the TCFPA's definition of telemarketing to encompass telemarketing by for-profit entities on behalf of charities.

that "no activity which is outside the jurisdiction of [the FTC Act, 15 U.S.C. §§ 41 et seq.] shall be affected by this Act." 15 U.S.C. § 6105(a).

The FTC promulgated its original Rule in 1995. 60 Fed. Reg. 43842. That Rule prohibited various deceptive telemarketing practices (16 C.F.R. § 310.3), as well as abusive practices such as calling a consumer who has said she does not wish to be called (the company-specific do-not-call provision). 16 C.F.R. § 310.4. Because of the jurisdictional limits of the TCFPA and the FTC Act, the Rule applied only to interstate telemarketing of goods and services, and did not apply to, inter alia, telemarketing by nonprofits or banks, or in connection with common carrier activities.

**c. Amendments to the FTC's Rule**

In 2000, the FTC commenced a review of the Rule's effectiveness, and based on the information it gathered, it decided to consider amendments to address recurring abuses. 68 Fed. Reg. 4581-82. On January 30, 2002, the FTC published its Notice of Proposed Rulemaking ("NPRM"). 67 Fed. Reg. 4492. The FTC noted that the Rule's company-specific do-not-call provision had been widely criticized as inadequate to protect consumers from unwanted telemarketing calls. Accordingly, the NPRM proposed, inter alia, the establishment of a national "do-not-call" registry for consumers who want to limit the number of telemarketing calls they receive. 67 Fed. Reg. 4516-20.

The FTC's rulemaking elicited a remarkable outpouring of public sentiment; the FTC received over 64,000 comments, not only from potentially affected businesses and organizations, but also from academics, privacy advocates, and thousands of individual citizens. 68 Fed. Reg. 4582. The vast majority of these comments supported creation of the registry. Id. at 4628.

The FTC promulgated its amendments on January 29, 2003. See 68 Fed. Reg. 4580 et seq., JA 214. In its amended Rule, the FTC supplemented its company-specific do-not-call rules with a national do-not-call registry. 16 C.F.R. § 310.4(b)(1)(iii)(B). The FTC noted that commenters identified a number of problems with the company-specific rules. 68 Fed. Reg. at 4629. Among other things, commenters observed that the company-specific approach is "extremely burdensome" to consumers, because it requires them to "repeat their 'do-not-call' request with every telemarketer that calls." Id. In addition, commenters asserted that their 'do-not-call' requests are ignored, that they have no way of verifying that they have been taken off a telemarketer's list, that private lawsuits under the TCPA are "complex and time-consuming," and that judgments against telemarketers are difficult to enforce. Id. As a result of this continuing frustration with unsolicited telemarketing calls, and as further evidence that the company-specific rules had, by themselves, "proven

ineffective," id., the FTC observed that 27 states had established statewide do-not-call lists. Id. at 4630.

The national registry works as follows: consumers who want to reduce the number of telemarketing calls they receive may add their phone numbers to the registry through either a toll-free telephone call or through the internet. The decision to place a number on the registry is voluntary; no consumer is required to participate, and consumers may remove their numbers at any time. Consumers who do not participate in the registry remain free to invoke the Rule's company-specific do-not-call provision to shield themselves from specific telemarketers. Telemarketers and sellers are prohibited by the Rule from calling numbers that have been placed on the registry (but they remain free to call consumers with whom they have an established business relationship, or consumers who have given the seller written authorization to call, 16 C.F.R. § 310.4(b)(1)(iii)(B)(*i*), (*ii*)). In order to "scrub" their phone lists of the numbers on the registry, telemarketers gain access to the registry through a secure website. Those companies are assessed a charge based upon the number of area codes of data that they wish to receive. 68 Fed. Reg. 4628-41.

The FTC recognized that implementation of the registry would not eliminate all telephone intrusions in the home; but it affords consumers "the prospect of at least reducing the number of unwanted solicitations that they receive." 68 Fed. Reg. at

4631. Based on its rulemaking record, the FTC determined that the registry would apply only to commercial telemarketers -- i.e., to calls "on behalf of sellers of goods or services." 68 Fed. Reg. 4629. In reaching that conclusion, the FTC considered comments received in the rulemaking, as well as its enforcement experience under the original Rule. For example, one major consideration weighing in favor of implementing the registry was the experience of consumers and enforcers with the company-specific do-not-call provision, which had applied to commercial telemarketers for several years. The record reflected great public dissatisfaction with that provision as a protection of residential privacy, in light of telemarketers' failure to abide by consumers' requests not to be called, as well as the burden on consumers due to the large number of commercial pitches. Id. at 4629-31.[5]

Not surprisingly, there were no similar reports of dissatisfaction with respect to noncommercial telemarketing, since the Rule did not address such calls until 2003. The FTC also concluded, based on comments received, "that fundamental differences between commercial solicitations and charitable solicitations may confer upon the company-specific "do-not-call" requirements a greater measure of success with

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[5] For example, the National Association of Attorneys General reported that many telemarketers were imposing burdensome conditions, such as requiring written notice, for consumers who wished to assert their rights under the company-specific rule. J.A. __-__.

respect to preventing a pattern of abusive calls" on behalf of charities. Id. at 4637; see JA 360-61. Moreover, the FTC considered arguments that charitable solicitations are often combined with fully-protected advocacy, which could be entitled to a greater degree of First Amendment protection. 68 Fed. Reg. at 4634-36; see JA 347-38. On the other hand, the FTC recognized that even charitable solicitations can interfere with residential peace, and therefore rejected some charities' assertions "that no privacy protection measures are necessary with respect to charitable solicitation telemarketing." 68 Fed. Reg. at 4637. Accordingly, the FTC made charitable solicitation by entities within its jurisdiction subject to the company-specific do-not-call requirement -- i.e., charitable solicitation performed by for-profit telemarketers is subject to this provision, while the activities of non-profit, charitable entities themselves remain outside the FTC's jurisdiction. See 15 U.S.C. § 44. The FTC also said it would monitor future experience and would revisit the issue if it appeared that the company-specific rule was not adequately protecting consumer privacy with respect to noncommercial solicitations. Id.

Shortly after the FTC promulgated its amendments, Congress passed two pieces of legislation intended to assist in the implementation of the registry. On February 20, 2003, it passed the Consolidated Appropriations Resolution, 2003. P.L. 108-7. This legislation allowed the FTC to use up to $18.1 million derived from "fees

sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule." 117 Stat. 96. On March 11, 2003, Congress enacted the Do-Not-Call Implementation Act ("DNCIA"), P.L. 108-10, authorizing the FTC to collect fees "sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the Telemarketing Sales Rule." 117 Stat. 557.

As a result of the DNCIA, the FTC promulgated its Fee Rule, 68 Fed. Reg. 45134 (July 31, 2003), which establishes the fees that a telemarketer or seller must pay to access the registry. The Fee Rule provides for a charge of $25 per area code, with a maximum fee of $7375. It also provides that the first five area codes of data are free to any entity. 68 Fed. Reg. 45144. Once an entity pays the fee, it may access the registry for a period of 12 months. Id. Entities (such as charities) that are not required to comply with the registry but nonetheless choose to do so may access the registry free of charge. Id.

The FTC began accepting sign-ups for the registry on June 27, 2003. Within 72 hours, consumers had enrolled more than 10 million phone numbers. See FTC press release, June 30, 2003 (http://www.ftc.gov/opa/2003/06/dncregistration.htm.). Enrollment has continued at a steady pace, and consumers have now registered more than 50 million numbers. On September 2, 2003, the FTC began allowing telemarketers and sellers to purchase access to the list.

**d. Amendments to the FCC's Rule**

At the same time that the FTC was amending its Rule, the FCC invited comments on whether its rules should be revised to carry out more effectively the purposes of the TCPA in light of significant changes in the telemarketing industry. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd. 17459, 17460-61 ¶ 1 (2002). The FCC specifically sought comment on "the effectiveness of company-specific do-not-call lists," as well as "whether to revisit the option of establishing a national do-not-call list, and, if so, how such an action might be taken in conjunction with the Federal Trade Commission's (FTC) proposal to adopt a national do-not-call list * * *." Id. at 17461. The FCC received thousands of comments expressing widespread consumer frustration with telemarketing calls, the overwhelming majority of which supported the creation of a national do-not-call registry. 18 FCC Rcd. 14017 ¶ 2; 14054 ¶ 66.

The DNCIA directed the FCC to issue its final revised do-not-call rules within 180 days, after "consult[ing] and coordinat[ing] with the Federal Trade Commission to maximize consistency with" the FTC's rule. P.L. 108-10, § 3, 117 Stat. 557. On July 3, 2003, the FCC released its Report and Order revising its telemarketing rules and established, with the FTC, a national do-not-call registry to supplement its

existing company-specific do-not-call rules. See 18 FCC Rcd. 14017 ¶ 1. The FCC determined that, in the decade since the passage of the TCPA, there had been significant changes in the telemarketing industry, including a substantial rise in the number of telemarketing calls and a proliferation in the use of computerized predictive dialers. Id. at 14017 ¶ 2. The FCC also noted "the burdens of making do-not-call requests for every [telemarketing] call, particularly on the elderly and individuals with disabilities." Id. at 14030 ¶ 19; 14054, ¶ 66. The FCC accordingly adopted a national do-not-call registry. Id. at 14034 ¶ 28. In doing so, the FCC emphasized that the registry "will only apply to outbound telemarketing calls and will only include the telephone numbers of consumers who indicate that they wish to avoid such calls," and that "[c]onsumers who want to receive such calls may instead continue to rely on the company-specific do-not-call lists to manage telemarketing calls into their homes." Id. at 14018 ¶ 3. Like the FTC, the FCC concluded that a national do-not-call registry is consistent with the First Amendment, see id. at 14052 ¶ 63, and that the "registry regulations may apply to commercial solicitations without applying to tax-exempt nonprofit solicitations." Id. at 14059 ¶ 73.

