March 28, 2002

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Dear Secretary:

I have been retained by parties who will be directly affected by the Federal Trade Commission's implementation of a National do-not-call registry. On their behalf, I submit these comments to express my serious concerns about the constitutionality of § 310.4(b) (1) (iii) of the Federal Trade Commission's proposed telemarketing changes to the telemarketing sales rule, creating a nationwide do-no-call list on which individuals may place their names in order to prohibit future commercial telemarketing calls. For the last 30 years, I have published extensively on the subject of the First Amendment protection of commercial speech. My curriculum vitae is attached. It is my considered opinion that, if promulgated, such a rule would violate the First Amendment's protection of commercial speech, as developed by the Supreme Court.

I reach this conclusion for the following reasons: (1) The do-not-call provision of the proposed rule significantly interferes with the exercise of expressive rights on the basis of content; (2) the proposed rule contemplates the existence of a substantial number of exceptions to the do-not-call list, even though those exceptions give rise to the exact same dangers sought to be prevented by the establishment of the do-not- call list in the first place; (3) in purporting to further the asserted interest in privacy, creation of the nationwide do-not-call list might actually undermine the Telemarketing Act's primary goal of reducing telemarketing fraud, thereby failing to materially advance the primary goal

underlying the regulation of commercial speech; and (4)

the privacy interest which the list's creation seeks to protect is of far less significance than the types of privacy invasion that have been accepted by the Supreme Court as justification for the restriction of commercial speech rights.[1]

The presence of any of these defects, standing alone, would be sufficient to doom the proposed provision under well established First Amendment commercial speech doctrine. The presence of all four constitutional defects in the same rule assures its ultimate failure when subjected to a judicial

[1]At first glance, one might be tempted to assume that the proposed nationwide do-not-call list may be justified as a classic "time-place-manner" regulation that causes only a relatively limited disruption to commercial communication, because it impacts only one means of communicating a commercial message. Other forms of sales promotion, the argument proceeds, remain unaffected. Moreover, since the proposed rule does not totally suppress telemarketing but merely facilitates consumer choices to limit such a mode of promotion, arguably any negative impact on commercial expression is merely indirect. Such a superficial method of analysis, however, should not obscure the serious and sweepingly restrictive impact that promulgation of the proposed rule would have on valuable free speech interests. The mere fact that government chooses to label a regulation a time-place-manner restriction does not automatically render it so. See, e.g., *Reno v. American Civil Liberties Union,* 521 U.S. 844, 879 (1997). The proposed nationwide do-not-call list cannot properly be deemed a "time-place-manner" regulation, for two reasons. First, it constitutes a regulation of content and second, in any event it constitutes a serious disruption of a commercial speaker's ability to communicate its message.

As to the first point, on its face the proposed nationwide do-not-call list focuses its impact not on all phone calls by strangers, and not even on all telemarketing calls, but rather only on certain types of telemarketing calls. By definition, a regulation of speech that allows some speakers to communicate but restricts others cannot be deemed a content neutral time-place-manner regulation. As to the second point, the congressional committee responsible for the Telemarketing Act correctly recognized that telemarketing "has been a cost-effective way for many legitimate businesses to reach potential customers." Telemarketing and Consumer Fraud and Abuse Prevention Act, House Report No. 103-20 (Energy and Commerce Committee; Feb. 24, 1993), at 2. The committee further acknowledged that "legitimate telemarketing activities are ongoing in everyday business and may provide a useful service to both businesses and their customers." Id. Telemarketing provides a uniquely inexpensive, flexible and efficient means of communication about commercially available products and services. Therefore the fact that the proposed rule may leave other, more expensive and inefficient methods of sales promotion unaffected does not reduce the constitutional problems to which the nationwide do-not-call list would give rise.

