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# ***STUDENT ARTICLE***

## **The Do-Not-Call Implementation Act: Legislating the Sound of Silence**

Douglas C. Nelson\*

### **I. Introduction**

Consumers recently ranked telemarketing fourth among the one hundred worst ideas of the 20th century.<sup>1</sup> And while the 20th century is behind us, the problem is not. Indeed, consumer complaints to the Federal Trade Commission (“FTC”) in regard to telemarketing calls increased ten-fold between 1998 and 2002.<sup>2</sup> Telemarketing calls represent a frequent and substantial intrusion upon the consumer’s fundamental right to be left alone in the privacy of the home.<sup>3</sup>

In March, Congress enacted the Do-Not-Call Implementation Act (“DNCIA”),<sup>4</sup> a short piece of legislation that shifts the balance of power in the consumer’s long-standing struggle with the telemarketing industry. No longer must consumers defend their basic right to be left alone in their homes with nothing more than Caller ID,

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<sup>1</sup> Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON. REG. 77, 79 (2003).

<sup>2</sup> H.R. REP. NO. 108-8, at 2 (2003), *reprinted in* 2003 U.S.C.C.A.N. 668, 669.

<sup>3</sup> Ayres & Funk, *supra* note 1, at 79. Worse yet, many telemarketers are perpetrating frauds rather than promoting legitimate businesses. Typical telemarketing frauds include: phony prizes, illegal sweepstakes, sham investments, fraudulent charities, credit-report restructuring, and vacation packages with hidden costs. Edwin L. Klett & Rochelle L. Brightwell, *Telemarketing: Exercise in Free Speech or Just a Pain in the Neck?*, 24-DEC PA. LAW. 38, 39 (2002).

<sup>4</sup> Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)).

an unlisted number, and an itchy hang-up finger.<sup>5</sup> The DNCIA provides for the creation of a national do-not-call list of consumer phone numbers, which will be off-limits to those telemarketers who are subject to the FTC's jurisdiction.<sup>6</sup> But, the DNCIA does not stop there, and soon consumers will be able to virtually eliminate the "shrill and imperious ring"<sup>7</sup> of the unwanted telemarketing call.

This note first reviews the history of telemarketing laws and First Amendment challenges leading up to the DNCIA. Then, this note summarizes the main elements of the DNCIA and discusses alternatives to the present law. Finally, this note considers the implementation and enforcement issues that lie ahead and evaluates the impact that this legislation will have on consumers.

## II. Prior Legislative Responses to an Excess of Calls

Telemarketing is a \$274.2 billion industry, employing 4.1 million people.<sup>8</sup> The relatively low cost of making a telemarketing call permits companies to profitably disturb thirty people in exchange for making a sale to the thirty-first prospect.<sup>9</sup> But each of the failed calls may have a detrimental effect on the market as a whole.<sup>10</sup> Have telemarketers called too often and while seeking individual profits, collectively crippled their market? At least one commentator has compared the current state of the consumer telephone network to an over-fished lake, decimated in a classic "tragedy of the commons" scenario.<sup>11</sup> In fact, evidence suggests the effects of this over-fishing may be accelerating.<sup>12</sup> Legislators and their constituents, however, do not appear convinced that over-fishing alone will drive significant numbers of telemarketers out of business, at least not soon enough.

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<sup>5</sup> Ayres & Funk, *supra* note 1, at 106.

<sup>6</sup> Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)); *see infra* text accompanying note 48.

<sup>7</sup> Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin' On!*, 3 WYO. L. REV. 167, 168 (2003).

<sup>8</sup> H.R. REP. NO. 108-8, at 2.

<sup>9</sup> Ayres & Funk, *supra* note 1, at 79.

<sup>10</sup> *Id.* at 87-88.

<sup>11</sup> *Id.* at 87-93.

<sup>12</sup> *Id.* at 89-90 (Pollsters' response rates appear to be declining precipitously. From 65-70% in their heyday, to at least 50% ten years ago, to as low as 15-20% presently); *see also supra* text accompanying note 2.

### A. State Telemarketing Law: “A Patchwork of Ineffective Remedies”<sup>13</sup>

State legislators have responded to their angry constituents with a vast amount of legislation.<sup>14</sup> Currently, all but six states have enacted consumer protection laws regulating telemarketing.<sup>15</sup> Typically, state legislation has: (1) required telemarketers to identify themselves at the outset of the call; (2) prohibited telemarketers from blocking their identity from Caller ID systems; and (3) prohibited calls before 8 a.m. and after 9 p.m.<sup>16</sup> Furthermore, nineteen states have enacted do-not-call statutes.<sup>17</sup> States with established do-not-call

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<sup>13</sup> Pattison & McGann, *supra* note 7, at 197.

<sup>14</sup> *See id.* at 168-70.

