Privacy Versus Freedom of Speech: Telemarketing and Government's Ability to Limit It

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Editors' Note:

The authors represented several of the telemarketers in the Tenth Circuit case discussed in this article. However, the views expressed herein are not necessarily the views of any party to that litigation. The Colorado Lawyer *includes the article in this special issue because the topic is timely and of widespread interest. Watch for updates on this case in a future issue of* The Colorado Lawyer.

In recent decades, telemarketers have become one of the most vilified groups in American society. Politicians and bureaucrats, quick to recognize this groundswell, championed their constituents' desire to reduce or avoid the interruptions created by telemarketing calls into the home by enacting do-not-call laws. As a result, Coloradans are now able to place their telephone number on one of two do-not-call lists, one administered and enforced by the state of Colorado, and the other through the joint efforts of two federal agencies, the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC").[1]

Individuals who place their telephone numbers on one of these lists can prevent certain groups of telemarketers, predetermined by the governmental body in charge of each respective list, from calling their homes. However, both the state and federal do-not-call laws contain numerous exceptions, thus creating a patchwork of who may speak and who may not. The existence of such a patchwork has formed the basis for the constitutional challenges by the telemarketers to both the state and federal do-not-call rules. This article examines the challenges brought to the federal rules.

Businesses whose lifeblood is directly correlated with their ability to sell goods and services via the telephone filed two lawsuits in Colorado challenging the constitutionality of the federal do-not-call registry—one suit in federal district court challenging the FTC's do-not-call rules and the other in the Tenth Circuit Court of Appeals challenging the do-not-call rules adopted by the FCC.[2] These lawsuits, together with the do-not-call regulations they challenge, have sparked one of the most interesting legal and policy debates over the last few years.

On one side of this debate are businesses that have grown and flourished as a result of their ability to inexpensively connect with potential consumers via the telephone by exercising their right to engage in commercial speech. On the other side are consumers, who, as more businesses capitalize on the efficient use of the marketing dollar through telemarketing, have grown weary of the frequent telephone rings that interrupt their dinners or favorite television programs. The consumers' right to privacy versus the businesses' right to free speech—between the two, which interest should prevail?

Unfortunately, the question is more complex than it appears at first blush. Businesses bringing these legal challenges have never questioned the individual homeowners' right to privacy and attendant right to determine when and who may reach into their homes via the tele-

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phone. Instead, the current debate rests squarely on whether and in what manner the government may step into the mix, such as when a government enacts do-not-call legislation in forms recently adopted by the FTC and FCC. Such laws necessarily restrict businesses' right to commercial free speech in favor of the consumers' right to privacy and make certain value judgments about what types of speech should be allowed into the home via telephone solicitations.

This article examines the arguments raised by both sides in the debate. It begins with an overview of some of the benefits that may be realized by telemarketing and the effect of the provisions establishing the national registry. It then evaluates the arguments on either side as to whether this registry infringes on the free speech rights of telemarketers, and details the course of the telemarketers' legal challenges. It concludes with some observations on what may lie ahead for the telemarketers' challenges.

Benefits of Telemarketing

Many different organizations, including businesses, charities, religious groups, and political parties, generate revenue by calling individuals at home and soliciting purchases and donations. This marketing approach, commonly called telemarketing, also provides significant benefits to the U.S. economy. First and foremost, telemarketing is a cost-effective way for legitimate businesses to reach potential consumers, and these cost efficiencies have far-reaching effects. Cheaper marketing costs can be passed onto the consumer in the form of lower prices for goods and services. In turn, the lower cost of teleservices when compared to other forms of marketing, such as commercial advertisements, enables smaller businesses to compete with larger providers of goods and services.

Indeed, among the comments provided to the FTC when it began considering do-not-call regulations were observations that the proposed regulations would limit competition in the market and, as a result, increase the prices of goods and services.[3] Because telemarketing helps new entrants make inroads to their rivals' customer base, consumers benefit through increased choices and lower prices. In many instances, telemarketing is the only feasible option for businesses to distribute a new product or service, as these startups must compete with much larger companies on a daily basis for consumer attention and dollars.