No more persuasive is the argument that the regulation does not directly restrict expression. But for the rule's creation of the "do not call" list, consumers would not be in a position to shun all telemarketing calls in the designated categories. Such governmental action, then, gives rise to an unambiguous interference with the right of commercial enterprises to convey their message in the most cost-efficient and effective manner.

challenge.[2]

My comments are divided into three sections. The first section briefly describes the current doctrinal framework by which the constitutionality of commercial speech regulations are measured. It

[2]In *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), *certiorari denied*, 519 U.S. 1009 (1996), the Ninth Circuit upheld, against a First Amendment challenge, California statutes regulating telephone automatic dialing and announcing devices (ADAD). For several reasons, however, that case is distinguishable from the Commission's proposed do-not-call list. Initially, the statutory regulation there "permit[ted] the use of ADADs, so long as the called party consents to listen to the prerecorded message," by informing a live operator of that fact. 88 F.3d at 733. By enabling individuals to place their names on the do-not-call list, in contrast, the Commission facilitates the summary and categorical denial to all future telemarketers, regardless of subject. Moreover, unlike live telemarketing calls, ADADs were found to present unique dangers, such as "filled-up answering machines [and] failures to disconnect...." Id. at 735. Also, unlike telemarketing calls, ADADs cannot interact with the customer except in preprogrammed ways. Id. at 732. Finally, the exceptions created by the regulatory framework – unlike those existing with regard to the do-not-call list – were found logically to imply the consent of the recipient. Id. at 734. In any event, *Bland* was decided before a number of highly protective commercial speech decisions were handed down by the Supreme Court.

emphasizes the rapidly expanding scope and strength of the First Amendment protection of commercial speech, as developed by the United States Supreme Court in recent years. The remainder of the comments explores the significant constitutional problems to which creation of the proposed do-not-call list would give rise when measured against that doctrinal framework. The second section explains both why the underinclusiveness of the proposed do-not-call list clearly violates the First Amendment when measured by current standards, and how the provision's adoption might unconstitutionally conflict with the primary statutory goal of reducing telemarketing fraud. The final section examines the constitutionality of the rule's unduly broad reach as a means of furthering the established goals of telemarketing regulation, in contravention of the Supreme Court's standards for protecting commercial speech.

I. THE SUPREME COURT EXTENDS SIGNIFICANT CONSTITUTIONAL PROTECTION TO COMMERCIAL SPEECH

Since its 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court has extended a significant degree of constitutional protection to commercial speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court established what it described as "a four-part analysis" to determine the constitutionality of commercial speech regulation:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Id. at 566.

The *Central Hudson* test, then, makes four distinct inquiries: (1) Whether the speech in

question is both truthful and in support of lawful activity; (2) whether the government's interest in regulating the speech is "substantial"; (3) whether the challenged regulation furthers that substantial interest in a direct and material way, and (4) whether the regulation does not extend further than necessary in order to vindicate the valid regulatory goal. If the answer to the first question is negative, the speech is deemed to fall outside the scope of the First Amendment. If, however, the speech sought to be regulated satisfies this criterion, government must satisfy *each* of the remaining three criteria in order to have its regulation judicially upheld.

Though this test continues to control to this day [see, e.g., *Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404 (2001) (invalidating Massachusetts regulation of tobacco advertising on basis of *Central Hudson* test)], it is widely recognized that the form of the *Central Hudson* test applied today is considerably stronger than it may have been in its earlier years. See, e.g., *North Olmstead Chamber of Commerce v. City of North Olmstead*, 86 F. Supp.2d 755, 770 (N.D. Ohio, 2000) ("the Supreme Court's recent cases have given extra bite to the intermediate scrutiny review of *Central Hudson.*"). On at least four occasions since 1995, the Supreme Court has invalidated governmental regulation of commercial speech, for the most part on the basis of the *Central Hudson* test. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001).

The Court has made clear that government may no longer justify its regulations of commercial speech "by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Otherwise, government "could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." Id. at 771. Moreover, the Court

has held that government may not selectively regulate commercial speech dangers on the grounds that commercial speech is not as valuable as non-commercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

By creating a nationwide do-not-call list, the proposed rule would give rise to a significant interference with commercial speech rights. Solely because of governmental action, the ability of honest and non-abusive telemarketers to reach consumers will be substantially disrupted. If the proposed do-not-call list's *prima facie* interference with constitutionally protected commercial speech is to be upheld, then, the Commission will bear a heavy burden to justify its regulation under the *Central Hudson* test. As the following analysis demonstrates, this it will be unable to do.