<sup>15</sup> ALA. CODE § 18-19A (2003); ALASKA STAT. § 45.50.475 (Michie 2002); ARIZ. REV. STAT. ANN. § 44-1271 (West 2003); ARK. CODE ANN. § 4-99-101 (Michie 2003); CAL. BUS. & PROF. CODE § 17511.1 (West 2003); COLO. REV. STAT. § 6-1-301 (2003); CONN. GEN. STAT. ANN. § 42-288a(b) (2003); DEL. CODE ANN. tit. 6, § 2503A (2003); FLA. STAT. ANN. § 501.059 (West 2003); GA. CODE ANN. § 10-5B-1 (2003); HAW. REV. STAT. § 481P (2002); IDAHO CODE § 48-1001 (Michie 2003); 815 ILL. COMP. STAT. § 413/1 (2003); IND. CODE ANN. § 24-5-12-1 (Michie 2003); KAN. STAT. ANN. § 50-670 (2003); KY. REV. STAT. ANN. § 367/46951 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 45:811 (West 2002); ME. REV. STAT. ANN. tit. 10 §§ 1498, 1499 (West 2002); MD. CODE ANN., COM. LAW § 14-2201 (2003); MICH. COMP. LAWS ANN. § 445.111 (West 2002); MINN. STAT. § 325E.26-31 (2003); MISS. CODE ANN. § 77-3-601 (2003); MO. ANN. STAT. § 407.1101 (West 2003); MONT. CODE ANN. § 30-14- 502 (2003); NEV. REV. STAT. § 599B (2003); N.J. STAT. ANN. § 48:17-29 (West 2003); N.M. STAT. ANN. § 30-50-1 (Michie 2003); N.Y. GEN. BUS. LAW § 399-p (McKinney 2003); N.C. GEN. STAT. § 66-260 (2002); N.D. CENT. CODE § 51-28-01 (2003); OHIO REV. CODE ANN. § 4719.01 (West 2002); 15 OKLA. STAT. tit. § 775A (2002); OR. REV. STAT. § 646.551 (2003); 73 PA. CONS. STAT. § 2241 (2002); R.I. GEN. LAWS § 5-61-1 (2002); S.D. CODIFIED LAWS § 37-30A-1 (Michie 2003); TENN. CODE ANN. § 65-4- 405 (2003); TEX BUS. & COM. CODE ANN. § 38.101 (Vernon 2003); UTAH CODE ANN. § 13-26-1 (2002); VA. CODE ANN. § 59.1-21 (Michie 2002); WASH. REV. CODE ANN. § 19.158.010 (West 2002); W. VA. CODE § 46A-6F-101 (2002); WIS. STAT. § 100.52 (2003); WYO. STAT. ANN. § 40-12-301 (Michie 2002); *see also* Pattison & McGann, *supra* note 7, at 176-77 (Only Iowa, Massachusetts, Nebraska, New Hampshire, South Carolina, and Vermont do not have consumer protection laws regulating telemarketing).

<sup>16</sup> Pattison & McGann, *supra* note 7, at 189-90.

<sup>17</sup> ALASKA STAT. § 45.50.475 (Michie 2002); ARK. CODE ANN. § 4-99-404 (Michie 2003); CAL. BUS. & PROF. CODE § 17592 (West 2003); COLO. REV. STAT. § 6-1-905 (West 2003); CONN. GEN. STAT. ANN. § 42-288(b) (2003); FLA. STAT. ANN. § 501.059 (West 2003); GA. CODE ANN. § 46-5-27 (2003); IDAHO CODE § 48-1003A (Michie); IND. CODE ANN. § 24-4.7-2-1 (Michie 2003); KY. REV. STAT. ANN. §

lists have recently seen a spike in consumer registration,<sup>18</sup> and states that have created lists in the last few years have experienced enormous demand from the outset.<sup>19</sup>

Under these statutes, violators may be fined, but enforcement of state legislation has been a problem.<sup>20</sup> In many cases, state legislation is so riddled with exceptions that the law has been rendered “practically unenforceable.”<sup>21</sup> For example, Kentucky provides 22 exemptions to its telemarketing regulations, prohibiting only an estimated 5% of telemarketing calls.<sup>22</sup> State telemarketing regulations, as a whole, have been characterized as a “patchwork of ineffective remedies.”<sup>23</sup>

## B. Telephone Consumer Protection Act

Although more than forty states had limited telemarketing in some way by 1991, Congress determined that federal legislation was necessary to restrict interstate calls that state laws were not reaching.<sup>24</sup> Congress passed the Telephone Consumer Protection Act (“TCPA”) in 1991,<sup>25</sup> which sought to balance “privacy rights, public

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367.46955 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 45:844.14 (West 2002); ME. REV. STAT. ANN. tit. 32 §14716 (West 2003); MO. ANN. STAT. § 407.1098 (West, 2003); N.Y. GEN. BUS. LAW § 399-z (McKinney 2003); OR. REV. STAT. § 646.569 (2003); TENN. CODE. ANN. § 65-4- 405 (2003); TEX BUS. & COM. CODE ANN. § 43.101 (Vernon 2003); WIS. STAT. § 100.52 (2003); WYO. STAT. ANN. § 40-12-302 (Michie 2002); *see also* Ayres & Funk, *supra* note 1, at 79.

<sup>18</sup> Ayres & Funk, *supra* note 1, at 91. Florida’s do-not-call registration, for example, has increased by more than 370% in the last five years. *See id.* (referring to Interview with Beth Evans, Regulatory Consultant, Florida Department of Agriculture and Consumer Services (July 8, 2001)).

<sup>19</sup> *Id.* at 92 (citing Press Release, Connecticut Department of Consumer Protection, Telemarketer Pays \$25,000 to Consumer Protection for Violating State’s Do No [sic] Call List Law (Sept. 6, 2002)).

<sup>20</sup> Michael E. Shannon, *Combating Unsolicited Sales Calls: The “Do- Not- Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 411 (2001).

<sup>21</sup> *Id.*

<sup>22</sup> *See* KY. REV. STAT. ANN. §§ 367.46951-367.46999.

<sup>23</sup> Pattison & McGann, *supra* note 7, at 197.

<sup>24</sup> S. REP. NO. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

<sup>25</sup> Telephone Fraud Consumer Protection Act of 1991, 47 U.S.C. § 227 (2002).

safety interests, and commercial freedoms of speech and trade.”<sup>26</sup> The TCPA prohibited: (1) the use of automatic dialer equipment and prerecorded messages to emergency lines and hospitals; (2) unsolicited fax advertisements without the consent of the recipient; and (3) prerecorded calls to residential lines.<sup>27</sup>

The TCPA also directed the Federal Communications Commission (“FCC”) to develop regulations for all telephone solicitations<sup>28</sup> to residential subscribers.<sup>29</sup> Although the Act authorized the creation of a national do-not-call list, the FCC rejected this option as “costly and difficult to establish and maintain.”<sup>30</sup> Instead, the FCC required each telemarketer to maintain a specific do-not-call list of consumers who have asked the company not to call again.<sup>31</sup> But company-specific do-not-call lists have failed to protect consumers from unwanted calls because consumers must continually assert their do-not-call rights to each and every telemarketer.<sup>32</sup> Moreover, consumers’ attempts to invoke this provision have been frustrated by telemarketers who simply ignore these do-not-call requests<sup>33</sup> and by the increased use of predictive dialing systems that

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<sup>26</sup> Telephone Fraud Consumer Protection Act § 2(9).

