

# Nonprofit Solicitation Under the Telemarketing Sales Rule

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## I. INTRODUCTION

In 2003, the Federal Trade Commission (“FTC”) revised its Telemarketing Sales Rule (“TSR”) to establish a national Do-Not-Call Registry for commercial telemarketing.<sup>1</sup> Thereafter, Congress directed the Federal Communications Commission (“FCC”) to coordinate its

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1. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4584-85 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

telemarketing regulations under the Telephone Consumer Protection Act (“TCPA”) of 1991<sup>2</sup> to achieve maximum consistency between the two agencies’ telemarketing restrictions.<sup>3</sup> Now, the two agencies enforce a single list containing the personal telephone numbers of consumers who do not wish to receive calls from telemarketers.<sup>4</sup> Based on the agencies’ different statutory authorities, some parties are exempt from the FTC rule (banks and insurance companies for example) but are covered by the FCC rules. Nonprofit solicitation is exempt from the national Do-Not-Call Registry,<sup>5</sup> but is covered by other provisions of the FTC rule.<sup>6</sup> The TSR created a new in-house no-call list requirement and imposed additional restrictions not previously known for nonprofit solicitors.<sup>7</sup> These restrictions apply, however, only if a commercial telemarketer is conducting the solicitation call.<sup>8</sup>

The federal Do-Not-Call System does not preempt any existing state registry.<sup>9</sup> Many states have merged their registries with the federal list, saving their residents from having to register twice. Some states, however, believe their systems provide better consumer protection, usually because of narrower exceptions. These states will continue to enforce their lists separately.<sup>10</sup> Most states exempt nonprofit solicitation from their requirements. North Dakota had rules that covered nonprofit solicitation if it was conducted by a for-profit telemarketer, similar to the FTC construct.<sup>11</sup>

In 2004, the Tenth Circuit Federal Court of Appeals upheld the validity of the new federal Do-Not-Call Registry.<sup>12</sup> The Supreme Court

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2. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2002).

3. Do-Not-Call Implementation Act, 15 U.S.C. § 1601 (2003).

4. 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003).

5. 16 C.F.R. § 310.6(a).

6. Restrictions on Telemarketing and Telephone Solicitation, 47 C.F.R. § 64.1200(c)(2) (2003).

7. 47 C.F.R. § 64.1200(d)(3).

8. 47 C.F.R. § 64.1200(f)(9).

9. Telephone Consumer Protection Act, 47 U.S.C. § 227 (e)(1) (2000). See Stephen M. Worth, “Do Not Call” Laws and the First Amendment: Testing the Limits of Commercial Free Speech Protection, 7 J. SMALL & EMERGING BUS. L. 467 (2003). See generally Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPECTUS 61 (2004) [hereinafter *To Call or Not to Call?*].

10. See Joseph Lewczak and Sofia Rahman, *Practical Suggestions for Complying with the National Do Not Call Registry*, METRO. CORP. COUNSEL, Feb. 2004, at 18. See also *To Call or Not to Call?*, *supra* note 9.

11. Fraternal Order of Police v. Stenehjem, 287 F. Supp. 2d 1023 (D.N.D. 2003).

12. Mainstream Mktg. Servs. v. FTC, 358 F.3d 1228 (10th Cir. 2004).

declined to hear the matter on appeal, leaving the *Mainstream Marketing* opinion as the final constitutional law regarding the national Do-Not-Call List.<sup>13</sup> Nevertheless, its outcome expressly does not apply to any solicitation on behalf of nonprofit organizations.<sup>14</sup> The separate nonprofit provisions of the TSR raise different issues regarding the scope of FTC authority and First Amendment rights of nonprofit organizations. These regulations are being disputed in separate litigation from the challenge to the national Do-Not-Call Registry.<sup>15</sup>

This Article looks at the current state of regulatory activity targeting charitable telephone solicitation. First, the Article examines the FTC's authority to adopt the provisions of the TSR that apply to nonprofit organizations.<sup>16</sup> Second, this Article explains the free speech jurisprudence that charitable solicitation cannot be regulated like other commercial messages.<sup>17</sup> Finally, the Article looks at the new FTC restrictions on nonprofit solicitation to determine if they can withstand Constitutional scrutiny.<sup>18</sup>

## II. FTC STATUTORY AUTHORITY TO REGULATE NONPROFIT SOLICITATION

The FTC's restrictions on nonprofit solicitation are based on new mandates under the Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act").<sup>19</sup> Often lost in the public debate regarding the USA PATRIOT Act are the provisions that swept charitable solicitation into existing telemarketing statutes. Previously, telephone solicitation by nonprofit organizations had been exempt from the federal Telemarketing and Consumer Fraud and Prevention Abuse Act, which is the FTC's statutory authority underlying the Telemarketing Sales Rule.<sup>20</sup> Nonprofit

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13. *Id.* See generally James Sweet, *Opting-out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 963 (2003). See also Rita Marie Cain, *Federal Do Not Call Registry is Here to Stay. What's Next for Direct Marketing Regulation?*, 19 J. OF INTERACTIVE MKTG. (forthcoming Jan. 2005).

14. *Mainstream Mktg. Servs.*, 358 F. 3d at 1233 n.2.

15. *Nat'l Fed'n of the Blind v. FTC*, 303 F. Supp. 2d 707 (D. Md. 2004).

16. See discussion *infra* Section II.

17. See discussion *infra* Sections III.A. and III.B.

18. See discussion *infra* Section III.C.

19. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at scattered sections of 18 U.S.C.).

20. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-08 (1996).

solicitation is also exempt from the Telephone Consumer Protection Act of 1991, which is the FCC's statutory authority for regulating telemarketing.<sup>21</sup>

Section 1011(b) of the USA PATRIOT Act amends the definition of "telemarketing" in the Telemarketing and Consumer Fraud and Abuse Prevention Act to include any telephone solicitation program conducted to induce "a charitable contribution, donation, or gift of money or any other thing of value."<sup>22</sup> Further, the definition of a "deceptive practice" under the Telemarketing and Consumer Fraud and Abuse Prevention Act was amended to include "fraudulent charitable solicitation."<sup>23</sup> Although not stated in the USA PATRIOT Act, the FTC concluded that these amendments only apply to charitable solicitations conducted by *commercial* telemarketers on behalf of nonprofit organizations. According to the FTC, nonprofit organizations are exempt from the FTC's general statutory authority to regulate unfair and deceptive trade practices.<sup>24</sup> The USA PATRIOT Act did not expand the FTC's basic statutory authority. Thus, the only way to reconcile the USA PATRIOT Act with the FTC's existing power over for-profit firms is to conclude that the USA PATRIOT Act only enables the FTC to regulate charitable solicitation conducted by commercial telemarketers.<sup>25</sup>

Arguably, the FTC's interpretation of this statutory authority under the USA PATRIOT Act is too limited to effectuate the Act's purpose. The legislative history of the Act, in the weeks following the September 11 attacks, makes it clear that Congress wanted to tackle the problem of fraudulent charitable solicitors who funneled donations to terrorists.<sup>26</sup>

This legislative objective will not be met if the regulations focus only

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21. Telephone Consumer Protection Act, 47 U.S.C. § 227 (2002).