**2. Proceedings below**

**a. U.S. Security v. FTC**

The U.S. Security plaintiffs filed their complaint in the Western District of Oklahoma on January 29, 2003. They alleged that the do-not-call registry was outside the FTC's statutory authority, was arbitrary and capricious, and violated the First and Fifth Amendments. The parties filed cross-motions for summary judgment.

On September 23, 2003, the court held that the FTC lacked authority to promulgate the registry. U.S. Security Order at 11. Because the TCPA granted the FCC specific authority to create a registry, the court was unwilling to find such authority in the TCFPA's prohibition of abusive practices. U.S. Security Order at 12. The court also held that the neither the Consolidated Appropriations Resolution nor the DNCIA ratified the registry. U.S. Security Order at 14. On September 24, the FTC filed its notice of appeal and a motion for stay pending appeal, which the district court denied.

In response to U.S. Security, Congress passed P.L. 108-82, expressly confirming the FTC's statutory authority to promulgate the do-not-call registry and "ratif[ying]" the FTC's do-not-call regulation. The President signed that legislation into law on September 29, 2003.

**b. Mainstream Marketing v. FTC**

The Mainstream plaintiffs filed their complaint in the District of Colorado on January 29, 2003. They alleged that the do-not-call registry was outside the FTC's statutory authority, was arbitrary and capricious, and violated the First and Fifth Amendments. The parties filed cross-motions for summary judgment. After the FTC promulgated the Fee Rule, plaintiffs filed an amended complaint, alleging that the Fee Rule was also unconstitutional, and the parties briefed that issue.

On September 25, 2003, the district court granted the plaintiffs' summary judgment regarding the registry. The court held that the provisions of the Rule that create and implement the registry violate the First Amendment and enjoined the FTC from enforcing them. The court acknowledged that the Rule does not directly ban speech but merely provides "a mechanism by which the individual can choose to ban all commercial telemarketing calls to his residence." Mainstream Order at 16. It also recognized that the governmental interests underlying the registry provisions are substantial, noting that protection of the right to residential privacy is "of the highest order in a free and civilized society." Id. at 19-20. Nevertheless, the court condemned the registry as imposing "a content-based limitation on what the consumer may ban from his home" because it exempts charitable solicitors. Id. at 18. Applying the commercial speech standard of Central Hudson Gas & Elec. Corp. v.

Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980), the court concluded that the registry failed the portion of that standard that requires restrictions on commercial speech to advance the government's interests to a material degree. Mainstream Order at 21-27. The court assumed that the registry would "eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe" (id. at 21-22), but, relying on Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), ruled it unconstitutional because it does not apply to noncommercial solicitations. Mainstream Order at 25-27.

On September 26, 2003, the FTC filed a notice of appeal and a motion in the district court for an emergency stay of the injunction pending appeal, which that court denied on September 29.

**3. Proceedings in this Court**

While the summary judgment proceedings were pending in the district court lawsuits against the FTC, the Mainstream plaintiffs also filed a petition for review of the FCC's Order in this Court. On August 28, after unsuccessfully seeking a stay pending appeal from the agency, see 68 Fed. Reg. 49480, they filed a motion in this Court for a stay pending appeal. On September 26, 2003, this Court denied the stay motion, emphasizing "the public interest in respecting 'residential privacy,'" "the strong expectation interest of the many millions of Americans who have registered

with the FCC's 'do not call' list," and petitioners' failure to establish a substantial likelihood of success on the merits." Sept. 26 Order, at 3. On September 29, 2003, the Mainstream petitioners filed an application in the Supreme Court for a stay pending resolution of their petition for review. Mainstream Marketing Serv., Inc. v. FCC, Application No. 03-A298. The application was referred to Circuit Justice Breyer, who denied it that day. Accordingly, the FCC's do-not-call rules took effect on October 1, 2003.

On September 30, 2003, the FTC filed in its Mainstream appeal an emergency stay motion in this Court. On October 7, this Court issued an Order granting the stay and holding that the FTC was likely to succeed on the merits. 10th Cir. Order, 10/7/03, at 15-21. This Court considered the legislative history of the TCPA, which indicated that unwanted commercial calls are a far greater problem than noncommercial calls, and that noncommercial calls were more expected and less intrusive. Id. at 16. It also noted that the FTC had evidence that the company-specific provision was inadequate to protect consumers from commercial telemarketers, but that differences between commercial and noncommercial telemarketers made the provision more likely to succeed with respect to noncommercial telemarketers. Id. at 19-20. This Court observed that it is permissible for the FTC to fix a problem as to which it has evidence without waiting for evidence with respect to noncommercial telemarket-

ers. Id. at 22. Finally, this Court found it significant that the registry allows consumers to "opt-in," id. at 22, and that the registry would cover "the preponderant source of the problem * * *," id. at 23. As a result, this Court found that the line drawn by the Rule was not based solely on the lesser degree of scrutiny applied to commercial speech, and that the FTC was substantially likely to show a reasonable fit satisfying the Central Hudson test. Id. at 22-23.

## SUMMARY OF ARGUMENT

In response to public outcry over the proliferation of unwanted commercial telemarketing, Congress passed the TCPA and the TCFPA to protect privacy and to shield consumers from abusive telemarketing. Pursuant to these statutes, the FCC and the FTC promulgated regulations mandating that commercial telemarketers maintain company-specific do-not-call registries. When these failed to provide adequate protection from unwanted telemarketing, both agencies established a nationwide do-not-call registry for commercial telemarketers. The registry does not ban telemarketing; it creates a mechanism akin to a "NO SOLICITORS" sign whereby consumers may indicate that they do not want any further unsolicited commercial telemarketing calls. (Part I.A.)

The registry is a reasonable regulation that easily passes the Central Hudson test. The interests the registry seeks to protect are of the highest order -- protecting

the privacy of the home, and shielding consumers from unwanted communications. The Supreme Court has repeatedly recognized the importance of protecting privacy at home and has held that this outweighs any intruder's interest in communication. The Court has separately recognized the right of the individual to be free from a communication she does not want to hear. In the words of the Court, "no one has the right to press even 'good' ideas on to an unwilling recipient." Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970). (Part I.B.1.)

The registry passes the second part of the Central Hudson test because the harm at issue is real and the registry materially advances the government's interest in preventing that harm. The agencies' rulemaking records illustrate the striking increase in the number of unwanted telemarketing calls and the corresponding increase in consumer frustration generated by those calls. The records also show the failure of company specific do-not-call provisions to protect consumer privacy from unwanted commercial telemarketing. The nationwide do-not-call registry, however, will directly and materially advance the government's interests. The registry only applies to consumers who sign up, and every consumer who signs up indicates that commercial telemarketing calls are unwanted. Accordingly, the registry only blocks unwanted calls. Regardless of the existence of exceptions, there is no dispute that signing up

for the registry will shield consumers from a substantial amount of unsolicited telemarketing. (Part I.B.2.)

The registry satisfies the third part of Central Hudson because it does not restrict more speech than necessary to serve the government's interests. Like the regulation at issue in Rowan, the registry is well tailored to the government's interests because consumers, not the government, make the choice to sign up. Further, the registry is firmly grounded on the government's experience with the company-specific do-not-call requirements, which had proved insufficient to protect consumers from unwanted commercial telemarketing. None of the alternatives that have been suggested would provide consumers with anywhere near the same degree of protection from unwanted telemarketing. (Part I.B.3.)

The registry is not rendered unconstitutional merely because it does not apply to charitable solicitation. The district court in Mainstream held that the registry was unconstitutional because it exempted such solicitation, but that conclusion was based on a misreading of both the pertinent law and the legislative and rulemaking record. The regulation at issue in Discovery Network, on which the court below relied, applied to newsracks in public spaces and achieved only a minute benefit. Moreover, the distinction that the regulation drew between commercial and noncommercial speech had no relationship whatsoever to the interest the regulation was intended to

further. The do-not-call registry, on the other hand, makes substantial progress toward the government's goals of protecting residential privacy, and the record establishes distinctions between commercial telemarketing and noncommercial solicitation that are related to the government's interests -- most unwanted telephone solicitations are commercial, the government has tried other means to protect consumers (the company-specific provisions), those means are more likely to work with respect to charitable solicitation, and noncommercial calls are less intrusive to consumers. Given these distinctions, it was wholly appropriate for the government to recognize the differential constitutional treatment accorded commercial and noncommercial speech and to exempt noncommercial solicitation from the registry. (Part I.B.4.)

There is nothing unconstitutional about the modest fees that the FTC assesses telemarketers for access to the registry. These fees offset the costs of the registry, and of enforcing the do-not-call and other provisions of the TCFPA. There is no constitutional impediment to collecting fees that meet the costs of administering the FTC's regulation. (Part II.)

The court's conclusion in U.S. Security that the FTC lacked statutory authority to create the do-not-call registry also fails. Two agencies may both have jurisdiction with respect to a portion of the economy. In any event, the court's decision was

overruled by an act of Congress, which recognized that the FTC had ample authority to create the registry, and which ratified the registry the FTC created. (Part III.)