In addition to its significance as a business tool and its role in fostering competition, telemarketing plays a substantial role in supporting the U.S. economy, as a multitude of businesses generate sales and appointments by phone. In fact, business-to-consumer telemarketing is one of the fastest growing industries in America. Prior to implementation of the government's do-not-call registry, it was the country's single largest direct marketing system, accounting for 34.6 percent of total direct marketing sales,[4] and, in 2003, generating $275 billion in annual revenues.[5]

Not only do the sales generated through telemarketing bolster economic output, but telemarketing also expands the economy through the countless jobs it creates. Prior to the FTC's do-not-call registry taking effect on October 1, 2003, telemarketing provided employment to more than 5.4 million individuals, many of whom needed to maintain flexible schedules.[6] The nature of telemarketing offers ideal employment opportunities for single mothers, disabled individuals, and working students. Evidence before the FTC prior to finalizing its do-not-call registry reflects that 60 percent of teleservices sales representatives are women, 25 percent are working mothers, 33 percent are minorities, 5 percent are disabled, and 10 percent were reported to be immediately off welfare.[7]

Evidence of the possible negative impact of a national registry on such workers and on the economy generally was before both agencies prior to finalizing their rules.[8] Given the important economic benefits created by telemarketing, it is likely that do-not-call regulations will result in a negative economic impact on many facets of the U.S. economy.

Means Available to Consumers to Guard Privacy

Given these far-reaching effects, the telemarketing industry has argued that any governmental decision to referee the conflict between individuals' right to privacy and the right to commercial free speech must take into account the means available to consumers who want to limit the number of telephone solicitations into the home. Telemarketers argue that numerous methods exist whereby consumers can determine which types of telephone solicitations to receive. These include company-specific do-not-call lists and various technological services and devices by which consumers can select the types of calls they wish to receive and those they wish to block.

Since the early 1990s, individuals have been able to request that a telemarketer place their numbers on a company-specific do-not-call list mandated by the FCC and FTC.[9] After that initial request, the telemarketer may not call that individual's number for a ten-year period. Not only does making such a company-specific do-not-call request prevent that solicitor from calling the individual again, but after the number is removed from the list, if the list is sold to any other organizations, the individual's number may not be passed on via sale of the business's calling list.

Rules adopted by both the FCC and FTC in the 1990s regulating telemarketing provided for company-specific do-not-call lists.[10] The FCC concluded that the company-specific approach balanced the desire by telephone subscribers to avoid unwanted calls with "the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations."[11]

At the time that the FCC and FTC adopted the company specific do-not-call rules in the 1990s, technological advances to protect consumer privacy were few. Today, however, myriad technological solutions exist to prevent interruptions in the home by unwanted phone calls. For example, consumers can purchase at a local electronics store or from their telephone company devices or services whose purpose is to prevent calls from all solicitors—whether they are political, charitable, or commercial in nature—or to allow the consumers to choose among the types of solicitations they will answer.[12]

The costs of these services through the telephone company vary depending on location, but are generally available for between $5 and $10 per month. Call-blocking or selection devices are available for a slightly higher, but one-time cost of between $20 and $120. With these devices, consumers can avoid unwanted solicitations without the need for government intervention.

The Federal Do-Not-Call Regulations

On January 30, 2002, the FTC, *sua sponte*, issued a Notice of Proposed Rule-

making proposing a number of revisions to its Telemarketing Sales Rule ("TSR"), including the creation of a national do-not-call registry. On December 18, 2002, the FTC held a press conference at which Chairman Timothy K. Muris stated, among other things, that he was that day fulfilling his October 2001 promise to create a national do-not-call registry.[13] At that conference, Chairman Muris announced that the FTC would soon be issuing its Statement of Basis and Purpose and an Amended TSR that would implement the national do-not-call registry.[14]

The FTC's enabling statute, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"),[15] does not expressly authorize the FTC to issue do-not-call regulations. Instead, the Telemarketing Act was adopted by Congress to target "unscrupulous" telemarketing activities "from which no one benefits but the perpetrator,"[16] and directs the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[17] In the original version of the TSR adopted on August 16, 1995, the FTC limited its reach to fraudulent and abusive telemarketing practices by, among other things:

1) imposing basic disclosure requirements upon telemarketing;
2) prohibiting credit-card laundering;
3) regulating offers to repair or secure credit or to obtain refunds;
4) prohibiting threatening calls and those made repetitively or continuously with the intent to annoy, abuse, or harass;
5) limiting the time of day during which telemarketing calls may be made; and
6) requiring companies to maintain and adhere to a list of consumers who indicate they wish not to receive telemarketing calls from that company.[18]