II. THE PROPOSED NATIONWIDE DO-NOT-CALL LIST VIOLATES THE "MATERIALLY ADVANCES" PRONG OF *CENTRAL HUDSON*

Under the third prong of the *Central Hudson* test, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Generally, the courts have found this constitutional standard not to be satisfied under two circumstances: (1) Where the existing governmental regulatory framework provides for inconsistent, contradictory or self-defeating results, and (2) where the regulatory framework contains within it exceptions that give rise to the very same danger sought to be prevented or reduced by the restriction on commercial speech. As the following analysis will demonstrate, the proposed nationwide do-not-call list fails under both tests. Creation of the list is designed to promote the interest in consumer privacy. However, because creation of such a list would in important ways actually facilitate the perpetuation of

telemarketing fraud, it would add a contradictory and self-defeating element to the existing regulatory framework. Moreover, because the proposed list would operate along side an extensive network of exceptions for a variety of forms of telemarketing, each of which gives rise to the exact same level of privacy invasion as the regulated calls, it leaves the problems sought to be remedied unaffected in numerous areas. Under controlling doctrine, then, the proposed rule fails the third prong of the *Central Hudson* test.

A. The Self-Contradictory Nature of the Regulatory Framework

Illustrative of the judicial approach invalidating inconsistent, contradictory or self-defeating commercial speech regulations is the Supreme Court's decision in *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995). In *Rubin,* the Court held that a federal statute prohibiting the listing of alcoholic content on beer labels "cannot directly and materially advance [the Government's] interest [in stopping alcoholic 'strength wars'] because of the overall irrationality of the Government's regulatory scheme." 514 U.S. at 488. Because of the existing network of contradictory regulations, the Court found, "brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country." Id. It reasoned that the failure to prohibit the disclosure of alcohol content in advertising "makes no rational sense if the government's true aim is to suppress strength wars." Id. Applying this "self-contradictory" standard of *Rubin* to the proposed nationwide do-not-call list, it is clear that the list fails the "materially advances" prong of *Central Hudson*. Both the text and legislative history of the Telemarketing Act, pursuant to which the Commission seeks to promulgate this rule, are replete with references to the concern over the pressing need to stop telemarketing fraud. Not only would creation of such a list in no way deter telemarketing fraud, it may actually facilitate it.

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Initially, regardless of its impact on privacy, it is clear that a "do-not-call list" would be meaningless as a means of fighting telemarketing fraud. There is no way for the government to know, *ex ante*, which telemarketing calls will be fraudulent and which will be legitimate. Indeed, government has absolutely no basis on which to assume that a majority–or even a significant percentage–of telemarketing calls are, in fact, fraudulent. See *Peel v. Illinois Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990) (potentially misleading commercial speech may not be suppressed; at most, a disclaimer may be required). Equally important, there exists absolutely no logical basis on which to assume that individuals who choose to place their names on a "do not call" list are any more likely than other consumers to receive fraudulent telemarketing calls; that all, most or even a significant percentage of the telemarketing calls that are blocked as a result of the list's creation would have been fraudulent; or that calls not blocked by the list will *not* be fraudulent. To the contrary, there is every reason to believe that a fraudulent telemarketer who has been legally blocked from calling consumer A will immediately proceed to call consumers B through Z. At best, then, the do- not- call list would merely shuffle the fraudulent calls among different consumers.

More important, for present purposes, is that creation of the list could conceivably *foster* fraudulent telemarketing practices. Any reviewing court could take judicial notice of the fact that by creating the list, the proposed rule would likely remove as potential recipients of fraudulent calls the most sophisticated and aware consumers–i.e., the ones who are sufficiently educated to be aware of the list's creation and sufficiently wary of telemarketers to put their names on the list. Virtually by definition, then, a consumer who places his or her name on the list is a sophisticated consumer – the very type of consumer who is least likely to be tricked by fraudulent telemarketers. As a result, fraudulent telemarketers will be able to focus their calls on the remaining, presumably less motivated and less sophisticated consumers. In effect, then, creation of the do-not-call list may actually facilitate the efforts of fraudulent telemarketers, by excluding from their target lists those who are least likely to be

duped. Thus, creation of the do-not-call list could render the government's structure of telemarketing regulation at least as irrational, contradictory and self-defeating as the alcoholic strength regulatory framework held unconstitutional in *Rubin*: By seeking to achieve a secondary purpose supposedly served by the law, i.e., promotion of privacy,[3] the Commission will have undermined attainment of the law's primary -- and compelling -- purpose, i.e., deterrence of telemarketing fraud.