22. USA PATRIOT Act § 1011(b)(3) (codified at 15 U.S.C. § 6016).

23. USA PATRIOT Act § 1011(b)(1) (codified at 15 U.S.C. § 6102).

24. The Commission's authority extends to "persons, partnerships and corporations. . . ." 15 U.S.C. § 45(a)(2) (2004). Most charitable and other nonprofit organizations fail to meet the profit-oriented definition of a corporation under the Act. *See* 15 U.S.C. § 44 (2004).

25. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4584-85 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

26. The synopsis of the Act states that it is intended "[T]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Another portion of the Act is entitled Cooperative Efforts to Deter Money Laundering and specifically authorizes cooperative procedures among financial institutions, regulatory authorities and law enforcement related to the "means by which terrorist groups transfer funds around the world and within the United States, including through the use of charitable organizations, nonprofit organizations, and nongovernmental organizations. . . ." USA PATRIOT Act § 314 (codified at 31 U.S.C. § 5311).

on the solicitation conducted by commercial solicitors and not on the defrauding charities themselves. Potentially, if sham charities were soliciting funds to funnel to terrorists, they would not hire a third-party firm to conduct their solicitation. Such a relationship with a commercial telemarketing vendor would require contracts, payments by check or credit card between the firms, and some interaction between the telemarketer and the persons representing the sham charity. Presumably, if a sham charity were trying to launder funds to terrorists, it would try to limit paper trails and third-party contacts regarding its illegal activities. Arguably, it would keep the telemarketing function within the organization of fellow conspirators.

Another interpretation of the USA PATRIOT Act is that, for the purpose of regulating *fraudulent* charitable solicitation, the FTC's original jurisdiction is expanded to include all solicitors whether their legal status is commercial or noncommercial.<sup>27</sup> This interpretation would better accomplish the regulatory objective of the USA PATRIOT Act (and would sidestep the constitutional sticking point, discussed below, that the FTC is unfairly regulating the free speech of those charities that must outsource their solicitation activities to for-profit firms).<sup>28</sup>

Whether or not the FTC is correct in limiting its approach to commercial parties soliciting for nonprofits, there is still a question whether the FTC could use the USA PATRIOT Act's mandates to impose *privacy* protections on nonprofit solicitation. These privacy protections include the in-house do-not-call list, time-of-day restrictions and technical requirements for autodialing equipment.<sup>29</sup> By enacting the USA PATRIOT Act, Congress targeted fraudulent charitable solicitation as part of a law enforcement regime designed to prevent money laundering for terrorist activity. Arguably, the USA PATRIOT Act does not support the FTC's move to also extend its various personal privacy restrictions to charitable solicitation.

The FTC addressed this point by stating that nothing in the USA PATRIOT Act suggested that Congress sought to exclude nonprofit

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27. Telemarketing Review, *Comments and Recommendations National Association of State Charity Officials*, FTC File No. R411001 at 3-5 (Apr. 16, 2002) at <http://www.ftc.gov/os/comments/dncpapercomments/04/nasco.pdf>.

28. See discussion *infra* Section III.C. In addition, for the purposes of this Article, unless otherwise noted, references to nonprofit or charitable solicitation under the FTC rule implies solicitation done by commercial telemarketers on behalf of the nonprofit organization.

29. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4581, 4582 n.24, 4592.

solicitation from the privacy provisions of the TSR.<sup>30</sup> Under this approach, Congress would have to tell a federal agency what powers it is *not* bestowing when it enacts enabling legislation. The FTC also argues that the USA PATRIOT Act rewrote the general definition of “telemarketing” to include nonprofit solicitation.<sup>31</sup> Accordingly, Congress altered the scope of the TSR, and thus empowered the FTC to exercise any or all of its Telemarketing Act authority over nonprofit solicitation.<sup>32</sup>

While the USA PATRIOT Act amends the definition of telemarketing to include charitable solicitation, it does not stop there. The statute actually goes beyond the general and states one, and only one, specific telemarketing restriction for the FTC to address—disclosure.<sup>33</sup> The disclosure requirements serve the dual purpose of fraud and privacy protection. Providing identifying information allows potential donors to investigate the organization before agreeing to contribute. After contributing, if donors have reason to suspect the charity is questionable, they have the identifying information to forward to law enforcement. These disclosure requirements also protect in-home privacy by allowing consumers to terminate the call immediately upon hearing the nature and source of the call.

The FTC asserts that the USA PATRIOT Act’s general definition of telemarketing injected charitable solicitation into all the provisions of the TSR.<sup>34</sup> This interpretation of the general definitions in the Act ignores the new, more specific mandates. Arguably, if Congress were authorizing the FTC to consider any other possible telemarketing regulations for nonprofits, such as the Do-Not-Call List requirement, it would not have expressly singled out disclosure in the legislation. In other words, once Congress expressed one specific requirement that the FTC could impose on nonprofit solicitation, the FTC was not free to assume blanket authority over nonprofit telemarketing.

At least one United States senator put the FTC on notice of his contrary interpretation of the USA PATRIOT Act. In a June 14, 2002, letter to FTC Chairman Timothy Muris, Senator Mitch McConnell commented on the Notice of Proposed Rulemaking:

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30. FTC Telemarketing Sales Rule, 67 Fed. Reg. 4492, 4493 (Jan. 30, 2002) (codified at 16 C.F.R. pt. 310).

31. *Id.*

32. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

33. 15 U.S.C.S. § 6102(a)(3)(C)(D) (Supp. 2004); 16 C.F.R. § 310.4(e) (2004).

34. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4585 n.52.