## ARGUMENT

## I. THE DO-NOT-CALL REGISTRY IS CONSTITUTIONAL[6]

### A. Congress And The Agencies Have Taken Measured Steps To Preserve Residential Privacy

At bottom, this case involves "'the most comprehensive of rights and the right most valued by civilized men'"-- i.e., the "'right to be left alone.'" Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Faced with new challenges to that right engendered by new technology and aggressive business practices, Congress, the FTC, and the FCC have taken a series of measured steps, based on continuing experience, to enable consumers to preserve privacy in their homes. Congress began in 1991 with the TCPA, which authorized the FCC to adopt rules "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicita-

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[6] Federal agency rules may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard is "narrow" and "a court is not to substitute its judgment for that of the agency." Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). This Court reviews the grant of summary judgment, including issues regarding the constitutionality of statutes and rules, de novo. Hoffman-Pugh v. Keenan, 338 F.3d 1136, 1138-39 (10th Cir. 2003).

tions to which they object," 47 U.S.C. § 227(c)(1), including rules requiring the use of a "national database * * * of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. § 227(c)(3). The TCPA defines "telephone solicitation" to exclude, among other things, "a call or message * * * by a tax exempt nonprofit organization." 47 U.S.C. § 227(a)(3)(C). As the Eighth Circuit recognized in Missouri v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003), that exclusion readily passes constitutional muster, for it is based on a record before Congress showing that "most unwanted telephone solicitations are commercial in nature," and that noncommercial solicitations "are less intrusive to consumers because they are more expected." Id. at 655; H.R. Rep. No. 102-317 at 16.

Three years later, in the TCFPA, Congress authorized the FTC to adopt rules "prohibiting * * * abusive telemarketing acts or practices," including any "pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. §§ 6102(a)(1), (a)(3)(A). In the DNCIA, Congress directed the FCC to issues rules under the TCPA that would "maximize consistency" with the FTC's do-not-call registry rules, and authorized the FTC to adopt rules establishing fees for the registry.

Pursuant to these statutes, the FTC and the FCC have promulgated rules establishing and implementing a national "do-not-call" registry, through which

consumers can register their residential telephone numbers to indicate their desire not to be called by commercial telemarketers. 16 C.F.R. § 310.4(b)(1)(iii); 47 C.F.R. § 64.1200(c)(2). The registry rules "supplement" the pre-existing company-specific do-not-call rules, which prohibit telemarketers from calling a consumer who has previously asked not to be called. 68 Fed. Reg. at 4629; 18 FCC Rcd. 14017 ¶ 1.

Under these regulations, consumers have "a variety of options for managing telemarketing calls." 18 FCC Rcd. 14033 ¶ 26. They may "(1) place their number on the national do-not-call list; (2) continue to make do-not-call requests of individual companies on a case-by-case basis; and/or (3) register on the national list, but provide specific companies with express permission to call them." Id.

The agencies adopted a national do-not-call registry because the consumer frustration with unsolicited telemarketing calls had continued unabated in the face of their company-specific rules, and despite the establishment of a number of statewide do-not-call registries as well as the self-regulatory efforts of the telemarketing industry. 68 Fed. Reg. at 4630; 18 FCC Rcd. 14017 ¶ 2. As the FCC explained, "[t]he telephone network is the primary means for many consumers to remain in contact with public safety organizations and family members during times of illness and emergency," yet "[c]onsumer frustration with telemarketing practices has reached a point in which many consumers no longer answer their telephones while others

disconnect their phones during some hours of the day to maintain their privacy." Id. at 14035, ¶ 29.

Particularly in light of the substantial increase in telemarketing calls in recent years, the company-specific rules imposed a considerable burden on consumers, since they "must repeat their 'do-not-call' request with every telemarketer that calls." 68 Fed. Reg. at 4629; 18 FCC Rcd. 14030 ¶ 19. Moreover, the use of computerized predictive dialers has led to an increase in "dead-air" or hang-up calls. Not only are many consumers frightened by such calls, but consumers have no practical ability to invoke their company-specific do-not-call rights when the telemarketer does not remain on the line. 18 FCC Rcd. 14030, 14035 ¶¶ 19, 28. Many telemarketers also lack the equipment necessary to receive a do-not-call request by persons with disabilities. Id. at 14035-36, ¶ 29. See generally 18 FCC Rcd. 14066 ¶ 87, 14067-68 ¶ 91.

The do-not-call rules do not "ban telemarketing calls," but instead "provide a mechanism by which individual consumers may choose not to receive telemarketing calls." 18 FCC Rcd. 14057 ¶ 71. And while there are "many other ways available to market products to consumers, such as newspapers, television, radio advertising and direct mail," the agencies concluded that "there simply are not 'numerous and obvious less-burdensome alternatives' to the national do-not-call registry." Id. Indeed, although the telemarketing industry "fears the economic impact a national

registry might have," the registry "might actually benefit industry," as the FTC pointed out, "because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls." 68 Fed. Reg. at 4632.

### B. The Do-Not-Call Registry Is A Reasonable Regulation Of Commercial Speech

The government has the power to regulate even nondeceptive commercial speech[7] if (1) its interest in doing so is "substantial," and the regulation it proposes both (2) "directly advances" that interest, and (3) "is not more extensive than is necessary to serve that interest." Central Hudson , 447 U.S. at 566. Under this test, the government must show, not that its regulation will effect a complete cure, but that it will alleviate identified harms to a "material degree." Florida Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995). In regulating commercial speech, the government is not required to employ the least restrictive means of advancing its interests; it is sufficient that there is a "reasonable fit" between means and ends -- "a fit that is not necessarily

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[7] The FCC's do-not-call registry rules apply to "telephone solicitations," 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 * * *." 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(9). The FTC's registry similarly applies to "outbound telemarketing calls to induce the purchase of goods or services." 16 C.F.R. § 310.4(b)(1)(iii). The telemarketing calls covered by the registry thus "fit[] soundly within the definition of commercial speech." U.S. West, Inc. v. FCC, 182 F.3d 1224, 1232-33 (10th Cir. 1999).

perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989) (citation omitted). "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." Id.

Perhaps the most striking feature of the do-not-call registry is that it bans no speech directly, but merely allows individual households to exercise the right "to be left alone," by barring from their own homes speech by others that they do not wish to hear. The Supreme Court has repeatedly recognized the strength of that interest, which "must be placed on the scales with the right of others to communicate." Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970); see Frisby v. Schultz, 487 U.S. 474, 484 (1988); Hill v. Colorado, supra. As explained below, this key feature of the registry affects every aspect of the Central Hudson analysis, and compels a conclusion that the registry is a modest and reasonable restriction on commercial speech.

**1. The Interests The Registry Seeks To Advance Are Substantial**

The interests that Congress and the agencies seek to advance here are of the highest order -- protecting consumers' homes from intrusion, and shielding them from unwanted commercial communication. The Supreme Court has repeatedly stressed

that the government's interest "'in protecting the well-being, tranquility, and privacy of the home'" is "'certainly of the highest order in a free and civilized society.'" Frisby v. Schultz, 487 U.S. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)). As the Court explained in Carey, the home is "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits." 447 U.S. at 471. The Court has emphasized that the Constitution does not leave governmental units "powerless to pass laws to protect the public from * * * conduct that disturbs the tranquility of [the] home[ ]* * *." Carey, 447 U.S. at 470-71 (quoting Gregory v. Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring)). Indeed, the Court has made plain that "the individual's right to be left alone [in the privacy of his home] plainly outweighs the First Amendment rights of an intruder." FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). "[T]he privacy of the home * * * is accorded special consideration in our Constitution, laws, and traditions." Department of Defense v. FLRA, 510 U.S. 487, 501 (1994).

Moreover, the do-not-call registry is aimed at an especially important element of residential privacy, the protection from direct interruption of home and family life. As one court observed in upholding a state law barring commercial messages sent by automated dialing devices, "[t]he telephone is unique in its capacity to bring those outside the home into the home for direct verbal interchange -- in short, the residen-

tial telephone is uniquely intrusive." State v. Casino Marketing Group, 491 N.W. 2d 882, 888 (Minn. 1992). Unlike other media, the telephone generally demands immediate attention, lest important personal or emergency messages be missed. Id. As discussed above, moreover, the legislative history of the pertinent statutes and the rulemaking records before both agencies demonstrate the onslaught against this core privacy interest that billions of commercial telemarketing calls have engendered. See Van Bergen v. Minnesota, 59 F.3d 1541, 1555 (8th Cir. 1995) ("The sheer volume of telemarketing calls further supports the government's interest in regulation protecting privacy."). Accordingly, there can be no question here that the government has articulated a privacy interest of the strongest sort.

There is also a distinct interest, repeatedly recognized by the Supreme Court, of a would-be listener to refrain from accepting unwanted communications. "[I]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom." Frisby v. Schultz, 487 U.S. at 485; see Edenfield v. Fane, 507 U.S. 761, 769 (1993) (protecting consumers from unwanted solicitation); Florida Bar, 515 U.S. at 625 (same); Bland v. Fessler, 88 F.3d 729, 734 (9th Cir. 1996) (state has significant interest in protecting consumers from unwanted telephone solicitation). The Court has "continued to maintain that 'no one has the

right to press even "good" ideas on an unwilling recipient.'" Hill v. Colorado, 530 U.S. at 718 (quoting Rowan, 397 U.S. at 738).

Indeed, one of these cases -- Rowan -- is particularly relevant to the issues at hand. There, the Supreme Court upheld against a First Amendment challenge a federal statute that allowed homeowners to shield themselves from any "advertisement" offering for sale matter that the recipient "believe[d] to be erotically arousing or sexually provocative." 397 U.S. at 730. Under the statute, the recipient could request the Postmaster General to order the sender of the advertisement to cease further mailings and remove the recipient from the sender's mailing lists. 39 U.S.C. § 4009 (1964 Supp. IV). The Court explained that "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit." 397 U.S. at 737. The Court "therefore categorically reject[ed] the argument that a vendor has the right under the Constitution or otherwise to send unwanted material into the home of another." Id. at 738. The Court concluded that "[t]he asserted right of" a person seeking to communicate with another "stops at the outer door of [that other] person's domain." Id.

Like the statute upheld in Rowan, the do-not-call registry serves the important public interest of facilitating the homeowner's right to block unwanted communica-

tions about commercial matters from the home.[8] The rationale for the Court's decision in Rowan applies as well to the registry. Consumers who have voluntarily added their numbers to the do-not-call registry have shown that they desire to receive no commercial telephone solicitations at their homes. The do-not-call registry serves the important interest of effectuating that desire.