B. The Regulatory Framework's Network of Exceptions

In support of its finding of unconstitutionality, the Court in *Rubin* further pointed to the existence of exceptions for the labeling of wine and spirits and continued permission for use of the term "malt liquor" as a means of signifying alcoholic strength. 514 U.S. at 489. Thus, because of the existence of widespread exceptions for behavior that gave rise to the very problem sought to be ameliorated by the regulation in the first place -- i.e., alcoholic "strength wars" -- the Court found that the statute violated the First Amendment. See also *Utah Licensed Beverage Association v. Leavitt,* 256 F.3d 1061, 1074 (10th Cir. 2001). (Utah's laws restricting liquor and wine advertising did not directly and materially advance it substantial interest in temperance, because "Utah's evidence. . .appears to prove only that there is a substantial state interest in tempering the consumption of all types of alcohol, not just liquor and wine.")

Even more directly relevant to the proposed do-not-call list's constitutionality is the Court's

[3]But see Section III, *infra*.

subsequent decision in *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173 (1999). There the Court held that the federal statutory prohibition on the broadcasting of lottery information could not be applied to advertisements of lawful private casino gambling that were broadcast by petitioners' radio or television stations located in Louisiana, where such gambling was legal. Exempted by separate federal statutes from the broadcast ban was the promotion of casino gambling operated by Indian tribes and lotteries operated by any governmental or not-for-profit organization or by a commercial organization as a promotional activity "clearly occasional and ancillary to the primary business of that organization." 527 U.S. at 179.

In defense of the broadcast ban's constitutionality, the government in *Greater New Orleans* sought to satisfy *Central Hudson*'s second prong by pointing to its "substantial" interests in "reducing the social costs associated with 'gambling' or 'casino gambling,' and. . . assisting States that 'restrict gambling' or 'prohibit casino gambling' within their own borders." Id. at 185. Though the Court expressed its willingness to "accept the characterization of these two interests as 'substantial,'" for purposes of *Central Hudson*'s second prong, it nevertheless found application of the broadcast ban unconstitutional. It did so because Congress had simultaneously undermined achievement of that purpose by condoning tribal and other forms of gambling activity. Id. at 189. It concluded that the operation of the federal statutory ban "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." Id. at 190. This was due to the facts that "advertisements for tribal casino gambling. . .are subject to no such broadcast ban," and that "[g]overnment-operated, nonprofit and 'occasional and ancillary' commercial casinos are likewise exempt." Id. "Government presents no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos," the Court reasoned. It further noted that "the Government admits that tribal casinos offer precisely the same types of gambling as private casinos." Id. at 191.

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Significant for present purposes is the fact that, while holding application of the broadcast ban unconstitutional, the *Greater New Orleans* Court nevertheless acknowledged that "[g]iven the special federal interests in protecting the welfare of Native Americans. . .we recognize that there may be valid reasons for imposing commercial regulations on non-Indian businesses that differ from those imposed on tribal enterprises." The Court reasoned, however, that "[i]t does not follow. . .that those differences *also justify abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors. For the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct."* Id. at 193 (emphasis added). Thus, the *Greater New Orleans* Court held that when commercial *speech*, rather than commercial *conduct*, is the subject of regulation, government may not draw distinctions among categories of regulated activity on the basis of "the identity of [the] owners or operators," but rather only on the basis of a disparity in terms of the negative impact on the particular interest asserted in support of the claimed need for the regulation of speech in the first place. Id. As the Court succinctly summarized the point, in commercial speech cases, governmental regulatory "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." Id. at 194.