<sup>27</sup> 47 U.S.C. § 227(b)(1).

<sup>28</sup> 47 U.S.C. § 227(a)(3) (The TCPA’s definition of a “telephone solicitation” excludes calls to a party who has given express permission, calls to a party with whom the caller has an established business relationship, and calls from tax-exempt nonprofit organizations).

<sup>29</sup> 47 C.F.R. § 64.1200(e) (The FCC’s definition of “residential subscribers” includes wireless phones).

<sup>30</sup> See *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C.R. 8752, ¶11 (1992), available at 1992 WL 690928. Conversely, the Congressional Budget Office presently estimates that the net effect of implementing a national do-not-call list on the federal budget will be insignificant. H.R. REP. NO. 108-8, at 6 (2003). Recently, the FCC explained that “advances in computer technology and software now make the compilation and maintenance of a national database a more reasonable proposition. In addition, considerable experience has been gained [since 1992] through the implementation of many state do-not-call lists.” *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,145-46 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 and 68).

<sup>31</sup> 47 C.F.R. § 64.1200(d).

<sup>32</sup> *Mainstream Mktg. Servs., Inc. v. FTC*, No. CIV. A. 03 N0184, 2003 WL 22213517, at \*3 (D. Colo. Sept. 25, 2003).

<sup>33</sup> *Id.*

often leave consumers talking to dead air.<sup>34</sup> Like many of its state counterparts, the FCC also imposed time of day restrictions, limiting telemarketing calls to between 8 a.m. and 9 p.m.<sup>35</sup>

Although the FCC may bring its own administrative action against willful or repeated violators,<sup>36</sup> the TCPA's principal enforcement mechanism is private action.<sup>37</sup> The TCPA, however, provides for only nominal private recoveries<sup>38</sup> and does not allow the prevailing party to recover attorney fees.<sup>39</sup> Generally, private causes of action under the TCPA have not been aggressively litigated.<sup>40</sup>

### C. Telemarketing Consumer Fraud and Abuse Prevention Act

The federal government's next major foray into telemarketing regulation was the Telemarketing Consumer Fraud and Abuse Prevention Act ("TCFAPA"), passed in 1994.<sup>41</sup> The TCFAPA was principally concerned with telemarketing fraud and required the FTC to promulgate rules prohibiting deceptive telemarketing practices.<sup>42</sup>

Accordingly, the FTC issued its Telemarketing Sales Rule ("TSR").<sup>43</sup> The TSR required telemarketers to disclose, among other things, their identity and the purpose of their call.<sup>44</sup> Other provisions prohibited misrepresentations regarding material aspects of the goods

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<sup>34</sup> Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,145.

<sup>35</sup> 47 C.F.R. § 64.1200 (c)(1) (2003).

<sup>36</sup> 47 U.S.C. § 503(b) (1992).

<sup>37</sup> 47 U.S.C. § 227(b)(3); Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 668-69 (2000).

<sup>38</sup> 47 U.S.C. § 227(b)(3).

<sup>39</sup> Miller & Biggerstaff, *supra* note 37, at 668-69; *see also* 137 CONG. REC. S16204 (1991) (statement of Sen. Hollings) ("Nevertheless, it is my hope that states will make it as easy as possible for consumers to bring such [TCPA] actions, preferably in small claims court . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney.").

<sup>40</sup> Miller & Biggerstaff, *supra* note 37, at 669.

<sup>41</sup> Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 (1994).

<sup>42</sup> 15 U.S.C. § 6101.

<sup>43</sup> FTC Telemarketing Sales Rule, 16 C.F.R. § 310 (2003).

<sup>44</sup> 16 C.F.R. § 310.4(d).

or services being offered.<sup>45</sup> The TSR also included a company specific do-not-call list similar to that prescribed by the FCC under the TCPA.<sup>46</sup>

The scope of the TSR, however, is limited to activities within the jurisdiction of the Federal Trade Commission Act.<sup>47</sup> Consequently, banks, credit unions, savings and loans, common carriers, non-profit associations, insurance companies, and intrastate telemarketing calls fall outside the scope of the FTC's telemarketing regulations.<sup>48</sup>

The TCFAPA and TSR have greatly expanded the FTC's authority to stop fraudulent telemarketers.<sup>49</sup> However, as explained below, recent amendments to the TSR are primarily directed at protecting consumers from unwanted calls regardless of the caller's integrity.<sup>50</sup>

#### D. A Growing Recognition of Limitations

Despite these state and federal regulations, telemarketing complaints have continued to rise.<sup>51</sup> Increasingly, Congress has felt a need to establish a national do-not-call registry to provide consumers with a "one-stop solution" for reducing unwanted telemarketing calls.<sup>52</sup> Pursuant to its authority under the TCFAPA, the FTC announced the adoption of its do-not-call amendment on December 18, 2002.<sup>53</sup> This amendment provides for a national do-not-call list of consumer phone numbers that telemarketers are prohibited from calling.<sup>54</sup>

Congress reported favorably on the FTC's national do-not-

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<sup>45</sup> 16 C.F.R. § 310.3(a)(2).

<sup>46</sup> 16 C.F.R. § 310.4(b)(1)(iii); *see supra* text accompanying notes 31-34.

<sup>47</sup> H.R. REP. NO. 108-8, at 3; Federal Trade Commission Act, 15 U.S.C. § 41 (2003).

<sup>48</sup> H.R. REP. NO. 108-8, at 3.

<sup>49</sup> *See* 15 U.S.C. § 6101; *see also* 16 C.F.R. § 310.

<sup>50</sup> *Mainstream Mktg. Servs., Inc. v. FTC*, No. CIV. A. 03 N0184, 2003 WL 22213517, at \*3 (D. Colo. Sept. 25, 2003).

<sup>51</sup> H.R. REP. NO. 108-8, at 2.