In an effort to protect generous citizens and the charitable institutions they support, I was proud to introduce the Crimes Against Charitable Americans Act and secure its inclusion in the USA PATRIOT Act. This legislation strengthens federal laws regulating charitable phone solicitations. . . . When Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal “do-not-call” list, and certainly not a list that applied to charitable organizations or their authorized agents.<sup>35</sup>

The only court to address the issue to date has agreed with the FTC.<sup>36</sup> According to the Federal District Court of Maryland, the applicable provisions of the USA PATRIOT Act were amendments to the Telemarketing Act.<sup>37</sup> The original Telemarketing Act instructed the FTC to enact rules to prevent fraud and protect privacy.<sup>38</sup> From this authority emerged the original Telemarketing Sales Rule. Thus, the court opined, by adding charitable solicitation to the definition of “telemarketing” used in the TSR, Congress must have recognized “*all* the telemarketing rules would apply to charitable solicitation.”<sup>39</sup> As for the views of Senator McConnell, “the statements of one Congressman cannot be treated as a definitive recitation of Congress’ purpose with respect to the statute.”<sup>40</sup>

### III. FREE SPEECH PROTECTION FOR CHARITABLE SOLICITATION

Shortly after the Supreme Court expressly extended free speech protection for advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>41</sup> it was faced with various challenges to state charitable solicitation laws. Typically, these regulations targeted the use of paid commercial solicitors for charitable fund raising. The regulations primarily were based on the government’s interest in preventing fraudulent solicitation. The Supreme Court had to decide how the commercial speech doctrine applied to solicitation on behalf of nonprofit organizations.

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35. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4585 n.50 (quoting a letter from United States Senator Mitch McConnell). In 2003, Congress passed the follow-up Do-Not-Call Implementation Act, which gave the FTC authority to impose the fee structure for the Do-Not-Call Registry. Do-Not-Call Implementation Act, 15 U.S.C. § 6101 (2003). The Act is widely seen as a congressional imprimatur for the Registry. Nevertheless, since the national Do-Not-Call Registry specifically exempts all calling for nonprofit solicitation, whether done by commercial or noncommercial solicitors, this subsequent Act by Congress does not address the FTC’s tactics regarding nonprofit solicitation.

36. Nat’l Fed’n of the Blind v. FTC, 303 F. Supp. 2d 707 (D. Md. 2004).

37. *Id.* at 711.

38. *Id.* at 710.

39. *Id.* at 714 n.3.

40. *Id.*

41. 425 U.S. 748 (1976).

A. *Fraud as a Compelling Interest to Support Regulation of Nonprofit Solicitation under the TSR*

In *Village of Schaumburg v. Citizens for a Better Environment*, the Supreme Court struck down a regulation that prohibited charitable solicitation unless 75 percent of the receipts were used “directly for charitable purpose of the organization.”<sup>42</sup> The government’s primary objective for the rule was to protect citizens from unscrupulous solicitors and to protect legitimate charities from the black eye created by disreputable organizations.<sup>43</sup> The Village of Schaumburg surmised that an organization using more than 25 percent of its receipts for salaries and overhead was a for-profit enterprise, not a charity.<sup>44</sup> Residential privacy also was articulated as a justification for such rules, as in most telemarketing regulation today.<sup>45</sup>

*Schaumburg* concluded that the 25 percent threshold did not reliably explain whether an enterprise was either commercial or charitable and the threshold addressed the fraud concern “only peripherally.”<sup>46</sup> The Court held that the anti-fraud interest could be served by penal laws that prohibit and punish fraud directly, rather than by approaches that restrict solicitation.<sup>47</sup>

*Schaumburg* also noted that charitable solicitation has not been regulated as “purely commercial speech.”<sup>48</sup> The Court explained that charitable solicitation “is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. . . .”<sup>49</sup> Accordingly, speech by charitable organizations, even when soliciting contributions, receives the highest First Amendment protection, the same as is available to all other political or social speech.

Thereafter, the Court invalidated a Maryland statute that prohibited charities from fundraising if they paid the solicitor more than 25 percent of the amount raised.<sup>50</sup> Maryland had tried to avoid the *Schaumburg* result by including a waiver of the 25 percent limitation if the restriction would

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42. 444 U.S. 620, 624 (1980) (citing *Schaumburg Village Code* § 22-20).

43. *Id.* at 636.

44. *Id.*

45. *Id.* at 638.

46. *Id.* at 636.

47. *Id.* at 637.

48. *Id.* at 632.

49. *Id.*

50. *Sec’y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984).



effectively prevent the organization from raising funds.<sup>51</sup> *Secretary of Maryland v. Joseph H. Munson, Co.* noted that this regulation was based on the same fundamentally flawed premise as in *Schaumburg*: that high solicitation costs are an accurate measure of fraud.<sup>52</sup> The Court explained that high solicitation costs could result from using the fundraising process to disseminate information.<sup>53</sup> Solicitation expenses are not excessive if they stem from the unpopularity of the charity's cause.<sup>54</sup> Again the Court explained that more direct regulatory measures could check fraud, this time citing financial disclosures by the charities as a meaningful option.<sup>55</sup>

In the final case in this trilogy, the Court invalidated a North Carolina statute that directly regulated professional fundraisers and the fees they could charge.<sup>56</sup> Fees above 35 percent were presumed unreasonable.<sup>57</sup> Fees between 20 and 35 percent could be deemed unreasonable if the State could show that the solicitation efforts did not include advocacy or dissemination of information.<sup>58</sup> Fees below 20 percent were presumed reasonable.<sup>59</sup>

Targeting the commercial solicitor with this regulation did not resolve the free speech issue. *Riley v. National Federation of the Blind of North Carolina, Inc.* concluded that solicitation conducted by commercial telemarketers on behalf of nonprofit organizations is afforded the same First Amendment protection. Speech is not entitled to less protection simply because the speaker is compensated for the message.<sup>60</sup> “[T]he State’s asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter.”<sup>61</sup> Again in *Riley*, the Court noted that fraud could not be inferred from percentages retained versus paid to the solicitor because charities might benefit from the act of solicitation itself.<sup>62</sup> The request for funds can convey information and include cause-oriented

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51. *Id.* at 947.

52. *Id.* at 966.

53. *Id.*

54. *Id.* at 967.

55. *Id.* at 961 n.9 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 624 (1980)).

56. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988).

57. *Id.* at 785.

58. *Id.*

59. *Id.* at 784-85.

60. *Id.* at 801.

61. *Id.*

62. *Id.* at 798-99.

advocacy.<sup>63</sup>

*Riley* also struck down a disclosure provision in the North Carolina statute that required solicitors to reveal the average of the percentage of gross receipts actually paid by a professional solicitor to its charitable clients in the prior 12 months.<sup>64</sup> The Court said these upfront disclosures could result in the solicitation ending before it ever started.<sup>65</sup> The possibility that these state-mandated disclosures would cause potential contributors to immediately hang up presented too chilling an effect on the speech. The less restrictive alternative was for the State to publish charitable financial disclosures and to vigorously prosecute fraudulent misrepresentation when it arose.<sup>66</sup>

According to the Court's charitable solicitation trilogy, nonprofit solicitation enjoys the highest First Amendment protection. This free speech standard applies whether the solicitation is conducted by the charity itself or by a paid agent. The Court will assume that nonprofit solicitation includes informational and advocacy messages. Regulations cannot presume fraud in these solicitation attempts by paid fundraisers, even if the presumption could be rebutted. The State can address fraud prevention through regular financial disclosures by charities. Actual fraudulent misrepresentations can be prosecuted when they occur.