The proposed do-not-call list fails when measured under the "exceptions" standard fashioned by the Court in both *Rubin* and *Greater New Orleans*. As the Commission itself acknowledges, the proposed nationwide do-not-call list would necessarily coexist with a broad network of exemptions, including ones for banks, credit unions, savings and loans, and companies engaged in common carrier activity or in insurance. Moreover, exempted from the list's reach are purely intrastate telemarketing calls. Yet there exists absolutely no basis on which to believe that calls from telemarketers involved in these activities are any less likely to give rise to whatever privacy invasion the list's creation would be

designed to avoid in the first place.[4] The very same pervasive regulatory inconsistency that proved fatal in both *Rubin* and *Greater New Orleans*, then, plagues the crazyquilt regulatory reach of the proposed nationwide do-not-call list.[5]

Further compounding the severe constitutional problems to which the proposed do-not-call list gives rise is its exemption for telemarketing conducted by both religious organizations and political activities. It is true that such activity cannot, at least in a technical sense, be characterized as "commercial speech," because the speaker is presumably not advocating commercial sale. But the Supreme Court has made clear that government may not rely on the supposed disparity in relative values of commercial and non-commercial expression in selectively regulating commercial speech when unregulated non-commercial speech gives rise to the very same dangers of harm.

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[4]The fact that some of these activities may fall beyond the Commission's jurisdiction is irrelevant for First Amendment purposes. Rather, the First Amendment looks at the governmental regulatory framework as a whole. See, e.g., *Rubin v. Coors Brewing Co., supra*; *Greater New Orleans, supra*. Otherwise, government could easily circumvent the First Amendment's restrictions on exemptions, simply by dividing up regulatory jurisdiction among a variety of agencies.

[5]The existing commercial exemptions, which give rise to the very same threats to privacy which the Commission claims the regulated categories of telemarketing give rise, may be contrasted with a hypothetical situation where telemarketing were to be regulated in order to prevent fraud, and an exemption were recognized for telemarketing calls where a face-to-face meeting is required to complete any financial transaction. In such a situation, the Commission could reasonably believe that the exempted category of calls does not give rise to the danger sought to be prevented to the same extent as the regulated category.

The Court made this point most forcefully in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). There the Court invalidated the city's ban on newsracks containing commercial advertising handbills. The ban had been grounded primarily in the city's expressed concern about the newsracks' negative impact on esthetics, even though the ban exempted newsracks containing traditional newspapers. "The major premise supporting the city's argument [to justify the commercial/non-commercial distinction]," the Court stated, "is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public." Id. at 418-19. The Court expressly rejected this argument: "In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech." Id. at 419. The city's categorical ban on commercial newsracks, the Court concluded, was unconstitutional, because it "place[s] too much importance on the distinction between commercial and noncommercial speech" and because in the instant case "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." Id. at 424 (emphasis in original). "The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive." Id. at 425.

Discovery Network establishes conclusively that government may not draw regulatory distinctions between commercial and non-commercial speech, unless it can demonstrate that the regulated commercial expression gives rise to harms that the unregulated non-commercial speech does

not create. Because the proposed rule expressly distinguishes between commercial and non-commercial telemarketing in the creation of a nationwide "do not call" list, *Discovery Network* necessarily dictates the conclusion that it would be unconstitutional.

III. BECAUSE THE PROPOSED NATIONWIDE DO-NOT-CALL LIST FURTHERS ONLY A MARGINAL INTEREST IN PRIVACY, IT VIOLATES *CENTRAL HUDSON*'S "REASONABLE FIT" REQUIREMENT

The fourth prong of the *Central Hudson* test, it should be recalled, asks whether the regulation of commercial speech "is not more extensive than is necessary to serve [the substantial governmental] interest." While the Court has made clear that under this standard that restrictions need not be "absolutely the least severe that will achieve the desired end" [*Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 479(1989)], the requirement does impose on government the obligation to adopt "a reasonable accommodation of competing state and private interests." *Greater New Orleans, supra,* 527 U.S. at 195. There must be a "reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . .a means narrowly tailored to achieve the desired objective.'" *Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404, 2422 (2001), quoting *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 632 (1995), quoting *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 480 (1989). Pursuant to this inquiry, the government must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulation. *City of Cincinnati v. Discovery Network, Inc., supra,* 507 U.S. at 417.

That *Central Hudson*'s fourth prong imposes a significant restriction on governmental power to regulate commercial speech is demonstrated by the Supreme Court's decision last term in *Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404 (2001). There the Court invalidated Massachusetts'

regulations restricting the promotion of tobacco products, purportedly designed to protect children from exposure to such promotional material, because the regulations unduly interfered with the ability of adults to receive lawful promotions for the sale of such products. Id. at 2425-26. In the Court's words, "[t]he uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring." Id. at 2426. See also *City of Cincinnati v. Discovery Network, Inc., supra* (holding that the city had failed to carefully calculate the competing interests in banning newsracks containing commercial handbills).