<sup>52</sup> *Id.* at 2-3.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> 16 C.F.R. 310.4 (b)(1)(iii)(B).



call list, but noted that the FTC could not provide a “one-stop” solution for all telemarketing calls because of its limited jurisdiction.<sup>55</sup> Accordingly, Congress directed the FCC to work with the FTC to make their respective rules as “consistent and compatible as possible.”<sup>56</sup> Similarly, Congress expressed a need for the national do-not-call list to work in conjunction with the various state lists.<sup>57</sup> Pursuant to these objectives, Congress enacted the DNCIA.<sup>58</sup> Before discussing the DNCIA, this note will briefly consider the First Amendment challenges that have faced prior government attempts to regulate telemarketing.

### E. First Amendment Challenges

Telemarketing, in constitutional terms, enjoys status as “commercial speech.”<sup>59</sup> While courts have not deemed commercial speech worthy of the full protection of the First Amendment,<sup>60</sup> when the government puts restrictions on the communications of some speakers but not others, such restrictions must be viewed with a wary eye.<sup>61</sup> After all, if a substantial government interest is in need of direct and material advancement, why not restrict all telemarketing calls rather than just some of them?<sup>62</sup> Nevertheless, the Supreme

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<sup>55</sup> H.R. REP. NO. 108-8, at 4.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* Many states have already provided their lists of do-not-call phone numbers for inclusion on the national list. Don Oldenburg, ‘Do Not Call’ gets complicated, HOUS. CHRON., Aug. 6, 2003, at 14, available at 2003 WL 57433365.

<sup>58</sup> Do-Not-Call Implementation Act of 2003, Pub. L. No. 108-10, 117 Stat. 557 (codified at 15 U.S.C. §§ 6101-6108 (2003)).

<sup>59</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv.*, 447 U.S. 557, 566 (1980); see *Van Bergen v. Minnesota*, 59 F.3d 1541 (1995); see also Steven R. Probst, *Telemarketing, Commercial Speech, and Central Hudson: Potential First Amendment Problems for Indiana Code Section 24-4.7 and Other “Do-Not-Call” Legislation*, 37 VAL. U.L. REV. 347 (2002).

<sup>60</sup> *Central Hudson*, 447 U.S. at 562-63.

<sup>61</sup> Probst, *supra* note 59.

<sup>62</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995) (striking a federal statute that restricted the advertisement of beer, but not wine or liquor). The Court held that “[i]f combating strength wars [competition based on alcohol content] were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones. . . There is little chance that [this statute] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract

Court has consistently upheld the constitutionality of “under-inclusive” regulations.<sup>63</sup>

Indeed, the various state and federal laws regulating telemarketing have, almost without exception, withstood constitutional scrutiny.<sup>64</sup> Over the past decade, a series of courts have found that telemarketing regulations, including the TCPA’s company-specific do-not-call list, directly and materially advance the government’s interest in protecting the privacy of citizens.<sup>65</sup>

There are at least three lines of reasoning that make courts sympathetic to telemarketing regulations.<sup>66</sup> First, while restrictions upon commercial speech over broadcast media, such as radio or television, inevitably prevent dissemination to willing recipients, consumer specific restrictions on point-to-point media, such as telemarketing or mail delivered to one’s residence, only prevent dissemination to the unwilling.<sup>67</sup> Second, aural communication is extremely difficult to ignore and therefore more intrusive than visual communication.<sup>68</sup> Accordingly, courts have allowed more restrictive

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its effects.” *Id.*

<sup>63</sup> *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 511 (1981) (plurality opinion) (“[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising”); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) (Puerto Rico’s ban on promotional advertising of casino gambling was upheld even though other types of gambling were permitted); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810-811 (1984) (City’s prohibition against the posting of signs on public property for esthetic reasons upheld even though it did not prohibit the posting of signs on private property).

<sup>64</sup> *Ayres & Funk*, *supra* note 1, at 124 (describing courts as “incredibly amenable” to telemarketing laws); *see Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995); *State v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882 (Minn. 1992); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. 1995).

<sup>65</sup> *Van Bergen*, 59 F.3d at 1554; *Moser*, 46 F.3d at 974; *Casino Mktg.*, 491 N.W.2d at 888; *Szefczek*, 668 A.2d at 1108.

<sup>66</sup> *Ayres & Funk*, *supra* note 1, at 124-25.

<sup>67</sup> *See Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (holding that a statute allowing an addressee to prohibit certain mailers from sending mail to addressee’s home did not offend the First Amendment); *see also FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (Justice Brennan dissenting from holding that offensive language on radio broadcast was not protected by First Amendment).

<sup>68</sup> *See Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (Reed, J.) (plurality

regulation of aural communication.<sup>69</sup> Third, courts have reasoned that citizens in the privacy of their homes should be able to exercise a high degree of control over the communication to which they are subjected.<sup>70</sup>

While First Amendment concerns are perhaps inevitable anytime communication is regulated, telemarketing regulations prior to the DNCIA have, by and large, withstood constitutional challenges.<sup>71</sup>

### III. The Do-Not-Call Implementation Act

The DNCIA authorizes the FTC to collect commercially reasonable fees from telemarketers to offset costs related to the implementation and enforcement of the do-not-call provision of the TSR.<sup>72</sup> By funding this previously dormant provision, Congress has drastically expanded the scope of the FTC's telemarketing regulations.<sup>73</sup> Additionally, the DNCIA requires the FCC to consult and coordinate with the FTC in order to "maximize consistency" between their respective telemarketing regulatory schemes.<sup>74</sup> Finally, the DNCIA requires the FCC and FTC to provide Congress with annual reports on the progress made toward coordinating the federal do-not-call registry with the registries maintained by states.<sup>75</sup>

#### A. The National Do-Not-Call List

Prior to the passage of the DNCIA, federal telemarketing

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opinion).

<sup>69</sup> *Id.*

<sup>70</sup> *Rowan*, 397 U.S. at 737-38 ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality. . . . We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient.").

<sup>71</sup> See sources cited *supra* note 64.

<sup>72</sup> Do-Not-Call Implementation Act § 2; FTC Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(B) (2003).

<sup>73</sup> Ian Heath Gershengom, *Telemarketing Restrictions and the First Amendment*, 20-SUM. COMM. LAW. 3, 5 (2002).

<sup>74</sup> Do-Not-Call Implementation Act § 3.