### 2. The Registry Materially Advances The Privacy Interests At Stake

The registry passes the second part of the Central Hudson test because "the harms [the government] recites are real and * * * its restriction will in fact alleviate them to a material degree." See Florida Bar, 515 U.S. at 626. There can be no dispute that the harm caused by unwanted telemarketing is real. As discussed above, the rulemaking records before both agencies reflected the dramatically growing number of intrusions from commercial telemarketing, and the outpouring of public desire to protect the sanctity of the home from such intrusions. It is clear from the vast majority of the thousands of comments that both agencies received during their rulemakings in support of the registry (68 Fed. Reg. 4630 n.593; 18 FCC Rcd. 14054

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[8] Indeed, consumers have a greater need for the registry than for the statute in Rowan because, although the "short, though regular, journey from mail box to trash can," see Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 72 (1983), may shield against unwanted mailings, there is no such simple solution to the intrusion of telephone solicitation.

¶ 66), and from the more than 50 million registrations the FTC has already received, that consumers perceive great harm in the roughly 16 billion commercial telemarketing calls they receive each year. See Anderson v. Treadwell, 294 F.3d 453, 462 (2d Cir. 2002) (the popularity of the government's program demonstrated that the harm was real, and that the program would alleviate the harm).

Nor is there any dispute that the registry will advance the government's interest. The registry does not seek, after all, to eliminate all telephone calls. Rather, the rulemaking record shows that consumers greatly value "the prospect of at least reducing the number of unwanted telephone solicitations that they receive." 68 Fed. Reg. at 4631. Although the record does not contain evidence as to the precise percentage of telemarketing calls that the registry would eliminate, there is record evidence to support the Mainstream court's conclusion that the registry as initially proposed by the FTC would apply to 40 to 60 percent of telemarketing calls.[9] As the FCC noted, "[t]he history of state-administered do-not-call lists demonstrates that such do-not-call programs have a positive impact on the ability of many consumers

[9] During the rulemaking, "[i]ndividual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect." 68 Fed. Reg. 4631. Such a reduction in employment would lead to a corresponding reduction in telemarketing calls. This provides a basis for the estimate, referred to by the court, that the registry would put a halt to 40 to 60 percent of telemarketing calls. See Mainstream Order at 22; Mainstream Stay Order at 4.

to protect their privacy by reducing the number of unwanted telephone solicitations that they receive each day." 18 FCC Rcd. 14054 ¶ 67. See also id. at 14030 ¶ 20 ("[m]any consumers indicate that their state lists have reduced the number of unwanted calls that they receive"). Moreover, the district court's conclusion did not reflect the impact of the FCC's rule, which fills substantial gaps in the FTC's jurisdiction, by covering intrastate telemarketing as well as telemarketing by banks and common carriers. Thus, the registry will alleviate the relevant harm to a substantial degree. See United States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993) (upholding a restriction on offending ads that applied only to a radio station that accounted for 11 percent of listening time in the affected area); Missouri v. American Blast Fax, Inc., supra (finding no First Amendment violation in TCPA provision that prohibited unsolicited fax advertising, but not noncommercial faxes); compare Cincinnati v. Discovery Network, Inc., 507 U.S. at 417-18 (faulting city's ordinance that would eliminate only 3 to 4 percent of the offending newsracks). In any event, there is no constitutional requirement that the government "make progress on every front before it can make progress on any front." Edge, 509 U.S. at 434.

Here, consumers beleaguered by repeated telemarketing calls will derive direct and concrete relief if they invoke the do-not-call registry, even if some exempt entities can continue to call. Moreover, because the communicative act itself (i.e., the

telemarketing call) causes the intrusion on consumer privacy, restricting such calls is plainly the most direct means of furthering privacy protection. See Trans Union Corp. v. FTC, 267 F.3d 1138, 1142 (D.C. Cir. 2001) (recognizing the directness of benefit where "the speech itself * * * causes the very harm the government seeks to prevent"); Anderson v. Treadwell, 294 F.3d at 462 (resident-activated restriction is coextensive with the harm it is designed to alleviate).

The efficacy of the agencies' rules in furthering the privacy interests at stake is also apparent from the legislative and rulemaking record behind their adoption. As explained above, the do-not-call registry grew out of the agencies' enforcement experience regarding their company-specific do-not-call rules. Since 1992, the FCC's rule, and since 1995, the FTC's rule, have both contained such provisions. See 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d). Due to limits upon the FTC's and the FCC's statutory jurisdiction (not "illogical distinctions" made by the agencies, see Mainstream Stay Order at 12), those provisions applied only to commercial telemarketers. 16 U.S.C. § 6106(4); 47 U.S.C. § 227(a)(3). Evidence collected during both agencies' rulemakings showed that commercial telemarketers ignored consumers' requests to be put on company-specific lists, or even hampered consumers' efforts to be placed on such lists. 68 Fed. Reg. 4628-29; 18 FCC Rcd. 14030 ¶ 19. As a result, the agencies had evidence that the company-specific provisions

simply did not work to shield consumers from unwanted telemarketing placed by commercial telemarketers. Implementation of the registry, however, will effectively address this failing in the preexisting regulation of commercial telemarketing, by giving consumers the added option of declining all such communications if they so choose.

The telemarketers have faulted the agencies for not extending the registry to charitable telemarketing. But they ignore the fact that the government has no evidence that charities will flout the company-specific provision, because neither rule has, until recently, applied to telemarketing on behalf of charities.[10] As discussed above, moreover, the legislative record before Congress showed that commercial telemarketing constituted a recognized intrusion and a source of widespread public dissatisfaction. In such circumstances, Congress and implementing agencies are amply justified in efforts to "make progress on [one] front." Edge Broadcasting, 509 U.S. at 434; see 10th Cir. Order, 10/7/03, at 19 n.7 ("that the FTC did not yet have a record as to the need to include charitable callers on a national do-not-call list does not mean that it could not at least address the problem as to which it did have an

[10] Although the Mainstream court's Stay Order called this a "newly devised justification," see Stay Order at 10, JA 128, the FTC had discussed this in its Statement of Basis and Purpose for the Rule, 68 Fed. Reg. 4637, and presented the argument to the court in its cross-motion for summary judgment.

adequate record * * *.").[11] Further, as the FTC pointed out, it could revisit the issue if further experience proves the company-specific approach inadequate to deter abuses in the context of charitable solicitation. 68 Fed. Reg. at 4637.

### 3. The Minimal Restrictions On Commercial Speech The Registry Imposes Are No More Extensive Than Necessary

The final element of the Central Hudson test, which also relates to the "fit" between the interests Congress and the agencies seek to advance and the means chosen, is whether the registry is "more extensive than is necessary to serve that interest." 447 U.S. at 566. As the Supreme Court has emphasized, in regulating commercial speech, Congress need not employ the "least restrictive means." Fox, 492 U.S. at 480-81. The relevant inquiry is "whether the speech restriction is not more extensive than necessary to serve the interests that support it." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001). And, as with the prior element, the fit need not be perfect or even the best possible fit, because, "[w]ithin the bounds of the general protection

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[11] Indeed, the situation in Rowan was similar in this regard. There, Congress acted "in response to public * * * concern with the use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive * * *." 397 U.S. at 731-32. Information developed at hearings established the seriousness of the problem. Id. Under such circumstances, it was proper for Congress to deal with the problem as identified -- through the carefully tailored means of facilitating consumer choice about receiving telemarketing -- regardless of whether other categories of communications might pose similar concerns.

provided by the Constitution to commercial speech [the courts] allow room for legislative judgments." 10th Cir. Order, 10/7/03, at 7 (quoting Edge, 509 U.S. at 434).

a. In fact, the do-not-call registry is extraordinarily well-tailored to impose only minimal restrictions on speech, because -- unlike most provisions that regulate commercial speech -- the FTC and FCC rules do not themselves ban any speech, but simply allow consumers to "opt in" to a list that shields them from telemarketing calls placed by commercial telemarketers. 10th Cir. Order, 10/7/03, at 22. Consumers, not the government, make the choice to limit the calls that intrude into their living rooms. Such an approach is substantially less restrictive than the alternative of barring solicitations unless consumers affirmatively assent to accept them, as some commenters had suggested. See 68 Fed. Reg. at 4629; 18 FCC Rcd. 14040 ¶ 37; Anderson v. Treadwell, 294 F.3d at 462; cf. U.S. West 182 F.3d at 1238-39 (noting significance of difference between opt-in and opt-out approaches in assessing narrow tailoring under Central Hudson).

In this respect, the present case is much like Rowan, in which the Supreme Court upheld a statute that similarly allowed householders to indicate their desire not to receive certain commercial speech -- advertisements that the recipient considered "erotically arousing or sexually provocative." There the Court stressed that, for the range of materials covered by the statute, there was no First Amendment problem

because of the "absoluteness of the citizen's right" to decide which sender's materials were offensive, and the "finality" of the consumer's judgment. 397 U.S. at 737. The do-not-call registry similarly puts the decision-making power unequivocally in the hands of individual consumers.

The Mainstream court purported to distinguish Rowan on the ground that, "in Rowan, the individual had complete autonomy to prevent any chosen material from entering his home," and "[t]he government's regulation had no bearing on his choice." Order at 18. That purported distinction is, however, based on the court's misreading of the statute in Rowan. Contrary to the court's apparent belief, the individual had no authority under § 4009 to prevent material from entering his home unless he had received an advertisement, and the sender could not be sanctioned until the Postmaster General determined, in "an administrative hearing," "whether the initial material mailed to the addressee was an advertisement." 397 U.S. at 738-739. Thus, although the homeowner had "unlimited" power to determine whether the advertisement was objectionable, id., the homeowner did not have "complete autonomy to prevent any chosen material from entering his home." See Mainstream Order at 18 (emphasis added). The homeowner only had autonomy to exclude commercial material, and that limit on the homeowner's choice was imposed by the statute that the Court upheld. See United States Postal Service v. Hustler Magazine, Inc., 630

F. Supp. 867 (D.D.C. 1986) (holding that the statute at issue in Rowan could not be constitutionally applied to block the publisher of Hustler magazine from mailing the magazine to members of Congress, where the publisher claimed he was petitioning government). The registry has the same limitation -- it blocks only commercial telemarketing calls.

b. As discussed above, moreover, the do-not-call registry is an outgrowth of the agencies' experience with company-specific do-not-call lists. The registry is carefully tailored to work in tandem with such lists, to provide consumers with choices while allowing solicitors to contact persons who have chosen not to place their numbers in the registry. Advertisers thus remain free to contact willing listeners– only the unwilling listener is placed off-limits.