This was the legal framework for the Supreme Court in 2003, when it revisited the issue of fraudulent charitable telephone solicitations conducted by for-profit telemarketers.<sup>67</sup> In *Madigan v. Telemarketing Associates, Inc.*, the state of Illinois pursued fraud cases against for-profit solicitors operating on behalf of Vietnam veterans organizations.<sup>68</sup> According to Illinois, paid fundraisers falsely represented in solicitation calls that a significant amount of each dollar donated would be used to assist veterans. In fact, 85 percent of contributions would either be paid to the solicitor or used by the organizations for administrative expenses.<sup>69</sup> Additionally, Illinois asserted that, when asked by potential donors about the allocation of funds to actual veterans, some of the solicitors misstated the facts.<sup>70</sup>

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63. *Id.* at 798.

64. *Id.*

65. *Id.* at 799-800.

66. *Id.* at 800.

67. *Madigan v. Telemktg. Assocs., Inc.*, 538 U.S. 600 (2003).

68. *Id.*

69. *Id.* at 605.

70. *Id.* at 600.

Illinois did not allege that the percentage retained by the telemarketing firm was so excessive as to amount to fraud, which would have directly violated the Court's rulings in the *Schaumburg* trilogy. The Supreme Court described the case as one "when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener."<sup>71</sup>

When it reversed the Illinois Supreme Court's decision to dismiss the claim, the Court in *Madigan* emphasized that the complaint did not simply stem from the percentage the for-profit solicitor charged, as in *Schaumburg*.<sup>72</sup> Further, the case was not limited to the statement that a "significant amount" of each contribution would go to charitable purposes.<sup>73</sup> In his concurring opinion, Justice Scalia (joined by Justice Thomas) stated that if the allegation of fraud was based on this statement, coupled with the fundraiser's 85 percent fee, the fraud claim would violate the First Amendment.<sup>74</sup>

Illinois presented two fact-based misstatements. One donor was falsely told that "90% or more goes to the vets."<sup>75</sup> Another donor was told that donations were not used for "'labor expenses' because 'all members are volunteers.'"<sup>76</sup> These "particular representations made with intent to mislead," provided the Court with distinguishable facts from the *Schaumburg* trilogy.<sup>77</sup> *Madigan* could survive a motion to dismiss.

*Madigan* seems to apply the *Schaumburg* charitable solicitation trilogy as it was intended. In *Schaumburg*, *Munson*, and *Riley*, the Court emphasized that the way to protect the public from fraudulent solicitation was not to legislate against potential fraud in ways that restrict the act of solicitation. The way to protect the public from fraudulent solicitation is to prosecute actual fraudulent misrepresentations. *Madigan* emphasized that the fraud claim included nondisclosure *plus* actual misstatements. Neither the fee amount, nor nondisclosure of the fee, was the basis for the fraud claim.

In *Madigan*, Justice Scalia's concurrence emphasized that general statements about the "significant" portion of donations that would go to the

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71. *Id.* at 606. The action was appealed on a motion to dismiss. Therefore, the Court would only decide if such an action was permissible, not whether any of the statements were actually true.

72. *Id.*

73. *Id.* at 605 (quoting Illinois' complaint).

74. *Id.* at 624-25 (Scalia, J., concurring).

75. *Id.* at 608.

76. *Id.*

77. *Id.* at 621.

charity could not be prosecuted as fraud.<sup>78</sup> This follows the *Riley* analysis that the state cannot impose disclosure requirements that effectively block the organization's attempt to solicit. If the "significant" statement could be pursued as fraud, the state would be using its prosecutorial power to decide what is or is not "significant." This is the same judgment that legislators had made in the statutes overturned by the *Schaumburg* trilogy. *Madigan* states that state attorneys general cannot achieve in case-by-case litigation the same solicitation constraints that legislators had attempted in the *Schaumburg* trilogy.<sup>79</sup>

*Madigan* is consistent with the *Schaumburg* approach that prophylactic fraud regulations governing charitable solicitation are unconstitutional. Other regulatory measures, specifically after-the-fact enforcement of specific misrepresentations, as well as general nonprofit financial disclosures, may be the only government restrictions on nonprofit solicitation that are justified by the anti-fraud interest.

As noted above, only the disclosure provisions for nonprofits in the TSR seem to be directly motivated by the fraud prevention concern. The time-of-day, do-not-call, and autodial restrictions all target in-home privacy.<sup>80</sup> The disclosure provisions for nonprofits in the TSR are not as obstructive of the message as those invalidated in *Riley*. The USA PATRIOT Act required telemarketers to disclose that the purpose of a call is to solicit a charitable contribution.<sup>81</sup> The Act also permitted the FTC to include any other such disclosures that the Commission considered appropriate, such as the name and mailing address of the charity for whom the solicitation is made.<sup>82</sup> The FTC adopted the congressionally-mandated disclosure that a call is for the purpose of soliciting a charitable contribution and also required disclosure of the charity for which the solicitation is made. The amended rule does not require disclosure of the charity's mailing address.<sup>83</sup>

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78. *Id.* at 624-25.

79. *Id.* at 617.

80. In *Mainstream Marketing*, the Tenth Circuit concluded that the national Do-Not-Call Registry advances the fraud objective. However, this analysis was expressly based on the commercial nature of the callers governed by that provision of the rule. The court accepted the FTC's conclusion that callers conducting noncommercial solicitation are less likely to resort to deceptive and abusive practices than commercial callers. Accordingly, the national Do-Not-Call Registry eliminates the more likely source of deceptive, abusive callers—the commercial solicitors. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1241 (10th Cir. 2004).

81. USA PATRIOT Act § 1011(b)(2)(D) (codified at 15 U.S.C. § 6102).

82. *Id.*

83. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4649 (Jan. 29, 2003) (codified

Disclosure of the name of a charity would seem to be a basic necessity in legitimate nonprofit solicitation. These messages seek a transaction (usually of money), which is almost impossible to accomplish without some disclosure of identifying information. The most undemanding donor would likely require the name of the charity before agreeing to make a donation. Unlike the disclosure requirements overturned in *Riley*, the requirement of a solicitor to disclose the name of the organization for which a contribution is sought certainly does not undermine the message's effectiveness. On the contrary, the TSR only seems to codify what is probably a basic necessity for successful solicitation.