The FTC's Amended TSR

Notwithstanding its decision in 1992 not to adopt a national do-not-call registry, and making good on Chairman Muris's promise, the FTC promulgated an amended TSR ("Amended TSR"), creating such a registry in January 2003. The rules adopted by the FTC require that covered entities and individuals remove from, or scrub, their telemarketing lists the names of any individuals who have signed up for the FTC's registry. [19] The Amended TSR makes it "an abusive telemarketing act or practice" for a telemarketer to "initiate any outbound telephone call to a person" when "that person's telephone number is on the 'do-not-call registry.'"[20] Moreover, the Amended TSR defines a single unsolicited call to a telephone number of the do-not-call registry as "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive."[21]

There are numerous exceptions and jurisdictional limitations to the Amended TSR, however, that limit its practical effect in ways that have not been quantified by the FTC.[22] For example, due to the limits on the FTC's jurisdiction, the Amended TSR does not cover telemarketing by non-profit entities, banks, savings associations, federal credit unions, regulated common carriers, and insurance companies. Therefore, these industries are not required to comply with the FTC's do-not-call regulations.[23]

Moreover, the Amended TSR expressly exempts from compliance calls made on behalf of political parties, campaigns, or candidates.[24] Calls by charities also are exempt, unless they employ professional call centers, whereupon they are subject to the company-specific do-not-call rules. These rules require companies and professional call centers making calls on behalf of charitable organizations to: (1) maintain a list of individuals who have expressly requested that the entity refrain from calling in the future; and (2) comply with that request for a ten-year period.[25] Finally, the Amended TSR permits calls by entities having an established business relationship with the called party that arises out of a consumer's purchase, rental, or lease of a seller's goods or services, or some financial transaction between them, within the eighteen months preceding the call.[26]

As a result of these carve-outs, individuals who have signed up for the FTC's do-not-call registry nevertheless can still receive calls from banks, insurance companies, and other non-covered entities. Not only do callers who signed up for the registry continue to receive calls, but also they have no ability to exercise any discretion among the types of calls that continue to come in. In large part due to these numerous exemptions distinguishing among different types of callers and the limitations that the Amended TSR imposes on commercial free speech, a group of telemarketers filed a lawsuit in the federal district court for the District of Colorado on January 29, 2003, asking the court to rule on the constitutionality of the FTC's regulations.[27] The course of this lawsuit is discussed below.

The FCC's National Registry

At the time the telemarketers' lawsuit against the FTC was filed in early 2003, the FCC was also considering imposing its own national do-not-call registry. Unlike the FTC, the FCC's enabling statute, the Telephone Consumer Protection Act of 1991 ("TCPA"),[28] authorized the FCC to regulate various non-fraudulent telemarketing activities. These activities included imposing do-not-call requirements in certain circumstances, provided that the agency give due consideration to the weighty issues associated with limiting commercial free speech. Specifically, the TCPA required the FCC to consider in any rule-making proceeding in which do-not-call regulations were proposed "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," and charged it with ensuring that the TCPA regulations maintain an appropriate balance between commercial interest and privacy concerns.[29]

As with the FTC, the FCC also examined the issue in 1992 and decided not to implement a national registry, but instead implemented company-specific do-not-call lists as the most appropriate balance between consumers' rights to privacy and the individuals' and entities' right to free speech.[30] As the FCC recognized, a do-not-call list would not help telephone subscribers who "would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear."[31] Such a registry also would disappoint those wishing to block every call because they "would still receive calls from exempted businesses or organizations."[32]

In 2002, the FCC revisited these rules when it adopted a notice of proposed rulemaking. By this time, individuals were better able than ever before to prevent unwanted calls into their homes without government intervention via technological improvements.[33] While the FCC had observed during the 1992 rulemaking that there were concerns about the ineffectiveness of any national registry in effecting consumer choice and stopping all calls into the home,[34] the FCC nevertheless chose to adopt a national do-not-call registry.

As with the FTC's rules, the FCC rules contain numerous exemptions, resulting in solicitations via the telephone that

reach individuals who want to block all calls. Also, as with the FTC's do-not-call rules, the FCC rules exempt charities, politicians, and those with an established business relationship from compliance with the national do-not-call registry. Individuals who want to block some but not all calls from commercial telemarketers or who want to block calls from charities and political organizations are unable to accomplish that via the registry. Instead, critics contend that consumers who add their names to the registry actually sign on for a list of calls predetermined by the government, without regard to their individual preferences.