<sup>75</sup> § 4.

regulations could perhaps justifiably be characterized as “weak.”<sup>76</sup> Despite the possible awareness of prior legislation, it is difficult to imagine that many Americans thought the government clamped down too hard on telemarketers by restricting calls between the hours of 8 a.m. and 9 p.m.<sup>77</sup> And, as for prohibiting telemarketers from calling consumers who have already asked them not to call again,<sup>78</sup> this restriction seems more like a sound business practice for the telemarketer than a consumer protection. The DNCIA, however, provides real restrictions on telemarketers and real protections for the consumer.

Specifically, the DNCIA provides consumers with a free “one-stop” method for eliminating all telemarketing calls subject to the FTC’s jurisdiction by simply adding their phone number to the do-not-call list either online or by calling a toll-free number.<sup>79</sup> Telemarketers, on the other hand, are required to pay for access to the list of consumers who they cannot call.<sup>80</sup> Furthermore, the fees that the FTC collects from telemarketers will be used to hire FTC personnel to enforce the TSR and aggressively implement a national campaign to make consumers aware of the do-not-call list.<sup>81</sup>

The TSR exempts from the requirements of the national do-not-call list telemarketers who have an existing business relationship with the consumer, as well as charities, political organizations, and pollsters.<sup>82</sup> A business relationship exists for eighteen months following the last transaction, or three months after a consumer’s inquiry in regard to a product or service offered by the company.<sup>83</sup>

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<sup>76</sup> Pattison & McGann, *supra* note 7, at 196.

<sup>77</sup> See *supra* text accompanying note 35.

<sup>78</sup> See *supra* text accompanying notes 31 and 46.

<sup>79</sup> Pattison & McGann, *supra* note 7, at 196. Consumers can register by calling 1-888-382-1222 or by visiting the FTC’s web site at <http://www.donotcall.gov> (last visited Oct. 5, 2003).

<sup>80</sup> Press Release, FTC, Telemarketing Sales Rule Amended to Establish Fees for Industry Access to National Do Not Call Registry (July 29, 2003) (“[T]he annual cost for companies to access phone numbers in the registry will be \$25 per area code, up to a maximum annual fee of \$7,375 to access numbers for the entire country. There will be no charge for companies to access the first five area codes of data.”), available at <http://www.ftc.gov/opa/2003/07/tsrfeesfrn.htm> (last visited Oct. 3, 2003).

<sup>81</sup> H.R. REP. NO. 108-8, at 7.

<sup>82</sup> 16 C.F.R. § 310(b)(1)(B)(ii).

<sup>83</sup> 16 C.F.R. § 310.2(n). At least one court has considered whether this

Telemarketers, however, must still honor consumers' specific requests that they not call again.<sup>84</sup> Additionally, the TSR permits telemarketers to trump the do-not-call list by obtaining the consumer's written permission, but "[s]uch written agreement shall clearly evidence such person's authorization. . .and include the telephone number to which calls may be placed and the signature of that person."<sup>85</sup>

While the most prominent aspect of the DNCIA is the creation of the do-not-call list, the Act also charges the FCC and FTC with the responsibility of working together and with the states, to develop a more consistent and coordinated national regulatory scheme.<sup>86</sup>

## B. Consistency and Coordination

The FTC's amended TSR is "only one piece of a multi-jurisdictional puzzle."<sup>87</sup> Determining whether a particular telemarketing contact is permitted may involve looking to the TCFPA, the TSR, the TCPA, the FCC's regulations under the TCPA, and the applicable state's telemarketing regulations.<sup>88</sup> Even then, one may find more inconsistencies than answers. For example, the TSR's "abandonment rule" requires telemarketers to disconnect calls when there is no live agent available to speak with the consumer unless a recorded message is played within the two seconds.<sup>89</sup> The TCPA, on the other hand, prohibits telemarketers from playing recorded

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exception applies when a consumer asks to be placed on a company's do-not call list while continuing to receive limited services from the company. *Charvat v. Dispatch Consumer Servs., Inc.*, 769 N.E.2d 829, 834 (Ohio 2002). That court held that the "business relations" exception would not apply in such a situation, reasoning that "[m]aintaining some limited commercial tie to a business should not leave consumers at the mercy of unbridled telemarketing efforts." *Id.*

<sup>84</sup> 16 C.F.R. § 310.4(b)(1)(B)(ii). The implementation of the FTC's national do-not-call list will not eliminate the need for telemarketers to maintain company-specific lists.

<sup>85</sup> 16 C.F.R. § 310.4(b)(1)(B)(i). In a footnote to this provision, the FTC authorizes electronic forms of signatures if recognized by the applicable jurisdiction's contract law. *Id.* at n.6.

<sup>86</sup> Do-Not-Call Implementation Act §§ 3-4.

<sup>87</sup> H.R. REP. NO. 108-8, at 3.

<sup>88</sup> *See id.*

<sup>89</sup> 16 C.F.R. § 310.4(b)(1)(iv).

messages.<sup>90</sup>

Furthermore, many states provide exemptions from their do-not-call lists for local industries or products, such as newspapers.<sup>91</sup> However, these exemptions are not recognized under federal law.<sup>92</sup> Until recently, it was not clear whether the *New York Times*, for example, could call consumers who were registered with the national do-not-call list in a state that exempted newspapers. Congress declined to take a stance on the validity of these state exemptions when they enacted the DNCIA.<sup>93</sup> Instead, Congress directed the FCC and FTC to work together and with the states to “maximize consistency” between their respective regulatory schemes.<sup>94</sup> As explained below, the FCC took prompt and decisive action consistent with the DNCIA when it adopted the FTC’s do-not-call list and made it clear that states may not preempt the national list.<sup>95</sup>

In sum, the DNCIA activates the FTC’s do-not-call list by authorizing the FTC to collect fees for its implementation and enforcement, and it charges the FCC and the FTC with the responsibility of working toward a more consistent and coordinated national regulatory scheme. While only time will tell if the DNCIA will succeed in harmonizing the nation’s telemarketing regulations and shielding consumers from unwanted telemarketing calls, there is reason for optimism.