Disclosure of the name of the charity is a narrowly tailored requirement that is an absolute necessity for law enforcement to investigate money laundering under the USA PATRIOT Act. Although the First Amendment protects the right to speak anonymously, cases dealing with anonymous speech acknowledge the government's right to a "limited identification" requirement.<sup>84</sup> This provision of the nonprofit TSR should be permissible.

*B. Privacy as a Compelling Interest to Support Regulation of Nonprofit Solicitation under the TSR*

In addition to fraud protection, the FTC justifies its new nonprofit telemarketing restrictions on the government's interest in protecting personal privacy.<sup>85</sup> The Do-Not-Call List requirement, the time-of-day restrictions and the autodialing restrictions are all more obviously directed at protecting in-home privacy than preventing fraud. Again, all of these provisions apply only to nonprofit solicitation conducted by commercial telemarketers.

The restriction on calling only between 8:00 a.m. and 9:00 p.m. has been the law for commercial solicitation since the Telephone Consumer Protection Act of 1991.<sup>86</sup> Charitable solicitation was exempt from that regulation, but is now covered under the TSR. The technical mandates in the TSR govern the use of autodialing equipment. Such equipment is commonly used by commercial telemarketing service providers. These "predictive" dialers automate the dialing process so that a new call is always at the ready when the telemarketer ends the current call. When the prediction is flawed, the consumer's phone rings only to have no one on the

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at 16 C.F.R. pt. 310).

84. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 353 (1995).

85. See discussion *supra* Section II.

86. 47 C.F.R. § 64.1200(c)(1) (2003).

other end because the telemarketer is still on the previous call. Usually the autodialer then hangs up on the consumer. The TSR technical requirements address these dead-air and hang-up issues.<sup>87</sup>

The do-not-call regulation for charitable solicitation requires the commercial solicitor to maintain an organization-specific list of numbers that do not want to receive solicitation calls.<sup>88</sup> The organization must maintain the list and abide by those do-not-call demands for five years.<sup>89</sup>

Most of the Supreme Court's statements on privacy and free speech came in cases in which the Court upheld privacy as a substantial interest that justifies restrictions on commercial speech. For example, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.<sup>90</sup> In *Rowan v. United States Post Office Department*, the Court acknowledged that one of the tenets of free speech was to protect the rights of unpopular speakers to convey their messages.<sup>91</sup> Nevertheless, such a right "stops at the outer boundary of every person's domain."<sup>92</sup> The FTC heavily relies on *Rowan* as support for customer-initiated do-not-call regulatory schemes, although it acknowledges that *Rowan* was a case involving commercial advertising for sexually-explicit materials and may not apply to all unwanted non-commercial messages.<sup>93</sup>

Similarly, the Supreme Court has approved regulations that punish door-to-door sellers for failing to honor "no solicitation" signs posted by citizens.<sup>94</sup> According to the Court, "[t]his or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant. . . ."<sup>95</sup> Both *Rowan* and *Martin v. City of Struthers*, involve commercial solicitation, and were decided in a time before the Supreme

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87. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4641-45.

88. 16 C.F.R. § 310.4(b)(3)(iii) (2004).

89. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4640.

90. *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970). The postal regulation in *Rowan* actually did not distinguish that the list was limited to commercial mailings, but was widely understood to have been adopted to provide homeowners a vehicle to block mailings for the sale of sexually-explicit material.

91. *See Id.*

92. *Id.* at 738.

93. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4635 n.674.

94. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943).

95. *Id.* at 148.

Court had expressly extended any First Amendment protection to commercial speech.

*Frisby v. Schultz* is one of the most commonly cited, modern non-commercial speech cases in which the Supreme Court concluded that in-home privacy was a compelling interest to justify some speech restrictions.<sup>96</sup> The case involved targeted picketing by abortion protestors at doctors' homes or offices. The Court stated, "[I]ndividuals are not required to welcome unwanted speech into their own homes."<sup>97</sup> Accordingly, the case is held out as support for consumer-initiated do-not-call restrictions.<sup>98</sup>

By contrast, in 2002, the Supreme Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a city permit.<sup>99</sup> *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton* was a religious speech case and the Court suggested that the ordinance might have been constitutional if it had been limited to commercial speech.<sup>100</sup> The regulation at issue in *Watchtower* included a separate provision for residents to post "No Solicitation" signs on their homes that canvassers had to honor.<sup>101</sup> The provision most closely analogous to the in-house do-not-call list requirement in the TSR was not challenged in *Watchtower* and, therefore, was not addressed by the Court.

None of these Supreme Court precedents has directly addressed the issue of whether in-home privacy is a compelling interest to justify regulations that preempt non-commercial messages from coming into the home via the telephone. Arguably, intrusion via the telephone is far less frustrating to privacy than picketers outside one's home or solicitors at the door. The FTC ignored this distinction when it relied on these precedents in support of its nonprofit do-not-call rule.

Competing with the personal privacy right is the established principle that the messages of nonprofit organizations do not simply inform the consumer of giving opportunities, but additionally promote the ideas and activities that these organizations undertake on behalf of entire communities. When these messages are preemptively blocked based on a government-enforced do-not-call requirement, important information and

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96. 487 U.S. 474 (1988).

97. *Id.* at 485. *See also* *Carey v. Brown*, 447 U.S. 455, 471 (1980).

98. Michael E. Shannon, *Combating Unsolicited Sales Calls: The "Do Not Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381 (2001).

99. *Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150 (2002).

100. *Id.* at 165.

101. *Id.* at 156-57.

dialogue is lost about social issues or needs and how these charities meet those needs. Perhaps the needs of individuals to remain preemptively unperturbed by this limited group of telephone calls is not a compelling enough interest in the face of society's need to ensure that charities survive and thrive.

Further, the FTC's do-not-call rule for nonprofits preempts all future possible calling for five years. The length of this restriction has a completely chilling effect on the ability of nonprofit organizations to solicit donations in response to crises or disasters. Americans have shown time and again their abundant generosity to charities.<sup>102</sup> Presumably, that generosity would prevail over the privacy interest, especially under exigent circumstances. Yet, the nonprofit do-not-call requirement provides no safe harbors, nor exceptions for such circumstances. Nothing in the Court's privacy jurisprudence suggests that a government-enforced, five-year ban on nonprofit speech is compelled by the in-home privacy interest, even if the ban is triggered by a consumer request rather than a direct government restraint.

Even assuming in-home privacy is a compelling interest to justify restrictions on non-commercial speech, the do-not-call list-keeping requirement now imposed on nonprofits still must withstand the second part of the First Amendment analysis: it must be narrowly tailored to satisfy the compelling interest without unduly burdening speech.<sup>103</sup> Arguably, the FTC approach faces several problems under this part of the First Amendment analysis with respect to the Do-Not-Call List, although the other new provisions of the TSR for nonprofits are likely to stand.