Legal Arguments in the Do-Not-Call Debate

The necessary effect of the national do-not-call registry administered by the FTC and FCC is to restrict commercial speech that is protected by the First Amendment. Neither side of the issue disputes this basic fact. However, the federal government and the businesses challenging the registry disagree about whether this particular restriction on speech is constitutionally permissible.

Under the test established in the 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[35] to determine whether commercial speech restrictions are permissible, the government must prove each of the following: (1) the government has a substantial interest in supporting the adoption of the particular restriction; (2) the proposed restriction will materially advance that interest; and (3) the restrictions on speech are "not more extensive than is necessary to serve [the asserted] interest."[36] Businesses subject to the registry argued in their challenge that the government has failed to meet its burden with respect to any of *Central Hudson*'s test elements. Each of these elements is discussed in more detail below.

Government's Substantial Interest in Adoption of a Registry

The plaintiffs in the telemarketing cases acknowledge that government has a generalized interest in protecting the residential privacy of its citizens. However, they argue that the FTC and FCC have a constitutional obligation to articulate and justify the government's interest and that these agencies have failed to meet that burden. As explained in 1999 by the Tenth Circuit in *U.S. West v. FCC*, "the government cannot satisfy [this] prong of the *Central Hudson* test by merely asserting a broad interest in privacy."[37] Because the concept of privacy is "multi-faceted" and protecting privacy in the abstract can impose "real costs on society" (such as lost jobs, higher prices, and decreased competition that flow from implementation of a national do-not-call list), "privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it."[38]

In the telemarketing cases, the FTC and FCC asserted a broad interest in residential privacy as the basis for their respective decisions to establish a national registry, without delineating expressly what privacy interest is violated by unwanted telephone solicitations into the home. Based on the administrative records, the notion of privacy the government acted to protect is a freedom from the annoyance of receiving telephone solicitations in the home.

This notion of privacy, however, is markedly different than the variants of privacy, including freedom from unreasonable search and seizure, public exposure of private facts, and intrusion or invasion of solitude, that have historically been recognized by the courts.[39] Although the specific privacy interest of invasion of solitude seems, on its face, most closely aligned with the notion of privacy protected by the government, privacy actions concerning invasion of solitude "normally involve[] some physical, not merely psychological, incursion into one's privacy."[40]

The notion of privacy the government seeks to protect via the registry is most closely equated with freedom from annoyances in the home. However, this type of interest has been deemed insufficient to justify other limitations on commercial speech that have been challenged in the courts. For example, in *Consolidated Edison Co. of New York v. Public Service Commission of New York*,[41] the U.S. Supreme Court struck down a state restriction on including inserts in utility bills that addressed controversial issues of public policy. Although the state court of appeals upheld the ban based on its finding that the inserts "intruded upon individual privacy," the U.S. Supreme Court disagreed, finding that even though the inserts "may offend the sensibilities of some consumers," the ability of government

> to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.[42]

In another U.S. Supreme Court case, where the government's regulations block some solicitation calls but not others, the Court found it is particularly difficult for the government to establish a substantial interest in privacy because its policies are "decidedly equivocal" with respect to its protection of consumer privacy.[43] For these reasons, among others, the telemarketers argued that the FTC's and FCC's generalized assertion in protecting privacy was inadequate.

Registry Materially Advancing The Privacy Interest

In order to satisfy the requirements of *Central Hudson*'s tests, the FTC and FCC have argued that the jointly administered do-not-call registry will materially advance the government's stated interest in protecting residential privacy. However, the telemarketers counter that registry subscribers will continue to receive calls from charitable and religious organizations, political parties and candidates, as well as from businesses with which the subscribers have an established business relationship, such as their credit-card and telephone companies. Thus, they argue, residential privacy will continue to be pierced by calls from such entities. Such inconsistent regulation among callers could render suspect the registry's ability to materially advance consumer privacy.

Courts have repeatedly struck down government regulations when, due to an uneven regulation of the problem, the regulations failed to advance the government's stated interest. For example, in the cases of *Rubin v. Coors Brewing Co.*[44] and *Greater New Orleans Broadcasting Ass'n v. U.S.*,[45] the critical fact in determining that the government's chosen means did not advance its stated interest in restricting commercial speech was that the government limited some, but not all, of the speech that resulted in the problem the government was attempting to address. In the telemarketing cases, the telemarketers have argued that because the federal agencies responsible for administering the do-not-call registry have chosen to exempt some callers, calls that are let through can be equally, if not more, annoying than the calls that are blocked by the registry.[46]

The government counters, citing *U.S. v. Edge Broadcasting Co.*[47] for the proposition that every telemarketing call that is prevented by the do-not-call registry au-

tomatically furthers the government's interest in guarding residential privacy. The telemarketers have sought to limit the holding of *Edge Broadcasting* to its specific context. They argue that the ban on lottery advertising at issue in *Edge Broadcasting* helped non-lottery states advance their interest in enforcing their laws. This reasoning, they argue, would not necessarily apply in the do-not-call context, as the activity underlying the restricted speech, namely telemarketing, is not itself illegal.