#### IV. On the Verge of Silence or Disappointment

In one of the greatest initial access counts ever recorded for any website, consumers jammed the FTC’s website to register their numbers with the do-not-call list.<sup>96</sup> Millions of consumers now expect to control what previously seemed uncontrollable.<sup>97</sup> But is the

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<sup>90</sup> H.R. REP. NO. 108-8, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*; see also Pattison & McGann, *supra* note 7, at 192.

<sup>94</sup> Do-Not-Call Implementation Act §§ 3-4. The FCC, however, is bound by the confines of the TCPA, and therefore will not be able to adopt rules identical to the FTC’s TSR. See H.R. REP. NO. 108-8, at 4.

<sup>95</sup> See *infra* text accompanying notes 113-16.

<sup>96</sup> State Telephone Regulation Report, *National No-Call List Begins; State Programs Can Continue*, July 4, 2003, available at 2003 WL 10827207.

<sup>97</sup> See ‘Do Not Call’ List Soars to 48.4 Million, WALL. ST. J., Sept. 5, 2003, at

DNCIA better than alternative proposals? Will this legislation really shield consumers from unwanted telemarketing calls? And, finally, will the DNCIA survive constitutional challenges?

### A. The DNCIA v. Alternative Proposals

Although some commentators have pushed different approaches, such as an opt-in list<sup>98</sup> or a “pay me to listen” plan,<sup>99</sup> it is not clear that these proposals are superior to the DNCIA. The opt-in proposal would require consumers to affirmatively indicate their willingness to receive telemarketing calls, thus abandoning the presumption underlying the do-not-call approach that everyone is fair game unless they take affirmative action to the contrary.<sup>100</sup> An opt-in system, however, would be a drastic departure from cultural norms and expectations. For better or worse, consumers are accustomed to being solicited at home and virtually everywhere else. Consequently, consumers naturally expect to have to do something in order to carve out a solicitation sanctuary. Requiring consumers to affirmatively opt out of telemarketing calls by going online or calling a toll-free number is not overly burdensome.

More important, an opt-in approach would seem to be more vulnerable to First Amendment challenges because such a law would require willing consumers to affirmatively overcome a government-sponsored barrier to this form of commercial speech.<sup>101</sup> In contrast, the DNCIA’s do-not-call approach does not restrict commercial speech until the consumer affirmatively indicates that she does not wish to be contacted.<sup>102</sup> Arguably, the do-not-call model merely provides the consumer with the opportunity to preemptively hang up on the telemarketer.<sup>103</sup>

The “pay me to listen” approach, on the other hand, is not

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A2 (forty-eight million telephone numbers were registered by August 31, 2003), available at 2003 WL-WSJ 3978876.

<sup>98</sup> Shannon, *supra* note 20, at 421.

<sup>99</sup> Ayres & Funk, *supra* note 1, at 77.

<sup>100</sup> Pattison & McGann, *supra* note 7, at 197.

<sup>101</sup> *Cf.* Pattison & McGann, *supra* note 7, at 197 (suggesting that there is no evident constitutional barrier to shifting the presumption underlying the do-not-call approach).

<sup>102</sup> *Mainstream Mktg. Servs., Inc. v. FTC*, No. CIV. A. 03 N0184, 2003 WL 22213517, at \*9 (D. Colo. Sept. 25, 2003).

<sup>103</sup> *Id.*

fundamentally inconsistent with the DNCIA.<sup>104</sup> This proposal would add language to the TSR that would allow consumers to put a price tag on their time spent listening to telemarketing calls.<sup>105</sup> This price tag would be registered with the consumer's phone company, which would connect only those telemarketers willing to pay the consumer's price.<sup>106</sup> This approach of marketing one's time and privacy for a price may one day gain favor. But for now at least, the idea seems ahead of its time because of the absence of any indication that significant numbers of consumers and telemarketers would be interested in participating. Moreover, since the TSR permits telemarketers to call consumers on the do-not-call list with their written consent,<sup>107</sup> telemarketers are presently free to offer compensation to consumers willing to consent to telemarketing calls. Until this notion of compensating consumers for listening to telemarketing pitches shows that it is a viable business practice in need of regulation, Congress should not become involved.

## **B. Implementation Hurdles other than the First Amendment**

Congress has given the FTC the authority and funding needed to give consumers what they have wanted for years, namely a way to stop unwanted telemarketing calls.<sup>108</sup> If the FTC implements the do-not-call list properly, the only criticism likely to be heard from consumers is that Congress should have done this years ago.<sup>109</sup>

So, what could go wrong? Well, assuming that the FTC and the Congressional Budget Office have accurately assessed the funds needed to effectively establish, maintain, and enforce the do-not-call list,<sup>110</sup> and setting aside constitutional concerns, there do not appear to be any significant hurdles standing in the way of the FTC successfully implementing the do-not-call list.

Furthermore, there is reason for optimism with regard to the "maximize consistency" mandate of the DNCIA.<sup>111</sup> Maximizing

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<sup>104</sup> See Ayres & Funk, *supra* note 1, at 81-82.

<sup>105</sup> *Id.* at 81.

<sup>106</sup> *Id.* at 82.

<sup>107</sup> See *supra* text accompanying note 73.

<sup>108</sup> See *supra* text accompanying note 61.

<sup>109</sup> See *supra* text accompanying note 30.

<sup>110</sup> H.R. REP. NO. 108-8, at 8.

<sup>111</sup> Do-Not-Call Implementation Act § 3.



consistency between the TCPA and the TSR will likely force the FCC and FTC to make some difficult choices as the agencies examine the areas where these laws clash and what, if anything, they can or should do about it administratively.<sup>112</sup> But the FCC and FTC have already made major progress.