### C. *Narrow Tailoring of the TSR*

First, as was noted above,<sup>104</sup> the FTC interprets its statutory authority under the USA PATRIOT Act as limited to nonprofit solicitation conducted by commercial solicitors. When examining the impact of these new privacy restrictions, the distinction between solicitation by commercial

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102. See, e.g., Robert A. Katz, *A Pig in a Python: How Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 252 (2003). See also Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J. L. & PUB. POL'Y 325, 341 (1997) (explaining that less wealthy individuals contribute a higher portion of their income to charity and households earning a small share of total income account for a disproportionate share of all contributions).

103. See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003); *United States v. Playboy Entm't Group*, 529 U.S. 803, 807 (2000).

104. See discussion *supra* Section II.



telemarketers and calling by the charity's own employees or volunteers presents a dichotomy that must be addressed.

The time-of-day limitation now applicable to charitable solicitation can survive this constitutional scrutiny. This privacy protection reflects a content-neutral time, place, and manner restriction.<sup>105</sup> It allows solicitation to continue during the substantial portion of the day and evening, when calling typically occurs. The restriction does not pose a substantially different constraint on charities that hire a commercial solicitor, since most organizations conducting solicitation through their own employees or volunteers would likely abide by similar time limits. The time limits are a practical matter and good solicitation practice, whether the caller is a paid professional or the charity's own volunteer or employee.<sup>106</sup> As such, this provision does not present an unconstitutional restriction for the charities that hire commercial telemarketers.

Similarly, the technical mandates for predictive dialers can also be characterized as time, place, and manner restrictions. All commercial telemarketers must comply with the technical mandates in the course of their solicitation business. Admittedly, compliance with these technical mandates creates new expenses that will apply to telemarketing solicitation. Presumably, all the customers of these commercial telemarketers are going to have to absorb the expense of these new technical requirements. This is the new reality of any party, nonprofit or otherwise, that hires a commercial telemarketing firm. This reality would affect the nonprofit telemarketing client regardless of whether the TSR covered charitable solicitation or not. Like the time-of-day restrictions, the technical mandates would seem to improve the interaction between the caller and the potential donor. Thus, the mandates do not undermine the charities' potential effectiveness at fundraising.

Regarding the in-house do-not-call list, however, the distinction between charitable solicitation done by the charity's own volunteers and solicitation by commercial telemarketers presents a questionable dichotomy. This rule is not a time, place, and manner restriction. It is a mandate that limits some charitable calling in ways not applicable to other charities that do not hire professional telemarketers. Courts will strictly scrutinize any regulatory classification when "the classification

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105. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

106. See Jeffrey LeBlanc, *Why Making the Best Call is the Right Call for You*, FUND RAISING MGMT., Oct. 1998, at 34; Tim Twardowski, *The Sounds of Success*, FUND RAISING MGMT., Aug. 1997, at 19.

impermissibly interferes with the exercise of a fundamental right.”<sup>107</sup> In this case, the fundamental right is free speech. Under the strict scrutiny analysis, it may be hard for the FTC to justify its regulatory scheme in which telephone consumers can receive no privacy protection when called by volunteer telemarketers; their do-not-call requests must be honored only by a charity using a paid telemarketing firm.

In the era before the Telemarketing Act, the TCPA or the TSR, one state court pointed out the illogic of placing restrictions on a limited group of professional solicitors when solicitation by charity volunteers and political organizations went unrestricted.<sup>108</sup> The court struck down such a restriction on professional solicitation, stating that it did “virtually nothing” to protect privacy.<sup>109</sup> The FCC was confronted with this constitutional problem of commercial versus nonprofit solicitation when it considered and rejected adopting a national Do-Not-Call Registry in the 1980s.<sup>110</sup>

The FTC begs the question when it addresses this issue. The Commission asserts that the amended TSR treats all calling by *commercial telemarketers* the same. “The company-specific ‘do-not-call’ provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions. . . .”<sup>111</sup> As such, the list-keeping requirement is content-neutral. There is no dichotomy in the speech restriction created by the mandate, according to the FTC. The Maryland Federal District Court has accepted this interpretation by the FTC regarding the scope of its statutory authority.<sup>112</sup>

This analysis, however, ignores the conclusion in *Riley*, that solicitation by a commercial party on behalf of a nonprofit is entitled to the same First Amendment protection as if the nonprofit organization were speaking for itself. In *Riley*, as in the TSR, the regulation was drafted to directly regulate the commercial solicitor, not the nonprofit agency. That legislative approach, however, did not shield the regulation from the same scrutiny the Court had applied in *Schaumburg* and *Munson*.

Under the new TSR, if a nonprofit party is calling on its own behalf, it will be totally unregulated. But when the nonprofit party opts to use a

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107. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

108. *Planned Parenthood League v. Attorney Gen.*, 464 N.E.2d 55 (Mass. 1984).

109. *Id.* at 61.

110. Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 110 (1986).

111. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4636 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

112. *Nat’l Fed’n of the Blind v. FTC*, 303 F. Supp. 2d 707, 713 (D. Md. 2004)

commercial soliciting agent, it will be restricted by the do-not-call requirement. The FTC and the Maryland Federal District Court ignored *Riley* when they sidestepped this obvious dichotomy by focusing only on the rule's "commercial" scope.

To support the national Do-Not-Call Registry (including the exemptions for charitable calling and political polling) the FTC argued that commercial telemarketers are more likely to engage in abusive calling practices than nonprofit organizations. In *Mainstream Marketing Services v. Federal Trade Commission*, the Tenth Circuit accepted the FTC's premise that the profit motive of commercial callers could result in more abusive, deceptive telemarketing, whereas the need to promote their causes would constrain nonprofits from the same behavior.<sup>113</sup>

Accepting the validity of this analysis for the moment,<sup>114</sup> the comparison between for-profit and nonprofit solicitation does not support the TSR charitable do-not-call requirement. The nonprofit in-house no call list can only be supported by evidence that commercial parties *calling on behalf of charities* are more likely to engage in deceptive and abusive calling than volunteers and nonprofit employees calling on behalf of charities. Of course, no such evidence existed in the FTC rulemaking record. Nor is any such evidence likely to be found if the FTC's own premise is correct: solicitation on behalf of a nonprofit cause requires special attention to promoting the cause, and not alienating the potential donor.<sup>115</sup> If this premise is true, it is equally true whether the calling is done by the charity itself or by the professional solicitor.