The telemarketers argue that this one-bite-at-a time approach to addressing a problem has been rejected by the U.S. Supreme Court in situations where the restriction bore no relation to government's purported interest in privacy. For example, in the 1980 case of *Village of Schamburg v. Citizens for Better Environment*,[48] the Court struck down an ordinance that restricted how much money a charity could devote to administrative costs, reasoning that there was no connection behind the privacy interest asserted by the government as the rationale for the ordinance and the percentage limit. In this case, it noted that "house-holders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations," and concluded that the government's showing was deficient where "[t]he 75-percent requirement protects privacy only by reducing the total number of solicitors, as would any prohibition on solicitation."[49]

This same reasoning could be used to apply to the exemptions from the registry. The ring of the telephone could be seen as equally invasive whether the caller is calling on behalf of a Senate campaign, a police officer's association, or a long-distance telephone company. Therefore, as the ordinance struck down in *Schaumburg*, the do-not-call regulations may be held by the U.S. Supreme Court not to satisfy the *Central Hudson* requirement that they materially advance the government's stated interest in privacy.

In addition to the inconsistent regulations among types of speakers and content of speech, the telemarketers have argued that the registry may not materially advance the government's interest in consumer privacy because the registry supplants rather than respects individual preferences for what types of commercial messages they wish to receive. Consequently, they argue that the registry may be seen as both under- and over-inclusive with respect to its ability to meet the government's stated privacy interest.

An individual's choice to subscribe to the registry is an all-or-nothing choice—either the individual must accept the predetermined list of callers (with its numerous exceptions) that are not permitted to call registry subscribers or the individual must decline to block any calls at all. Individuals who choose to block only certain types of commercial telemarketing calls or who want to block calls from charities and political organizations are unable to do so via the registry. Thus, the registry is under-inclusive in that, for these subscribers, the registry fails to protect an individual from all undesired solicitations.

The registry also can be seen as over-inclusive. Some individuals may accept the blocking of calls chosen by the government so as to obtain the benefits of the registry with respect to calls the individual really wants to avoid. These individuals, therefore, will tolerate the blocking of some calls the individual would otherwise accept in order to achieve the blocking of specific undesired calls.[50]

The danger of the over-inclusiveness in the registry's operation has been acknowledged by the government, as the FTC decided not to subject charitable solicitations to the rigors of the national registry. In the FTC regulations, the FTC noted

> concerns that subjecting charitable solicitation telemarketing . . . to national "do-not-call" registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side effect.[51]

The government may not have realized that this danger also could impact some types of commercial telemarketing calls.

The government argued in the telemarketing litigation that the choice to sign up for the list is the consumers' and, therefore, the registry is constitutional. The government has relied in large part on a case decided by the U.S. Supreme Court long before telemarketing in its present form existed, *Rowan v. Post Office Dept.*[52] In *Rowan*, the Supreme Court upheld a regulatory regime in the face of First Amendment challenges that permitted a consumer to have his or her name removed from the mailing list of any mailer who, in the consumer's view, sent out sexually offensive material. The telemarketers contend that this regime, however, bears more resemblance to the company-specific do-not-call lists than the national registry at issue in the current debate. This is because the *Rowan* decision is predicated on the fact that the *individual homeowner* was free to choose among the types of mailings he or she deemed offensive and that discretionary decision to determine the types of mailings to be banned was not left in the hands of the government.[53]

Registry Not More Extensive Than Necessary to Serve Privacy Interest

The final element that the government has to prove in order to have the do-not-call registry pass muster under *Central Hudson* is that the registry must not be "more extensive than is necessary to serve [the asserted] interest."[54] In this regard, the U.S. Supreme Court has made clear that "if the Government can achieve its interest in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so."[55] Because there are numerous less restrictive measures that give telephone subscribers control over unwanted calls, the telemarketers argue that the do-not-call registry failed this final prong of *Central Hudson* as well.