In July, the FCC revised the TCPA to prohibit telemarketers from calling phone numbers registered with the FTC's national do-not-call list.<sup>113</sup> Thus, the national do-not-call list now prohibits telemarketing calls from common carriers, insurance companies, banks, credit unions, savings and loans, airlines, and intrastate callers that the FTC, because of its limited jurisdiction, cannot reach.<sup>114</sup> While states remain free to maintain their own do-not-call lists, the federal rules now represent a "floor" for the states' do-not-call requirements.<sup>115</sup> States may only adopt more restrictive laws and generally cannot regulate interstate calls.<sup>116</sup>

The FCC's sweeping assertion of its authority under the TCPA dramatically increases the reach of the national do-not-call list established by the DNCIA. It also goes a long way toward developing a more unified and consistent national regulatory scheme. Furthermore, the FCC's revision of the TCPA may also strengthen the DNCIA against constitutional challenges because it reduces the number of content-based distinctions within the federal regulatory scheme.<sup>117</sup> Nonetheless, the government's early successes will not mean much if consumers who register their phone numbers with the do-not-call list are not shielded from unwanted telemarketing calls.

### C. Enforcement of the National Do-Not-Call List

Until now, telemarketers have had their way with consumers. Indeed, there has been such an imbalance of power that the idea that consumers will have the ability to decide who may disturb them in the privacy of their own homes may seem more like a windfall than a basic right. But being left alone in the privacy of one's home is a

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<sup>112</sup> See H.R. REP. NO. 108-8, at 4.

<sup>113</sup> See Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,144.

<sup>114</sup> *Id.* at 44,154.

<sup>115</sup> State Telephone Regulation Report, *supra* note 96.

<sup>116</sup> *Id.*

<sup>117</sup> See *supra* text accompanying notes 60-62.

basic right,<sup>118</sup> and that right will need to be defended.

If the national do-not-call list is going to protect consumers from unwanted calls, telemarketers who violate the law need to be punished. The FTC and FCC will share enforcement responsibilities<sup>119</sup> and may fine violators up to \$11,000 per violation.<sup>120</sup> However, consumers who receive illegal calls will need to report the name or phone number of the offending corporation if the national do-not-call list is going to be enforced. The consumer's role as "whistle blower" should be easier now that the FCC has prohibited telemarketers from blocking Caller ID information.<sup>121</sup> Moreover, now that the FCC has expanded the reach of the do-not-call list to virtually all businesses calling residential or wireless telephones, it will be easier for consumers to distinguish between legal and illegal calls.<sup>122</sup> There is no reason to think that the same consumers who flooded the FTC's do-not-call website to register their phone numbers would be unwilling to also report illegal calls.

Given the federal government's commitment to enforcing the national list,<sup>123</sup> the steep fines it is authorized to collect from violators,<sup>124</sup> and the anticipated willingness of consumers to report violators, it appears that the government and consumers alike are ready to enforce the national do-not-call list. Are the courts ready, though?

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<sup>118</sup> Rowan v. Post Office Dept., 397 U.S. 728, 737 (1970) ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality.").

<sup>119</sup> Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,145.

<sup>120</sup> Brian Steinberg et al., *'Do Not Call' Registry is Pushing Telemarketers to Plan New Pitches*, WALL ST. J., July 2, 2003, at A1, available at 2003 WL-WSJ 3972987.

<sup>121</sup> Mary Beth Franklin, *Be Vigilant*, KIPLINGER'S PERS. FIN. MAG., Sept. 1, 2003, at 83, available at 2003 WL 2058042. Effective August 25, 2003, telemarketers are prohibited from blocking Caller ID information. Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,144.

<sup>122</sup> Prior to the FCC's revision of the TCPA, see *supra* text accompanying note 113, even if consumers were knowledgeable of the types of businesses covered by the list, it was not clear how consumers were going to distinguish between illegal interstate calls, and legal intrastate calls.

<sup>123</sup> Ryan J. Foley, *Second Ruling Deals Blow to the Popular Registry as Free Speech Takes Focus*, WALL ST. J., Sept. 26, 2003, at A3, available at 2003 WL-WSJ 3980910 (Congress promptly passes bill to granting the FTC clear authority to implement the national do-not-call list by a near unanimous vote).

<sup>124</sup> See *supra* text accompanying note 120.

#### D. Mainstream Marketing Services v. Federal Trade Commission

In September 2003, the telemarketing industry won at least a temporary victory against the FTC's "regulatory imperialism"<sup>125</sup> when the United States District Court for the District of Colorado held that the FTC's national do-not-call list was unconstitutional under the First Amendment.<sup>126</sup> Although the district court in *Mainstream Marketing* acknowledged that the government had a substantial interest in protecting consumers' privacy from unwanted calls, the court held that the do-not-call list unconstitutionally imposed a content-based restriction on commercial speech.<sup>127</sup>

The court began its analysis by considering whether the do-not-call list even amounts to a government restriction on speech.<sup>128</sup> After all, the list does not directly limit speech; it merely provides a mechanism by which consumers can choose to prohibit telemarketing calls to their homes.<sup>129</sup> Emphasizing that the do-not-call list does not provide consumers with the ability to restrict calls from charities, the court concluded that the do-not-call list influences consumer choice by allowing consumers to prohibit one type of speech but not another.<sup>130</sup> Thus, the court held that this "entangling" of government influence with consumer choice was sufficient to implicate the First Amendment.<sup>131</sup>

After determining that the do-not-call list was a government restriction on speech, the court turned to the question of whether this restriction materially advanced a substantial government interest as required under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*<sup>132</sup> Here, the court distinguished between regulations that are "under-inclusive" and those that discriminate on the basis of content.<sup>133</sup> The Court concluded that "[w]ere the under-inclusive

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<sup>125</sup> *Mainstream Mktg. Servs., Inc. v. FTC*, No. CIV. A. 03 N0184, 2003 WL 22213517, at \*5 (D. Colo. Sept. 25, 2003).

<sup>126</sup> *Id.* at \*18.

<sup>127</sup> *Id.* at \*10.

<sup>128</sup> *Id.* at \*8-9.

<sup>129</sup> *Id.* at \*9.

<sup>130</sup> *Mainstream Mktg.*, 2003 WL 22213517, at \*10.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*10-11.

<sup>133</sup> *Id.* at \*12.

scope of the registry the only issue relevant to whether the registry 'materially advances' the FTC's interest, this court would hold that the amended Rules passed this part of the *Central Hudson* test."<sup>134</sup> In other words, the FTC's do-not-call list does not have to prevent all unwanted calls in order to advance the government's interest in consumer privacy, but the list cannot allow some types of callers to ring through while restricting others.