As the *Schaumburg* trilogy revealed, professional solicitors usually get paid a percentage of the revenue generated. If that revenue (donations) is linked to the attitude of the public toward the cause, as the FTC surmised, then the commercial solicitor would be as motivated as the nonprofit organization not to deceive or abuse the called party. Accordingly, the TSR arbitrarily restricts the free speech of certain charities based on the agents they hire to make their calls, without any suggestion that this restriction bears any relationship to the fraud or privacy interests the rule purports to protect.

A North Dakota Federal District Court addressed a similar bifurcated statutory provision in its state charitable solicitation law.<sup>116</sup> In general, the law established a state Do-Not-Call Registry that solicitors were prohibited

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113. 358 F.3d 1228, 1241 (10th Cir. 2004)

114. See discussion *infra* Section IV.

115. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4637.

116. Fraternal Order of Police v. Stenehjem, 287 F. Supp. 2d 1023 (D.N.D. 2003).

from calling. Exempt from the prohibition were calls made by volunteers or employees of charitable organizations.<sup>117</sup> Accordingly, the statute was similar to the federal TSR in that its provisions only applied to charitable solicitation performed by an outside firm or individual, likely to be a paid commercial solicitor. The North Dakota court held that the regulation imposes a direct and substantial limitation on the charity's solicitation activity because it "prevents charities from hiring professional telemarketers to solicit funds for them."<sup>118</sup> Accordingly, the court applied the strictest free speech scrutiny.

The North Dakota court also concluded that the state's regulation was not narrowly tailored to satisfy either the anti-fraud or privacy interest. The court explained that state criminal fraud laws directly protected the state's interest in protecting its citizens against fraud but the do-not-call law blocked all calls by paid solicitors to numbers on the list. Because not every professional telemarketer will commit fraud, the law targets and eliminates more "than the exact source of the evil it seeks to remedy."<sup>119</sup> This analysis echoes the *Schaumburg* trilogy and *Madigan*.

Regarding the privacy interest, the North Dakota court held that unrestricted charitable solicitation from volunteers or employees of charities proved that the restriction on nonprofit solicitations by commercial fundraisers was not narrowly drawn to serve the privacy interest.<sup>120</sup>

For the reasons stated above, the TSR's organization-specific do-not-call list fails as a narrowly-tailored regulation that protects the in-home privacy interest of consumers. The FTC spoke at length regarding the failures of the original TSR do-not-call provisions: "The record in this matter overwhelmingly shows . . . that the company-specific approach is seriously inadequate to protect consumers' privacy. . . ."<sup>121</sup> These failures justified the Commission's decision to create the new national Do-Not-Call Registry for commercial telemarketers. How can such a flawed regulatory approach as the in-house rule now become a legitimate privacy-protection vehicle, especially under the strict scrutiny for charitable speech?

Again, the FTC's answer was that the nature of charitable solicitation is qualitatively different than commercial telemarketing because the call is

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117. *Id.* at 1025.

118. *Id.* at 1029 (citing N.D. CENT. CODE § 51-28-01(7)(c) (2003)).

119. *Id.* (quoting *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000)).

120. *Id.*

121. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4631 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

not just about the contribution but the cause. To ignore the do-not-call requests of consumers in such a context potentially alienates the called party against the cause, not just the caller. Such a difference in calling motives would render the charity-specific, list-keeping mandate more effective than the former company-specific lists, according to the FTC.<sup>122</sup>

Notwithstanding the support of a lone commenter in the rulemaking process, the Commission's reliance on this alleged fundamental difference between commercial and nonprofit solicitation flies in the face of modern marketing research. For over thirty years, marketing scholars have contended that classic marketing concepts apply equally to nonprofit solicitation.<sup>123</sup> Regardless of the commercial or noncommercial nature of the speaker, marketing proposes an exchange.<sup>124</sup> In fact, some nonprofit organizations may be offering to exchange goods or services for money, just like for-profit organizations.<sup>125</sup>

Further, while the marketing literature acknowledges the unique difficulty nonprofits have in persuading individuals to exchange old ideas or behaviors for new ones,<sup>126</sup> studies do not support the FTC's assumption that nonprofits are more customer-oriented than commercial sector marketers.<sup>127</sup> "In fact, existing entities are still seen to be content with their nonprofit offer, irrespective of what their beneficiaries or those whom they sustain economically may think. This attitude is justified by the maxim 'we know better than you what is good for you.'"<sup>128</sup>

Courts can set aside the factual conclusions of an administrative agency if those fact-findings are arbitrary, capricious, or unsupported by substantial evidence.<sup>129</sup> In this case, the FTC's factual conclusions about

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122. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4637.

123. See Philip Kotler & Sidney J. Levy, *Broadening the Concept of Marketing*, 33 J. MKTG. 10 (1969).

124. PHILIP KOTLER & ALAN R. ANDREASEN, *STRATEGIC MARKETING FOR NONPROFIT ORGANIZATIONS* 25 (3rd ed. 1987).

125. *Id.* at 30.

126. Michael L. Rothschild, *Marketing Communications in Nonbusiness Situations or Why It's So Hard to Sell Brotherhood Like Soap*, 43 J. MKTG. 11 (1979).

127. See John H. Hanson, *Breaking the Cycle of Marketing Disinvestment: Using Market Research to Build Organisational Alliances*, 6 INT'L J. NONPROFIT & VOLUNTARY SECTOR MKTG. 33 (2001); Mike Riley & Jim McCullough, *A Survey of Marketing Activity in Nonprofit Organizations*, in *NON-PROFIT MARKETING: CONCEPTUAL AND EMPIRICAL RESEARCH* 40 (F. Kelly Shuptrine & Peter H. Reingen eds., 1983).

128. Luis Ignacio Álvarez González et al., *The Market Orientation Concept in the Private Nonprofit Organisation Domain*, 67 INT'L J. NONPROFIT & VOLUNTARY SECTOR MKTG. 55, 56-57 (2002) (citing V. Hayden, *How to Increase Market Orientation*, 7 J. MGMT. IN MED. 29 (1993)).