Under this prong, any restriction on commercial speech "must signify a 'carefu[l] calculat[ion] [of] the costs and benefits associated with the burden on speech imposed by its prohibition.'"[56] In *U.S. West*, the Tenth Circuit held that the FCC failed to analyze the adverse impact of its regulation, which was intended to protect consumer privacy, or to show that a narrower opt-out strategy would be insufficient.[57] The court held that when the government fails to do that, the regulations must be invalidated.

With respect to the do-not-call registry, the telemarketers argue that government made no effort to assess the adverse impact of its rules on the telemarketing industry, much less carefully evaluate the costs and benefits. Additionally, they argue that the agencies acknowledged that they lacked information at the time the regulations were enacted about whether consumers now have multiple mutually-reinforcing alternatives to control unwanted telephone calls, including the current company-specific do-not-call lists and various forms of consumer services and electronics. The findings that are contained in the record before the agencies, the telemarketers contend, show that the

various less restrictive measures are able to protect consumer privacy.[58]

In the event that the U.S. Supreme Court grants *certiorari* on the telemarketers' appeal, such findings may be highly relevant, since "the existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'fit' between means and ends is reasonable"[59] Given the Supreme Court's position that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not a first—resort,"[60] the existence of such numerous, less burdensome options could lead to a conclusion that the do-not-call registry does not meet this final prong of *Central Hudson.*

Status of the Legal Debate

Immediately after the FTC rules appeared in the Federal Register, a consortium of telemarketers filed suit in the U.S. District Court for the District of Colorado challenging the constitutionality of the FTC's do-not-call rules. The district court agreed, applying *Central Hudson* to determine that neither of the interests asserted by the government justified creating the no-call registry.[61] Specifically, the court found that the registry does not legitimately advance the government's interest in protecting privacy because "unwanted calls seeking charitable contributions are as invasive to [] privacy . . . as unwanted calls from commercial telemarketers,"[62] and regulations may not distinguish between commercial and noncommercial speech if both have the same effect on the asserted interest.[63]

The court dealt similarly with the government's asserted interest in preventing "abusive and fraudulent" telemarketing practices, finding "there is no evidence in the administrative record or before this court that abusive and fraudulent telemarketing practices are more often instigated by commercial telemarketers than by charitable telemarketers."[64] The district court later denied the FTC's request for a stay, again rejecting the FTC's assertion that its interest in preventing "abusive telemarketing practices" justified the do-not-call registry, and explaining "the FTC has gathered no evidence" regarding whether commercial telemarketers are more likely than noncommercial telemarketers to ignore company-specific "do-not-call" requests.[65]

Within days, the FTC appealed the decision to the Tenth Circuit, which combined the FTC's appeal with that court's review of the FCC do-not-call registry. In early 2004**,** the Tenth Circuit issued a decision that overturned the district court's decision and declared that neither the FTC's nor FCC's rules violated the First Amendment.[66] The court held that, under *Central Hudson*, the interest in protecting individual privacy and preventing telemarketing abuse justified the new rules.

The Tenth Circuit rejected the district court's reading of *City of Cincinnati v. Discovery Network, Inc.*[67] and held it is immaterial whether exempt noncommercial speech affects privacy in the same way as the commercial speech banned by the rules. The court reasoned that *Discovery Network* merely held that "a regulation that has only minimal impact on the identified problem cannot be saved simply because it targets commercial speech," and "so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal."[68]

Thus, as of September 2004, both the FTC and FCC rules have been held constitutional. However, the telemarketers have filed a petition for *certiorari* with the U.S. Supreme Court, and observers are watching closely to see what the Court decides to do. If the Supreme Court decides not to hear the case, politicians may feel emboldened to regulate commercial speech in other ways, such as by expanding the do-not-call registry to other forms of speech, including fax and e-mail communications. If the Supreme Court decides to grant *certiorari*, any opinion it renders will likely determine the level of protection that commercial speech receives for years to come, and might strike a better balance between the competing interests of commercial speech and individual privacy.

Conclusion

The telemarketers' challenges to the FTC and FCC rules that created a national do-not-call registry have focused national attention on whether and in what manner the government may restrict what is presumed to be "unwanted speech." The cases have pitted important, but often competing, public interests against each other, namely a business's right to engage in commercial speech versus the consumer's right to privacy. Although the cases challenging the do-not-call rules are the first cases to have percolated up to the federal courts of appeal involving these competing interests, other government regulations limiting solicitation by fax and by "spam" e-mail trigger the same sort of analysis.[69]

The question of whether the telemarketers' challenge discussed in this article will be resolved in the U.S. Supreme Court has yet to be decided. What does seem clear, however, is that the responsibility for prioritizing these often-competing constitutional rights will, at some point, ultimately fall on the shoulders of the U.S. Supreme Court.