Indeed, the FTC's and the FCC's rules give consumers a nuanced menu of choices. Consumers may enroll on the registry, thereby halting all commercial telemarketing. But the rules also allow consumers to tailor the impact of registration. A consumer who has registered may nonetheless authorize a particular telemarketer to make calls. See 16 C.F.R. § 310.4(b)(1)(iii)(B)(*i*); 47 C.F.R. § 64.1200(c)(2)(ii). Further, if a consumer chooses not to register, she may invoke the company specific do-not-call provision to prohibit telemarketing calls from particular telemarketers. 16 C.F.R. § 310.4(b)(1)(iii)(A); 47 C.F.R. § 64.1200(d). The rules also require that,

when calling consumers, telemarketers must transmit caller ID information. 16 C.F.R. § 310.4(a)(7); 47 C.F.R. § 64.1601(e). This requirement assists consumers who choose not to register but who have caller ID service and want to screen, rather than prohibit, unwanted telemarketing calls.

Furthermore, none of the alternatives suggested during the rulemaking and during litigation would have anywhere near the same effect as the registry. The U.S. Security plaintiffs tout DMA's do-not-call list, known as the Telephone Preference Service (TPS). However, the TPS is voluntary and applies only to DMA members, a small subset of the telemarketers to whom the registry applies. See 68 Fed. Reg. 4630-31. Telemarketers who violate TPS face only possible dismissal from DMA. In addition, both agencies noted that consumer frustration continues despite these voluntary efforts. 68 Fed. Reg. 4630; 18 FCC Rcd. 14017 ¶ 2.

The Mainstream plaintiffs urge "technological alternatives," which consist of various services offered by local telephone providers and various devices marketed to the public. See Mainstream Stay Opp. at Appx. D. All of these measures impose costs on the public, and none even approaches the degree of protection from unwanted telemarketing that the registry provides. 18 FCC Rcd. 14041 ¶ 39. Plaintiffs hold out caller ID as an example of such services. But it is costly and the consumer must screen every call. Unlike the registry, it does not prevent the intrusion

caused by unwanted calls. The TeleZapper is an example of a device that is sold to limit telemarketing. It emits a beeping noise that is supposed to fool telemarketers who use certain automated dialing devices by signaling those devices that the consumer's phone line has been disconnected. Of course, to the extent it works at all, it only affects telemarketers who use certain automated dialing devices. Moreover, it would eliminate non-telemarketing calls placed by such devices (some school systems use automated dialing systems to send emergency notices to parents), and the TeleZapper's beep is heard not only by telemarketing calls but by anyone who calls the consumer. See www.telezapper.com/faq.htm#3. Far from being "obvious alternatives" to the registry, these options merely show the extent to which consumers, and hence the market, have struggled to solve the problem of unwanted telemarketing.

#### 4. The Registry's Exemption Of Charitable Solicitation Does Not Violate The First Amendment

The argument accepted by the district court in Mainstream was not that the registry extends too broadly but that it does not extend far enough. The court concluded that the do-not-call registry was fatally flawed because charitable solicitations are subject at most to a company-specific do-not-call restriction and not to the registry. That conclusion was based on a misreading of Supreme Court precedent, and a

failure to recognize the firm legislative and rulemaking record on which the registry is based.

a. The district court believed its conclusion was compelled by Discovery Network. In that case, Cincinnati, motivated by asserted aesthetic and safety considerations, prohibited newsracks that dispensed commercial handbills but allowed all other types of newsracks. See 507 U.S. at 414. It was established that, as a result of this distinction, only 62 newsracks would be removed and 1,500 to 2,000 would remain. See id. at 414, 418. In invalidating Cincinnati's action, the Court stressed that any benefit from such a reduction would be "minute" and "paltry." Id. at 417-18. The Court ruled that Cincinnati's distinction between commercial and noncommercial speech thus bore "no relationship whatsoever" to the interests that the city had asserted. Id. at 424.

Faced with a scheme that barred commercial speech without advancing the city's stated goals, and which ignored other readily available alternatives, the Court concluded that, "[i]n the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handouts.'" Id. at 428. The Court cautioned,

however, that its holding was "narrow," and that it was only concluding that, based on the record before it, Cincinnati had "not established the 'fit' between its goals and its chosen means that is required * * *." Id.

b. The do-not-call regulations bear no resemblance to the ordinance invalidated in Discovery Network. In contrast to Cincinnati's ordinance, the do-not-call registry significantly advances the purpose of the legislation and was adopted only after other means of regulation had failed.

As the Eighth Circuit noted in American Blast Fax, the "legislative record" of the TCPA "indicates that commercial calls constitute the bulk of all telemarketing calls * * *." 323 F.3d at 658 (citing H. R. Rep. No. 102-317, at 16). See also id. at 655 n.4 (distinguishing Discovery Network because "commercial newsracks represented only a small percentage of the newsracks on Cincinnati streets"); accord Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1995) (Discovery Network did not condemn statutory ban on commercial faxes because the bulk of unwanted faxes are commercial).

The record before Congress showed that noncommercial calls constituted a relatively low volume of solicitations, and that the vast majority of consumer complaints concerned commercial rather than charitable or political calls. H.R. Rep. No. 102-317 at 16. The proportion of consumer complaints regarding commercial soli-

citations ranged from 80 to 99 percent. Id. Indeed, the district court recognized that application of the registry even to those callers subject to FTC jurisdiction would reduce unwanted telemarketing calls by somewhere between 40 and 60 percent, and that the gains in privacy protection achieved by the registry are substantial and cannot plausibly be compared to the "paltry three percent reduction in news racks achieved by the city in Discovery Network." Mainstream Order at 22.

In sharp distinction to Discovery Network, where Cincinnati failed even to consider means for advancing its aesthetic and safety concerns that would not have barred commercial speech, the agencies here established a do-not-call registry only after a decade of experience demonstrated that company-specific lists were ineffective with respect to commercial solicitations. In Discovery Network, the Court stressed that "[t]he fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." 507 U.S. at 417. The extensive rulemaking record makes plain that precisely the opposite is true here.

The distinctions drawn by Congress and the FCC and the FTC are also grounded in evidence of a kind wholly lacking in Discovery Network. In that case, "the only justification advanced by the city for singling out commercial newsracks was 'the

"low value" of commercial speech' * * *. When Congress enacted the TCPA, however, it had found that "non-commercial calls . . . are less intrusive to consumers because they are more expected." American Blast Fax, 323 F.3d at 655 (quoting H. R. Rep. 102-317, at 16); see also H.R. Rep. No. 102-317 at 9 (survey data underscored the resentment generated by calls "from people selling things"). As noted, the complaints prompting the enactment of the TCPA related overwhelmingly to commercial solicitations. In excluding calls from tax exempt nonprofit organizations from the TCPA's definition of "telephone solicitation," see 47 U.S.C. § 227(a)(3), Congress not only relied on the evidence that solicitations by nonprofit organizations "were less of a problem than commercial calls," but it was "sensitive to restraints on its authority to regulate the speech of charitable and political organizations." H.R. Rep. 102-317 at 17. Although the district court concluded that the TCPA findings were "irrelevant" to its holding, Mainstream Stay Order at 12 n.5, to the extent the findings justify the distinction between commercial telemarketing and charitable solicitation that underlies both agencies' statutes, they firmly support the corresponding distinctions contained in both agencies' rules. 10th Cir. Order, 10/7/03, at 14-15.

Similarly, the FTC's decision to make charitable solicitations by for-profit telemarketers subject to a company-specific requirement was firmly grounded in the

administrative record. As discussed above, the FTC had substantial evidence that the company-specific approach was insufficient to control unwanted commercial telemarketing, but had amassed no similar evidence regarding charitable telemarketing. 68 Fed. Reg. at 4629. Moreover, the rulemaking record supports the conclusion that, in light of "fundamental differences between commercial solicitations and charitable solicitations," the company-specific approach is more likely to be successful in the charitable context. 68 Fed. Reg. at 4637. The record includes evidence that telemarketers soliciting on behalf of charities face different incentives from telemarketers that sell goods and services, making it more likely that the company-specific provision will work as intended to protect consumer privacy. See 68 Fed. Reg. 4637. It also includes evidence showing that charitable solicitors would be more receptive to the company-specific provision -- comments to the FTC provided evidence that some charitable solicitors had already set up their own in-house do not call lists. See JA 405; 18 FCC Rcd. 14070 ¶ 95 ("[w]e note that some tax-exempt nonprofit organizations have determined to honor voluntarily specific do-not-call requests"). Instead of deferring to the FTC's determination based on this evidence, the court rejected it based on its belief that charitable fundraisers are just as likely to engage in fraud as commercial telemarketers. See Order at 25. Although charitable solicitors may indeed also engage in fraudulent practices, the FTC was focusing on a different

problem -- whether they would comply with the company-specific provision. The FTC contravened no constitutional command by pursuing the company-specific approach first before applying the do-not-call registry to charitable solicitations.

c. The district court misunderstood not only the distinctions between this case and Discovery Network, but also the import of that decision.[12] The court believed that Discovery Network represents an application of a general rule that "content discrimination" raises grave First Amendment concerns, thus altering the application of Central Hudson and requiring heightened First Amendment scrutiny. Mainstream Order at 23.