The FTC attempted to justify its exemption of non-commercial speech on the grounds that such speech has been afforded a heightened level of protection under the First Amendment.<sup>135</sup> The court summarily dismissed this argument, stating that "[a] content-based distinction cannot be made on constitutional grounds unrelated to the asserted government interest."<sup>136</sup>

Thus, under this court's *Central Hudson* analysis, the national do-not-call list violates the First Amendment. But did the Framers of the Constitution really intend for the First Amendment to prevent the government from protecting citizens from unwanted speech in the privacy of their homes? In the coming months, consumers will find out if higher courts come to a similar conclusion under *Central Hudson*; or alternatively, if the Supreme Court is willing to reshape its commercial speech analysis to protect consumers from unwanted telemarketing calls.<sup>137</sup> On October 7, 2003, consumers received an encouraging sign when the Tenth Circuit Court of Appeals stayed the district court's order preventing the implementation of the national do-not-call list, pending its expedited review on the merits.

## V. An Empowered Tele-Consumer

If the government's lawyers ultimately prevail over the telemarketing industry's lawyers, consumers will finally get what they have wished for, namely a way to virtually eliminate unwanted telemarketing calls. But should consumers have been more careful about what they wished for? Might consumers actually lose something in the bargain? And, since companies are not going to stop selling, what kind of sales pitches might consumers expect from

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<sup>134</sup> *Id.*

<sup>135</sup> *Mainstream Mktg.*, 2003 WL 22213517, at \*14.

<sup>136</sup> *Id.*

<sup>137</sup> See Probst, *supra* note 59, at 362 ("Despite recurring questions by some Justices regarding its continued viability, *Central Hudson* remains the test for commercial speech regulations.").

telemarketers faced with this new regulatory landscape?

The telemarketing industry suggests that aggressive telemarketing benefits consumers by forcing companies to keep their prices low in order to prevent their customers from being lured away by more enticing offers from competitors.<sup>138</sup> In particular, the industry claims that over the last decade, competition from telemarketing has resulted in lower long-distance telephone rates and better deals on credit cards.<sup>139</sup> Indeed, the fact that Americans purchased \$200 billion worth of goods and services via outbound marketing last year suggests that telemarketers may be offering consumers a better deal.<sup>140</sup>

If, however, telemarketing does provide consumers with the benefits that the industry claims, then many consumers will simply choose not to register their phone numbers with the do-not-call list.<sup>141</sup> Furthermore, even if 60 million phone numbers are eventually registered as the FTC predicts,<sup>142</sup> there will still be more than 100 million unregistered residential phone numbers in the United States.<sup>143</sup> Therefore, there is little reason to believe that telemarketing is no longer a viable industry.<sup>144</sup> Consumers who want to receive telemarketing calls will find no shortage of companies willing to contact them over the telephone. In fact, those who choose not to opt out of the telemarketing pool may see an increase in calls because they will be “left alone to bear the concentrated attention of the telemarketing industry.”<sup>145</sup>

Nonetheless, telemarketers will need to adapt to this new consumer-empowered environment. Some have suggested that the national do-not-call list will merely cull out consumers who are

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<sup>138</sup> Kevin G. DeMarrais, *Do-not-call downside; Industry leaders predict loss of jobs, competitive prices*, REC., July 9, 2003, at B01, available at 2003 WL 4623102.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,147.

<sup>142</sup> DeMarrais, *supra* note 138.

<sup>143</sup> *Id.*

<sup>144</sup> Rules and Regulations Implementing the TCPA, 68 Fed. Reg. at 44,147 (“We believe that industry commenters [sic] present a false choice between the continued viability of the telemarketing industry and the adoption of a national do-not-call list.”).

<sup>145</sup> Ayres & Funk, *supra* note 1, at 108.

unlikely prospects for telemarketers anyway.<sup>146</sup> However, current telemarketing practices suggest that telemarketers want to call everyone, even unlikely prospects, apparently believing that if they call enough, they will eventually catch even unlikely prospects at a weak moment.<sup>147</sup> Unless telemarketers have been woefully out of touch with their own industry, the national do-not-call list represents a serious threat to the survival of many telemarketers.<sup>148</sup>

Consumers can be certain, however, that companies are not going to stop selling. Some companies may invest more in direct mail, traditional media advertising, and Internet-based marketing, but these alternatives do not provide marketers with what they really want—namely a direct line to the consumer's living room.<sup>149</sup> Consequently, consumers can expect to see some creative marketing in the future. Perhaps telemarketers will use the mass media to invite consumers to consent to telemarketing calls representing specific types of products. If, for example, a consumer is interested in products produced by reputable United States companies, or products that are all-natural, or otherwise of a particular kind, consumers may be given the opportunity to consent to a telemarketing package that includes, for example, six calls a year and a 10% discount off the normal purchase price. Alternatively, consumers may be able to elect to receive twelve telemarketing calls a year from a particular firm in exchange for a one-in-six million chance of winning a 2004 Cadillac Escalade.

Even if the FTC prevails in court, the telemarketing industry will survive. Some companies will rely on creative marketing, while others will find success by pounding on consumers that choose not to opt out of the telemarketing pool. The survival of the telemarketing industry, however, will not change the fact that telemarketing in the future will be on the consumer's terms.

## VI. Conclusion

The passage of the DNCIA does not mean that consumers have received their last unwanted telemarketing call. Indeed, judicial

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<sup>146</sup> Klett & Brightwell, *supra* note 3, at 41; Steinberg et al., *supra* note 120.

<sup>147</sup> See Ayres & Funk, *supra* note 1, at 85. In fact, there have already been federal regulations put in place to keep telemarketers from calling consumers that have previously asked them not to call back. See *supra* text accompanying note 31.

<sup>148</sup> Steinberg et al., *supra* note 120.

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

review is pending. Moreover, even assuming the DNCIA's constitutional validity, there will be telemarketers willing to test the government's commitment to enforcing this law. But, consumers who were annoyed by legal telemarketing calls will be even less tolerant of illegal calls. Armed with the do-not-call list, consumer complaints will drive government action, and the sound of silence will prevail.