NOTES

1. CRS §§ 6-1-901 *et seq.*; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003) (*hereafter*, "*1991 Rules and Regulations*"); *Amended Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (2003) (*hereafter*, "*Amended TSR Order*").

2. *Colorado Citizens for Free Speech, LLC et al. v. Bruce N. Smith et al.*, Case No. 02-RB-1192 (D.Colo.); *Mainstream Marketing Servs., Inc. v. FTC*, 283 F.Supp.2d 1151 (D.Colo. 2003) (order re. constitutionality of FTC rules) (*hereafter*, "*Mainstream District Court Case"*); *Mainstream Marketing Servs., Inc. v. FTC*, 284 F.Supp.2d 1266 (D.Colo. 2003) (order denying stay); *Mainstream Marketing Servs., Inc. v. FTC et al.*, 358 F.3d 1228 (10th Cir. 2004) (*hereafter*, "*Mainstream 10th Circuit Case*").

3. *See, e.g.*, Comments of the Direct Marketing Association, Inc. and U.S. Chamber of Commerce (*hereafter*, "DMA Comments"), Telemarketing Rulemaking, Comment FTC File No. R411001 (Proposed Amendments to the Telemarketing Sales Rule) (April 15, 2002) ("initiatives reducing the effectiveness of telemarketing are likely to increase prices"); *Id.* at 10-11 ("firms with largest market shares charge higher prices, a consequence of the fact that having a larger captive customer base to start with creates an incentive to exploit this advantage with higher prices. . . . [Thus,] [w]hen restrictions on telemarketing raise the costs of contacting a rival's customers, price competition is lessened and prices raise.").

4. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459, 17467 (2002).

5. *See* WEFA Group Study, "Economic Impact," *U.S. Direct and Interactive Marketing Today*, *cited in* DMA Comments, *supra*, note 3 at 5.

6. *See Amended TSR Order, supra*, note 1 at 4667, n.1059.

7. DMA Comments, *supra*, note 3 at 5-6.

8. *See Amended TSR Order, supra*, note 1 at 4631 (*citing* estimate that "[i]ndividual sellers and telemarketing firms . . . might have to lay off up to 50% of their employees" and "predictions [that] job losses would impact most seriously on women, minorities and rural areas").

9. *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC

Rcd. 8752, 8753 (1992) (*hereafter*, *"TCPA Report"*).

10. *Id.* at 8757.

11. *Id.* at 8757-58.

12. *See* "Privacy Technologies: The Telezapper," *How Stuff Works*, available at http://electronics.howstuffworks.com/ces20022.htm.

13. Remarks of Chairman Timothy K. Muris, FTC Press Conference (Dec. 18, 2002).

14. *Id*.

15. 15 U.S.C. §§ 6101 through 6108.

16. H. Rep. 103-20 at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626, 1629 (1993).

17. 15 U.S.C. § 6102(a).

18. *See* 16 C.F.R. § 310.3.

19. In addition to the do-not-call registry, the FTC mandated that businesses transmit the telephone number and its business name to any Caller ID service when made available by the telemarketer's phone carrier. 16 C.F.R. § 310.4(a)(7). It also prohibited telemarketers from "abandoning" calls, defined as the failure to connect a consumer with a representative within two seconds of the consumer's completed greeting. 16 C.F.R. § 310.4(b)(1)(4). The FTC provided telemarketers with a safe harbor from liability for abandoned calls where one of the requirements to take advantage of the safe harbor is that telemarketers play a recorded message with the name and number of the entity on whose behalf the call was placed if a live representative is unable to answer the call within two seconds. However, this is precluded by FCC rules prohibiting the use of recorded messages. *See* 47 U.S.C. § 227(b)(1)(A)-(B); 47 C.F.R. § 64.1200(a)(1)-(2).

20. 16 C.F.R. § 310.4(b)(1)(iii)(B).

21. 15 U.S.C. § 6102(a)(3)(A).

22. *Amended TSR Order, supra*, note 1 at 4586-87.

23. *Id.* at 4591.

24. *Id.*

25. *Id.* at 4629.

26. 16 C.F.R. § 310.4(b)(1)(iii)(B).