That premise is mistaken. The Supreme Court has made clear that "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content.'" Bates v. State Bar of Ariz., 433 U.S. 350, 363 (1977) (quoting Virginia Pharmacy Bd. v.

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[12] The court also relied heavily on Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998). See Stay Order at 16. In that case, the Seventh Circuit overturned an Illinois statute that, in order to prevent blockbusting, required real estate agents to honor consumers' requests to receive no further solicitations. However, by the time the case had completed its convoluted legal journey, blockbusting was no longer a problem. To save its statute, the state attempted to assert a last-minute justification for the law as a protection of consumer privacy. But the state produced no evidence that real estate solicitation harmed or even threatened privacy. 153 F.3d at 404. Pearson cited Discovery Network frequently, but interpreted it to prohibit "severe underinclusiveness." Id. Because it found that Illinois' statute was "severe[ly] underinclusive," it held the statute to be unconstitutional. The do-not-call registry suffers from no such infirmity -- it is not "severely underinclusive," and the district court recognized this. See Mainstream Order at 22.

Virginia Consumer Council, 425 U.S. 748, 761 (1976)). Indeed, commercial speech limitations are routinely based on the content of the speech in question. See Trans Union Corp. v. FTC, 267 F.3d at 1141-42. Thus, although "[i]n most other contexts, the First Amendment prohibits regulation based on the content of the message," under the commercial speech doctrine the government is empowered to regulate commercial speech because of its content. Central Hudson, 447 U.S. at 564 n.6; see Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1513 (10th Cir. 1994) (recognizing commercial speech restrictions, though "content-based," are subject to Central Hudson scrutiny).[13]

Discovery Network makes clear that the government cannot bar commercial speech when doing so would not advance the government's stated purpose and when it has failed to consider alternative means of regulation to accomplish its end. The "low" value of commercial speech cannot justify that result. 507 U.S. at 428. Equally clearly, however, when the government has considered alternative means of regulation and addresses a problem caused primarily by commercial speech by regulating commercial speech, it is not required to apply identical restrictions to non-

[13] Moreover, the district court's application of Discovery Network would effectively overrule Rowan -- since, as discussed above, the statute there applied only to sexually provocative commercial speech. There is no indication in Discovery Network or any other case the that Court intended such a result. On the contrary, the Court has continued to cite favorably to Rowan's central holding. See, e.g., Hill v. Colorado, 530 U.S. at 717-18; United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 814 (2000).

commercial speech because it might in some respects contribute to the problem. That result would be flatly at odds with the "subordinate position [of commercial speech] in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). See National Advertising Co. v. City and County of Denver, 912 F.2d 405, 409 (10th Cir. 1990) ("[c]ommercial speech receives less First Amendment protection than other constitutionally safeguarded expression").

Indeed, the district court's analysis conflicts with the Supreme Court's recognition that "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." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). Thus, charitable solicitation "has not been dealt with * * * as a variety of commercial speech." Id.; see Riley v. National Federation of the Blind, 487 U.S. 781, 796 (1988) (speech does not "retain its commercial character when it is inextricably intertwined with otherwise fully protected speech"). As the Court has declared, "[t]o require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." Fox, 492 U.S. at 481 (citation omitted). Such a leveling would be particularly inappropriate here, where one of the principal values underpinning the

commercial speech doctrine is utterly lacking. In recognizing that First Amendment protection extends to commercial speech, the Supreme Court emphasized that "a particular consumer's interest in the free flow of commercial information * * * may be as keen, if not keener by far, than his interest in the day's most urgent political debate," Virginia Bd. of Pharmacy, 425 U.S. at 763. Such interest is plainly absent where consumers have expressly indicated that the speech in question is not of value to them.

Nothing in Discovery Network suggests that it casts any doubt on these fundamental tenets of the Court's jurisprudence.[14] As long as it directly advances a substantial government interest in a sufficiently tailored way, government is empowered to regulate commercial speech without at the same time regulating noncommercial speech in precisely the same manner. Central Hudson, 447 U.S. at 566.

## II. THE FEE RULE DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF TELEMARKETERS

Although the district court in Mainstream did not address the First Amendment challenge to the FTC's Fee Rule raised by the plaintiffs, see Order at 27, the Main-

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[14] In Edge, decided only three months after Discovery Network, the Court upheld a federal ban on broadcast advertising of state-run lotteries. Although the Court noted that the statute restricted only the broadcast of advertising, not noncommercial information regarding lotteries, 509 U.S. at 424, the Court applied the Central Hudson analysis and made no mention of Discovery Network.

stream plaintiffs have reasserted that challenge before this Court. Opposition to Emergency Stay Motion, Oct. 1, 2003, at 12-14. While plaintiffs' challenge is insubstantial, it turns on issues of law that are closely related to the constitutional issues already addressed. Accordingly, this Court should resolve the issue now. See Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982) (reviewing court may enter judgment where "the record permits only one resolution" of the issue).

The fee established by the Fee Rule imposes no unconstitutional prior restraint on speech. See Mainstream First Amended Complaint at ¶ 159, JA 51. Even assuming that the prior restraint doctrine applies to commercial speech, but see Central Hudson, 447 U.S. at 571 n.13 (suggesting doctrine may not apply in this context), the Fee Rule imposes no such restraint. Under the First Amendment, the mere fact that a regulation restricts speech in advance of actual expression does not render the regulation a "prior restraint." Instead, a regulation imposes a prior restraint on speech only where the speaker must obtain some sort of permit in advance of speaking and the permitting authority enjoys "too much discretion" over the permitting process. American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1250 (10th Cir. 2000); see MacDonald v. City of Chicago, 243 F.3d 1021, 1029-32 (7th Cir. 2001). The Fee Rule (and, for that matter, the do-not-call registry) involves no discretionary permitting process and, therefore, no prior restraint.

Nor is the fee structure established by the Fee Rule, which imposes sliding fees depending on the number of area codes of data accessed, in any way unconstitutional.[15] See Mainstream First Amended Complaint at ¶¶ 158, 161, 162, 168, 170, JA 51-53. "[A] regulatory fee may be constitutional only if it serves a 'legitimate state interest.'" Giani 199 F.3d at 1248-49. Further, "fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible." National Awareness Foundation v. Abrams, 50 F.3d 1159, 1164-65 (2d Cir. 1995); see also Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474 (6th Cir. 1995) (upholding a $200 registration fee for professional solicitors). Here, the fees are collected "only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule * * *." P.L. 108-10, § 2; see 68 Fed. Reg. 45141. Thus, they serve a "legitimate state interest"

[15] Moreover, the level of the fee is, by any measure, modest as a cost of doing business. A telemarketer may obtain up to five area codes of the registry at no cost, 16 C.F.R. § 310.8(c), and 33 states currently have five or fewer area codes, 18 FCC Rcd. 14048 ¶ 54. Thus, a local business that wishes to telemarket to the entire State of Oklahoma (3 area codes) is afforded free access to the list, and a regional company that wishes to market to all of the States in the Tenth Circuit (15 area codes) may do so for a fee of $250 per year. Even a company that wishes to telemarket throughout the nation (approximately 120 million households) is subject to a maximum fee of $7375. These fees impose no more than a modest burden on a telemarketer's commercial speech.

and function "as means to meet the expenses incident to the administration of a regulation and to public order in the matter regulated." Accordingly, the fees are constitutional.

## III. THE FTC IS AUTHORIZED TO CREATE THE DO-NOT-CALL REGISTRY

The district court in U.S. Security erred as a matter of law in holding that the FTC lacked statutory authority to create the registry. That authority came from the TCFPA, and was confirmed by Congress's passage of the Consolidated Appropriations Resolution and the DNCIA. Moreover, even if the court's ruling were correct when issued, P.L. 108-82 removes any doubt about the FTC's authority and Congress's express ratification of the Rule.

The FTC's authority to promulgate the registry comes from the TCFPA, which authorizes the FTC to prohibit telemarketers from engaging in abusive or deceptive telemarketing practices, 15 U.S.C. § 6102(a)(1), and from undertaking "a pattern of unsolicited telephone calls," 15 U.S.C. § 6102(a)(3)(A). The FTC's Rule fleshes out these broad provisions by defining as abusive a telemarketing call to a person who has had her number listed on the do-not-call registry. 16 C.F.R. § 310.4(b)(1)(iii)(B). The district court mistakenly believed that, because the TCPA specifically authorizes the FCC to create a do-not-call registry, Congress could not have intended to give the

FTC the same authority unless the TCFPA contained authorizing language every bit as specific as that of the TCPA. U.S. Security Order at 12-14. But in this "era of overlapping agency jurisdiction under different statutory mandates," FTC v. Texaco, Inc., 555 F.2d 862, 881 (D.C. Cir. 1977), there is no justification for cabining the FTC's authority in this manner.

To the extent that there was any question as to the FTC's authority under the TCFPA, that question was answered through passage of the Consolidated Appropriations Resolution in February 2003, and the DNCIA the following month. The Appropriations Resolution provided a budget for the FTC and authorized it to spend up to $18.1 million derived from "fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule." The DNCIA gives the FTC, for a period of five years, authority to collect fees "sufficient to implement and enforce the provisions relating to the 'do-not-call' registry of the Telemarketing Sales Rule." P.L. 108-10 at § 2. The accompanying committee report recognizes that, "[i]n order to assist consumers in dealing with telemarketing, Congress provided authority to the FTC and the [FCC] to limit these intrusions into their homes." H.R. Rep. 108-8 at 2 (2003). The report further notes that the FTC had promulgated the registry pursuant to its authority under the Telemarketing Act. Id. at 3.