129. Administrative Procedures Act, 5 U.S.C. § 706 (2002).

nonprofit telemarketing activities could be vulnerable considering that the FTC has no experience regulating nonprofit operations. Further, the Commission never gave the public an opportunity to comment on the efficacy of a do-not-call list-keeping obligation for nonprofit fundraising. When the nonprofit sector overwhelmingly criticized the proposed national registry,<sup>130</sup> the FTC opted for the organization-specific list-keeping mandate without any further investigation. Accordingly, the Commission's sweeping conclusions about nonprofit telemarketing are based on little factual support and contradict decades of marketing research.<sup>131</sup>

Finally, the new TSR requires that all commercial telemarketers, including nonprofit solicitors, not interfere with caller identification ("caller ID") technology to enable telephone consumers to use that technology as intended to self-select what calls to receive or ignore.<sup>132</sup> The Tenth Circuit was not persuaded that this technology was a reasonable alternative for handling the glut of commercial solicitation calls.<sup>133</sup> When the caller ID rule is applied to the much smaller volume of nonprofit calls, however, consumer privacy may be sufficiently protected without preemptively blocking every charitable message to a phone line. The caller ID technology allows individual residents the choice of answering or not, and allows that choice on a call-by-call basis. By contrast, the do-not-call mandates (national registry and in-house list) ban all future messages from an organization to all residents at the designated phone number for five years.<sup>134</sup>

Caller ID enforcement protects the unquestioned right not to engage in a telephone conversation (and at least half of all telephone consumers subscribe to it).<sup>135</sup> The Commission's action regarding enforcement of caller ID technology may be a narrowly tailored remedy to the privacy concern that obviates the need for the do-not-call list-keeping requirement for nonprofit organizations under the strict scrutiny standard that applies to this free speech.

In *Mainstream Marketing*, the plaintiffs raised caller ID and call-

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130. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4634 (2003) (codified at 16 C.F.R. pt. 310).

131. None of these issues were examined in the Maryland Federal District Court opinion upholding the nonprofit TSR provisions.

132. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4626.

133. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1245 (10th Cir. 2004).

134. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4640.

135. FTC Telemarketing Sales Rule, 68 Fed. Reg. at 4626 n.533 (citing Dina ElBoghady, *Ears Wide Shut: Researchers Get Punished for Telemarketers' Crimes*, WASH. POST, Sept. 8, 2002, at H2.)

blocking technologies as reasonable alternatives to the national Do-Not-Call Registry. The Tenth Circuit rejected this argument, however, because it puts the expense of avoiding the calls on the consumer.<sup>136</sup> Further, for every advance in call-blocking technology that consumers acquire, the industry will likely find a mechanism for circumventing it. The court characterized this approach as a technological arms race between consumers and the telemarketing industry, not an effective alternative to the national registry.<sup>137</sup>

Nevertheless, the Tenth Circuit's rejection of the caller ID argument may be inapplicable to the nonprofit TSR. The Tenth Circuit was analyzing the national registry based on the commercial speech *Central Hudson* test, which requires regulatory measures to reasonably fit the asserted interest.<sup>138</sup> The stricter political/social speech test presumably requires some tighter fit. Additionally, the Tenth Circuit was concerned about the huge number of commercial calls the registry would address. In a separate part of its "reasonable fit" analysis, the court in *Mainstream Marketing* specifically contrasted the much smaller volume of noncommercial solicitation calls.<sup>139</sup> Perhaps no government-enforced, do-not-call list is justified because caller ID and answering machine screening are sufficient protections for consumer privacy.

## V. CONCLUSION

As was noted above, the FTC did not investigate the impact of the in-house do-not-call list on charitable solicitation. Specifically, the FTC adopted it as a fallback position when the nonprofit sector vehemently protested the national registry during the public comment period. Several unintended consequences may emerge from the rule as a result of this unexamined regulation.

First, nonprofit organizations are already battling public misunderstanding about their exemptions from state do-not-call lists. One study, conducted before enactment of the new federal do-not-call TSR, showed that 88 percent of consumers believed that their do-not-call requests were binding on nonprofit organizations.<sup>140</sup> This misunderstanding

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136. *Mainstream Mktg Servs. v. FTC*, 358 F.3d 1228, 1245 (10th Cir. 2004).

137. *Id.*

138. *Id.* at 1236.

139. *Id.* at 1240.

140. Curt J. Dommeyer & Barbara L. Gross, *What Consumers Know and What They Do: An Investigation of Consumer Knowledge, Awareness, and Use of Privacy Protection Strategies*, 17 J. INTERACTIVE MKTG. 34, 41 (2003).

is only likely to be exacerbated by a federal rule that applies to some charitable solicitation calls but not others.

Further, the FTC instilled additional potential for misunderstanding by its comments regarding “percent of purchase” contributions. In these solicitation programs, charitable contributions are sought in connection with the purchase of a good or service, with a portion of the price going to the charity. Are these solicitations treated like commercial sales calls covered by the national registry, or like charitable solicitations covered only by the charity’s in-house do-not-call list? Here is the FTC’s answer:

[W]hen the transaction predominantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services.<sup>141</sup>

With this ambiguous regulatory guidance, commercial telemarketers might refuse to accept nonprofit clients who want to undertake this type of fundraising plan because of the risk of regulatory noncompliance. Nonprofit organizations might be forced to alter their marketing plans that had previously included these “percentage of purchase” components.

In the face of potential \$11,000 fines for violating do-not-call registrations,<sup>142</sup> commercial telemarketers might just conclude, out of misunderstanding or for the sake of efficiency, to lump their nonprofit clients into the same do-not-call treatment as for-profit clients. Then, the charities’ calling lists would be “scrubbed” based on the entire national database, resulting in needlessly restricting access to these households. At the same time organizations doing their own calling with employees or volunteers are free to call anyone and everyone.

Although a variety of factors can go into the choice to outsource a telemarketing fundraising drive,<sup>143</sup> it is widely assumed that smaller, local charities must use commercial solicitors because they have fewer employees and volunteers to conduct fundraising calls versus large nonprofits. The do-not-call restrictions on these smaller charities could

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141. FTC Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4590 (2003) (codified at 16 C.F.R. pt. 310).

142. Harvy Lipman, *Charities Exempted from Plan for U.S. ‘Do Not Call’ List*, CHRON. PHILANTHROPY 27 (Jan. 9, 2003).

143. Paul Papich, *The How To’s of Telefund-Raising for the Annual Fund and Beyond*, FUND RAISING MGMT., Oct. 2000, at 35, 36.



have unforeseen effects on donation patterns for local needs or lesser-known causes. In other words, the very organizations that need more exposure to accomplish their missions are the ones prevented from unfettered calling. These issues were never examined by the FTC.

Instead of a government-enforcement mechanism to preemptively thwart a charity's opportunity to persuade about the importance of its charitable mission, individual consumers can continue to decline to receive these messages ad hoc. Consumers can use blocking measures such as caller ID and answering machine screening, or they can mute the telephone bell at inconvenient times. They can ask charitable solicitors to forward solicitation material by mail, rather than calling again. They can decline to listen to the message, without expecting relief from future calling for the next five years. Or they can listen to the message and consider if the work of the charitable organization aligns with their own values. If so, they should consider contributing—another act of protected free speech!