27. *Mainstream District Court Case, supra*, note 2.

28. Telephone Consumer Protection Act, 47 U.S.C. § 227(1a-10a).

29. 47 U.S.C. § 227(c)(1).

30. *TCPA Report, supra*, note 9 at 8761.

31. *Id*.

32. *Id.* at 8758-59.

33. *Id*. at 8761.

34. *Id.*

35. *Central Hudson*, 447 U.S. 557, 566 (1980).

36. *Central Hudson* outlines the test embodying the intermediate level of scrutiny generally applicable to restrictions on commercial speech. The plaintiffs in the telemarketing litigation argue that the registry operates as a prior restraint on speech and makes discriminatory distinctions based on the content of the speech and identity of the speaker. There also is case law suggesting that the regulations are subject to the strictest level of First Amendment review. *See e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims' Board*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (regulations that restrict commercial speech are particularly suspect where they bear no relationship to goal government is trying to accomplish). This latter point has been argued by the plaintiffs/petitioners in the federal do-not-call cases. Due to space constraints, this article does not focus on this issue.

37. *U.S. West*, 182 F.3d 1224, 1234-35 (10th Cir. 1999), *cert. denied sub nom., Competition Policy Inst. v. U.S. West, Inc.*, 530 U.S. 1213 (2000).

38. *U.S. West, supra*, note 37 at 1235.

39. *1991 Rules and Regulations, supra*, note 1; *Amended TSR Order, supra*, note 1.

40. *See* McCarthy, *The Rights of Publicity and Privacy* (Eagan, MN: West Group, 2000) at § 5.10(a)(1).

41. *Consolidated Edison Co. of New York*, 447 U.S. 530, 541 (1980).

42. *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (an interest in shielding homeowners from unsolicited advertisements they are likely to find offensive or overbearing "carries little weight").

43. *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 187 (1999).

44. *Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (striking down federal restriction on disclosing alcohol content on beer labels, but not other alcoholic beverages, as failing to directly and materially advance government's stated interest in reducing content wars among alcoholic beverage producers).

45. *Greater New Orleans Broad., supra*, note 43 at 189 (ban on advertising casino gambling could not achieve stated purpose of reducing social ills of gambling where government policy simultaneously promoted tribal casino gambling and permitted advertising of state-run lotteries).

46. *See* cases at note 2, *supra*.

47. *Edge Broad. Co*., 509 U.S. 418 (1993) (upholding federal prohibition against broadcast advertising of lottery information in states where lotteries illegal, even though individuals may be exposed to lottery advertising originating in adjacent states where lotteries permitted).

48. *Village of Schaumburg*, 444 U.S. 620, 638-39 (1980).

49. *Id.*

50. Indeed, the administrative records supports the concept that the registry may fail to block some unwanted calls while blocking some calls individuals may not mind receiving. The registry's wholesale approach to consumer privacy contradicts government findings that "consumers prefer[ ] a 'nuanced approach' to the 'do-not-call' issues, wanting to limit some calls to their household, but not all calls." *See Amended TSR Order, supra*, note 1 at 4593.

51. *Id.* at 4636.

52. *Rowan*, 397 U.S. 728, 737 (1970).

53. *Id.* at 731.

54. *Central Hudson, supra*, note 35 at 566.

55. *Western States Med. Ctr.*, 535 U.S. 357, 371 (2002).

56. *U.S. West, supra*, note 37 at 1238, *quoting Discovery Network, supra*, note 36 at 417.

57. *U.S. West, supra*, note 37 at 1238-39.

58. The FTC found that company-specific do-not-call lists can effectively protect consumer preferences (at least for charitable solicitations) and that technological alternatives can provide protection as well. *Amended TSR Order, supra*, note 1 at 4623, 4630, and 4631.

59. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995).

60. *Western States Med. Ctr., supra*, note 55.

61. *Mainstream District Court Case, supra*, note 2.

62. *Id.* at 1166.

63. *Id., citing Discovery Network, supra*, note 36.

64. *Mainstream District Court Case, supra*, note 2 at 1167.

65. *Id*.

66. *Mainstream 10th Circuit Case, supra*, note 2.

67. *Discovery Network, supra*, note 36.

68. *Mainstream 10th Circuit Case, supra*, note 2 at 1245 and 1239.

69. *See, e.g*. (in this issue) Fagin, "Practicing Safe E-Mailing: The CAN-SPAM Act of 2003," 33 *The Colorado Lawyer* 61 (Oct. 2004). ■