In passing this legislation, Congress confirmed that the FTC had ample statutory authority under the Telemarketing Act to create the registry. Indeed, "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." North Haven Board of Education v. Bell, 456 U.S. 512, 535 (1982) (quotation marks omitted). Here, Congress was well aware that the FTC had promulgated the registry. By making specific provision for funding and fee collection, Congress recognized that the registry was an appropriate exercise of the FTC's authority.

In any event, Congress has overruled U.S. Security. On September 29, 2003, President Bush signed into law H.R. 3161, which is titled, "[a]n act to ratify the authority of the Federal Trade Commission to establish a do-not-call registry." P.L. 108-82, 117 Stat. 1006 (2003). Section 1(a) of that Act states that "[t]he Federal Trade Commission is authorized under section 3(a)(3)(A) of the [TCFPA, 15 U.S.C. § 6102(a)(3)(A)] to implement and enforce a national do-not-call registry." Section 1(b) states "[t]he do-not-call registry provision of the [FTC's Rule], which was promulgated by the Federal Trade Commission, effective March 31, 2003, is ratified." The district court recognized that Congress may ratify an agency's action. U.S. Security

Order at 13. Here, not only did Congress ratify the registry, it also reaffirmed that, contrary to the court's holding, the FTC already had the authority to create the registry. Thus, not only did the district court err as a matter of law, it was also overruled by Congress.[16] The decision in U.S. Security must be reversed.[17]

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[16] See 149 Cong. Rec. H8916-17 (daily ed. Sept. 25, 2003) (statement of Rep. Tauzin, "The bill [H.R. 3161] leaves no doubt as to the intent of Congress. The FTC wants this list. The President of the United States wants this list, and more importantly, 50 million Americans, who are growing impatient about being interrupted at mealtime by unwanted and unnecessary harassing telemarketing calls, want this list. And this Congress is going to make sure they have this list today.")

[17] The U.S. Security plaintiffs argued that the judgment in Mainstream renders the ratification ineffective. See U.S. Security Brief Regarding Mootness at 6-8. That argument, however, begs the principal question before this Court. If this Court reverses the Mainstream decision, the district court's decision loses all effect and will have no impact on P.L. 108-82. Nor is Congress required to invoke any magic formula in a ratifying statute, see Brief Regarding Mootness at 9 n.5, where, as here, its intent to overturn the U.S. Security decision is clear.

## CONCLUSION

For the above reasons, this Court should reverse the district court decisions in U.S. Security and Mainstream, and deny the petitions for review of the FCC's Order.

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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13,694 words. I relied on my word processor and its WordPerfect 10 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____

Lawrence DeMille-Wagman

## CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2003, I served a copy of the Consolidated Opening Brief of Appellant Federal Trade Commission, Respondent Federal Communications Commission, and Respondent-Intervenor United States of America on appellees and petitioners by e-mail directed to their counsel listed below. On the same day, I served the same counsel with two copies of the brief and one copy of the joint appendix by express overnight delivery.

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**ADDENDUM PURSUANT TO 10th CIRCUIT RULE 28.2**

**ORDER, U.S. Security, et al. v. Federal Trade Commission, No. CIV-03-122 (W.D. Okla. Sept. 23, 2003)**

**ORDER [Denying Stay], U.S. Security, et al. v. Federal Trade Commission, No. CIV-03-122 (W.D. Okla. Sept. 25, 2003)**

**MEMORANDUM OPINION AND ORDER, Mainstream Marketing Services, Inc., et al. v. Federal Trade Commission, et al., Civ. No. 03-–0184 (D. Colo. Sept. 25, 2003)**

**ORDER DENYING STAY OF JUDGMENT, Mainstream Marketing Services, Inc., et al. v. Federal Trade Commission, et al., Civ. No. 03-–0184 (D. Colo. Sept. 29, 2003)**

**ORDER [Denying Stay], Mainstream Marketing Services, Inc., et al. v. Federal Communications Commission, No. 03-9571 (10th Cir. Sept. 26, 2003)**

**ORDER [Granting Stay], Federal Trade Commission, et al. v. Mainstream Marketing Services, Inc., et al., No. 03-1429 (10th Cir. Oct. 7, 2003)**

## STATUTORY AND REGULATORY ADDENDUM

**TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C.A. § 227**

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means 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 (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement; and

(C) may, by rule or order, exempt from the requirements of paragraph

(1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small
businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile 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. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or
revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify

methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

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

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable
practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does
not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

CONGRESSIONAL STATEMENT OF FINDINGS

Section 2 of Pub.L. 102-243 provided: "The Congress finds that:

"(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

"(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

"(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

"(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

"(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

"(6) Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

"(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices.

"(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

"(9) Individuals' 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.

"(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

"(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

"(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

"(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

"(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

"(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech."

**TELEMARKETING AND CONSUMER FRAUD AND ABUSE PREVENTION ACT, 15 U.S.C. §§ 6101-6108**

§ 6101. Findings

The Congress makes the following findings:

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose $40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

§ 6102. Telemarketing rules

(a) In general

(1) The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.

(2) The Commission shall include in such rules respecting deceptive telemarketing acts or practices a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.

(3) The Commission shall include in such rules respecting other abusive telemarketing acts or practices--

(A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,

(B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers,

(C) a requirement that any person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell

goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services; and

(D) a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made. In prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.

(b) Rulemaking

The Commission shall prescribe the rules under subsection (a) of this section within 365 days after August 16, 1994. Such rules shall be prescribed in accordance with section 553 of Title 5.

(c) Enforcement

Any violation of any rule prescribed under subsection (a) of this section shall be treated as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.

(d) Securities and Exchange Commission rules

(1) Promulgation

(A) In general

Except as provided in subparagraph (B), not later than 6 months after the effective date of rules promulgated by the Federal Trade Commission under subsection (a) of this section, the Securities and Exchange Commission shall promulgate, or require any national securities exchange or registered securities association to promulgate, rules substantially similar to such rules to prohibit deceptive and other abusive telemarketing acts or practices by persons described in paragraph (2).

(B) Exception

The Securities and Exchange Commission is not required to promulgate a rule under subparagraph (A) if it determines that--

(i) Federal securities laws or rules adopted by the Securities and Exchange Commission thereunder provide protection from deceptive and other abusive telemarketing by persons described in paragraph (2) substantially similar to that provided by rules promulgated by the Federal Trade Commission under subsection (a) of this section; or

(ii) such a rule promulgated by the Securities and Exchange Commission is not necessary or appropriate in the public interest, or for the protection of investors, or would be inconsistent with the maintenance of fair and orderly markets.

If the Securities and Exchange Commission determines that an exception described in clause (i) or (ii) applies, the Securities and Exchange Commission shall publish in the Federal Register its determination with the reasons for it.

(2) Application

(A) In general

The rules promulgated by the Securities and Exchange Commission under paragraph (1)(A) shall apply to a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company, or any individual associated with a broker, dealer, transfer agent, municipal securities dealer, municipal securities broker, government securities broker, government securities dealer, investment adviser or investment company. The rules promulgated by the Federal Trade Commission under subsection (a) of this section shall not apply to persons described in the preceding sentence.

(B) Definitions

For purposes of subparagraph (A)--

(i) the terms "broker", "dealer", "transfer agent", "municipal securities dealer", "municipal securities broker", "government securities broker", and "government securities dealer" have the meanings given such terms by paragraphs (4), (5), (25), (30), (31), (43), and (44) of section 78c(a) of this title;

(ii) the term "investment adviser" has the meaning given such term by section 80b-2(a)(11) of this title; and

(iii) the term "investment company" has the meaning given such term by section 80a-3(a) of this title.

(e) Commodity Futures Trading Commission rules

(1) Application

The rules promulgated by the Federal Trade Commission under subsection (a) of this section shall not apply to persons described in section 9b(1) of Title 7.

(2) Omitted

§ 6103. Actions by States

(a) In general

Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The State shall serve prior written notice of any civil action under subsection (a) or (f)(2) of this section upon the Commission and provide the Commission with a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State shall serve such notice immediately upon instituting such action. Upon receiving a notice respecting a civil action, the Commission shall have the right (1) to intervene in such action, (2) upon so intervening, to be heard on all matters arising therein, and (3) to file petitions for appeal.

(c) Construction

For purposes of bringing any civil action under subsection (a) of this section, nothing in this chapter shall prevent an attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(d) Actions by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) or (f)(2) of this section against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(e) Venue; service of process

Any civil action brought under subsection (a) of this section in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of Title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

(f) Actions by other State officials

(1) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

(2) In addition to actions brought by an attorney general of a State under subsection (a) of this section, such an action may be brought by officers of such State who are authorized by the State to bring actions in such State on behalf of its residents.

§ 6104. Actions by private persons

(a) In general

Any person adversely affected by any pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, or an authorized person acting on such person's behalf, may, within 3 years after discovery of the violation, bring a civil action in an appropriate district court of the United States against a person who has engaged or is engaging in such pattern or practice of telemarketing if the amount in controversy exceeds the sum or value of $50,000 in actual damages for each person adversely affected by such telemarketing. Such an action may be brought to enjoin such telemarketing, to enforce compliance with any rule of the Commission under section 6102 of this title, to obtain damages, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The plaintiff shall serve prior written notice of the action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the person shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(c) Action by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no person may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(d) Cost and fees

The court, in issuing any final order in any action brought under subsection (a) of this section, may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party.

(e) Construction

Nothing in this section shall restrict any right which any person may have under any statute or common law.

(f) Venue; service of process

Any civil action brought under subsection (a) of this section in a district court of the United States may be brought in the district in which the defendant is found, is an inhabitant, or transacts business or wherever venue is proper under section 1391 of Title 28. Process in such an action may be served in any district in which the defendant is an inhabitant or in which the defendant may be found.

§ 6105. Administration and applicability of chapter

(a) In general

Except as otherwise provided in sections 6102(d), 6102(e), 6103, and 6104 of this title, this chapter shall be enforced by the Commission under the Federal Trade Commission Act (15 U.S.C. 41 et seq.). Consequently, no activity which is outside the jurisdiction of that Act shall be affected by this chapter.

(b) Actions by Commission

The Commission shall prevent any person from violating a rule of the Commission under section 6102 of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter. Any person who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this chapter.

(c) Effect on other laws

Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

§ 6106. Definitions

For purposes of this chapter:

(1) The term "attorney general" means the chief legal officer of a State.

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate

telephone call. The term does not include the solicitation of sales through the mailing of a catalog which--

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or illustrations, and

(D) has been issued not less frequently than once a year,

where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

§ 6107. Enforcement of orders

(a) General authority

Subject to subsections (b) and (c) of this section, the Federal Trade Commission may bring a criminal contempt action for violations of orders of the Commission obtained in cases brought under section 53(b) of this title.

(b) Appointment

An action authorized by subsection (a) of this section may be brought by the Federal Trade Commission only after, and pursuant to, the appointment by the
Attorney General of an attorney employed by the Commission, as a special assistant United States Attorney.

(c) Request for appointment

(1) Appointment upon request or motion

A special assistant United States Attorney may be appointed under subsection (b) of this section upon the request of the Federal Trade Commission or the court which has entered the order for which contempt is sought or upon the Attorney General's own motion.

(2) Timing

The Attorney General shall act upon any request made under paragraph (1) within 45 days of the receipt of the request.

(d) Termination of authority

The authority of the Federal Trade Commission to bring a criminal contempt action under subsection (a) of this section expires 2 years after the date of the first promulgation of rules under section 6102 of this title. The expiration of such authority shall have no effect on an action brought before the expiration date.

§ 6108. Review

Upon the expiration of 5 years following the date of the first promulgation of rules under section 6102 of this title, the Commission shall review the implementation of this chapter and its effect on deceptive telemarketing acts or practices and report the results of the review to the Congress.

**THE DO-NOT-CALL IMPLEMENTATION ACT**

Pub.L. 108-10, §§ 1 to 4, Mar. 11, 2003, 117 Stat. 557, provided that:

"Section 1. Short title.

"This Act [this note] may be cited as the 'Do-Not-Call Implementation Act'.

"Sec. 2. Telemarketing Sales Rule; do-not-call registry fees.

"The Federal Trade Commission may promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the 'do-not- call' registry of the Telemarketing Sales Rule (16 CFR 310.4(b)(1)(iii)), promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6101 et seq.) [Pub.L. 103-297, Aug. 16, 1994, 108 Stat. 1545, which enacted chapter 87 of this title, 15 U.S.C.A. § 6101 et seq.]. Such regulations shall be promulgated in accordance with section 553 of title 5, United States Code. Fees may be collected pursuant to this section for fiscal years 2003 through 2007, and shall be deposited and credited as offsetting collections to the account, Federal trade Commission--Salaries and

Expenses, and shall remain available until expended. No amounts shall be collected as fees pursuant to this section for such fiscal years except to the extent provided in advance in appropriations Acts. Such amounts shall be available for expenditure only to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales Rule, and other activities resulting from such implementation and enforcement.

"Sec. 3. Federal Communications Commission do-not-call regulations.

"Not later than 180 days after the date of enactment of this Act [Mar. 11, 2003], the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act [Telephone Consumer Protection Act of 1991 (TCPA), Pub.L. 102-243, Dec. 20, 1991, 105 Stat. 2394] (47 U.S.C. 227 et seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b)).

"Sec. 4. Reporting requirements.

"(a) Report on regulatory coordination.--Within 45 days after the promulgation of a final rule by the Federal Communications Commission as required by section 3 [of this note], the Federal Trade Commission and the Federal Communications Commission shall each transmit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include--

"(1) an analysis of the telemarketing rules promulgated by both the Federal Trade Commission and the Federal Communications Commission;
"(2) any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry; and
"(3) proposals to remedy any such inconsistencies.

"(b) Annual report.--For each of fiscal years 2003 through 2007, the Federal Trade Commission and the Federal Communications Commission shall each transmit an annual report to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include--

"(1) an analysis of the effectiveness of the 'do-not-call' registry as a national registry;
"(2) the number of consumers who have placed their telephone numbers on the registry;
"(3) the number of persons paying fees for access to the registry and the amount of such fees;
"(4) an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States;
"(5) an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with the enforcement activities of the Federal Communications Commission pursuant to the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.); and
"(6) a review of the enforcement proceedings under the Telemarketing Sales Rule (16 CFR 310), in the case of the Federal Trade Commission, and under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.), in the case of the Federal Communications Commission."

**P.L. 108-82, 117 Stat. 1006**

**NATIONAL DO-NOT-CALL REGISTRY**

An Act To ratify the authority of the Federal Trade Commission to establish a do-not-call registry.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. NATIONAL DO-NOT-CALL REGISTRY.

(a) AUTHORITY.--The Federal Trade Commission is authorized under section 3(a)(3)(A) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6102(a)(3)(A)) to implement and enforce a national do-not-call registry.

(b) RATIFICATION.--The do-not-call registry provision of the Telemarketing Sales Rule (16 C.F.R. 310.4(b)(1)(iii)), which was promulgated by the Federal Trade Commission, effective March 31, 2003, is ratified.

Approved September 29, 2003.

**PART 310--TELEMARKETING SALES RULE**

§ 310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§ 310.2 Definitions.

(a) Acquirer means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) Attorney General means the chief legal officer of a state.

(c) Billing information means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) Caller identification service means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) Cardholder means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) Charitable contribution means any donation or gift of money or any other thing of value.

(g) Commission means the Federal Trade Commission.

(h) Credit means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) Credit card means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) Credit card sales draft means any record or evidence of a credit card transaction.

(k) Credit card system means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) Customer means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) Donor means any person solicited to make a charitable contribution.

(n) Established business relationship means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) Free-to-pay conversion means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) Investment opportunity means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) Material means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) Merchant means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) Merchant agreement means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) Negative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) Person means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) Preacquired account information means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account

number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) Prize promotion means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

(aa) State means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) Upselling means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate
telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§ 310.3 Deceptive telemarketing acts or practices.

(a) Prohibited deceptive telemarketing acts or practices. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays [FN1] for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:

[FN1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by § 310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or directing a customer to have a courier pick up payment or authorization for payment.

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; [FN2]

[FN2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged

unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z, [FN3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E. [FN4] Such authorization shall be deemed verifiable if any of the following means is employed:

[FN3] Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR part 226.

[FN4] Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq., and Regulation E, 12 CFR part 205.

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature; [FN5]

[FN5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§ 310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; provided, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) Assisting and facilitating. It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

(c) Credit card laundering. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) Prohibited deceptive acts or practices in the solicitation of charitable contributions. It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) Requesting or receiving payment of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; provided, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing
information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

<Compliance date of subsection (a)(7) is Jan. 29, 2004.>

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; provided that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

<Compliance date of subsection (b)(1)(iii)(B) is (date pending).>

(B) that person's telephone number is on the "do-not-call" registry,

maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature [FN6] of that person; or

[FN6] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

(ii) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. 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.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained

from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed [FN7]; and

[FN7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) Required oral disclosures in charitable solicitations. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services
purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services; [FN8]

[FN8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 et seq., and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with § 310.5(a)(3) of this Rule.

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by § 310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by § 310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§ 310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with § 310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§ 310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by § 310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled
"Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, provided, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, provided, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, provided, however, that this exemption does not apply

to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling

included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; provided, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the National Do

Not Call Registry maintained by the Commission under § 310.4(b)(1)(iii)(B); provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; provided, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§ 310.4(b)(1)(iii)(B)(i) or (ii), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $25 per area code of data accessed, up to a maximum of $7,375; provided, however, that there shall be no charge for the first five area codes of data accessed by any person, and provided further, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in § 310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $25 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $15 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and

must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using

the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

**AMENDMENTS TO FCC RULES, 47 C.F.R. Parts 64 and 68**

**68 Fed. Reg. 44177-79 (July 25, 2003)**

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends parts 64 and 68 of the Code of Federal Regulations as follows:

PART 64--MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

2. Subpart L is amended by revising the subpart heading to read as follows:
* * * * *

Subpart L--Restrictions on Telemarketing and Telephone Solicitation

* * * * *

47 CFR § 64.1200

3. Section 64.1200 is revised to read as follows:

47 CFR § 64.1200

§ 64.1200 Delivery restrictions.

(a) No person or entity may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,
(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;
(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call,
(i) Is made for emergency purposes,
(ii) Is not made for a commercial purpose,
(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,
(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or
(v) Is made by or on behalf of a tax-exempt nonprofit organization.
(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine,
(i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.
(ii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.
(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.
(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.
(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not- call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.
(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.
(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.
(7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded telephone messages shall:
(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and
(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, *44178
or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.
(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:
(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or
(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:
(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:
(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;
(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;
(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not- call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and
(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or
(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or
(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do- not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a caller's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(3) The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction *44179 with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(4) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(5) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(6) The term telemarketer means the person or entity that initiates 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.

(7) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(9) The term telephone solicitation means 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:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(10) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(11) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and

conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

47 CFR § 64.1601

4. Section 64.1601 is amended by adding paragraph (e) to read as follows:

47 CFR § 64.1601

§ 64.1601 Delivery requirements and privacy restrictions.

* * * * *

(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(7) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph.

PART 68--CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

5. The authority citation for part 68 continues to read:

Authority: 47 U.S.C. 154, 303.

47 CFR § 68.318

6. Section 68.318 is amended by revising paragraph (d) to read as follows:

47 CFR § 68.318

§ 68.318 Additional limitations.

* * * * *

(d) Telephone facsimile machines; Identification of the sender of the message. It shall be unlawful for any person within the United States to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual. If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name. Telephone facsimile machines manufactured on and after December 20, 1992, must clearly mark such identifying information on each transmitted page.

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