The proposed rule fails to meet this standard, as it has been developed and applied by the Supreme Court. The primary purpose behind the Commission's original rules, as evidenced by both the text and legislative history of the Telemarketing and Consumer Fraud and Abuse Prevention Act -- pursuant to which the Commission promulgated the rule -- is to prevent fraudulent telemarketing practices. To a lesser extent, the rule is designed to prevent serious invasions of privacy that could conceivably result from a *pattern* of harassing or abusive telemarketing calls. In light of these asserted "substantial" interests, the proposed do-not-call list violates the "reasonable fit" requirement, because the privacy concern which the list's creation is designed to foster represents, at most, only a marginal invasion of privacy, falling far below the standard of invasiveness and egregiousness demanded by both the Telemarketing Act and the common law traditions of privacy.[6]

[6]While it is, of course, true that the Commission does not propose a complete ban on telemarketing, there is little doubt that, by creating the nationwide do-not-call list, it is substantially disrupting commercial communication.

Redish/Telemarketing Comments

It is certainly true that the Supreme Court has recognized the preservation of privacy as a substantial interest to justify the regulation of commercial speech. See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). But government may not establish the existence of a substantial interest in preserving privacy simply by asserting it in a conclusionary manner. As the court in *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235 (10th Cir. 1999), stated, "[Government may not simply assert] a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government articulates and properly justifies it."

The type of privacy invasion caused by telemarketing phone calls–at least during the hours already specified by the Commission's rule-- hardly rises to the level of the severe privacy invasion recognized by the Court in its prior decisions. In *Florida Bar*, for example, the state sought to protect privacy by prohibiting personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. The magnitude of the invasion of the privacy of especially vulnerable and sensitive victims can hardly be equated to the privacy invasion resulting from run-of-the mill phone calls, which the intended recipient may simply hang up upon or not answer. The same is true for *Ohralik*, where the Court held that the state may discipline an attorney for

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See note 1, *supra*.

soliciting clients in person, for pecuniary gain, in a post-accident setting in either the victim's hospital room or home. The Court itself has recognized that the concept of privacy invasion sufficient to justify a restriction on commercial speech is confined to such egregious interferences with personal privacy. *Edenfield v. Fane*, 507 U.S. 761, 775-76 (1993) (holding unconstitutional restrictions on in-person solicitation by presumably less "persuasive" accountants and noting that the clients in *Ohralik* "were approached at a high moment of stress and vulnerability"). In *Edenfield*, while the Court acknowledged that "the protection of potential clients' privacy is a substantial state interest," it brought within this concept only "solicitation that is...pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." Id. at 769. "Invasion of privacy is not a significant concern," the Court stated, where recipients of solicitation phone calls who are "unreceptive...need only terminate the call." Id. at 776. Thus, creation of the do-not-call list would be fatally overinclusive as a means of furthering government's "substantial" interest in promoting privacy, for the simple reason that such a list would protect privacy interests only in the most diluted sense of the term.

Nor does the privacy interest sought to be protected by the proposed do-not-call list rise to the level of invasion demanded under traditional common law standards. In his famed exposition of the common law right of privacy, Dean Prosser found four distinct manifestations of that right: Commercial appropriation of name or likeness, "unreasonable intrusion," public disclosure of private facts, and holding an individual up to the public eye in a false light. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts 849-869 (5th ed. 1984). Of those categories, the only one even arguably implicated by telemarketing is unreasonable intrusion. Yet when compared to the cases found to fall within this category– for example, home invasion, illegal searches of possessions, eavesdropping on private conversations by means of wiretapping or microphones, peeking into windows or persistent and harassing phone calls [id. at 854-55]– the

telemarketing affected by the proposed list appears to be little more than a relatively slight inconvenience, of the kind people have become accustomed to dealing with regularly in their day-to-day lives.

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Of course, if telemarketing calls are made in the middle of the night or as part of a harassing pattern of unwanted calls, the government's interest in protecting consumer privacy would most assuredly rise to the level of the invasions recognized by the Court as legitimate grounds for restricting commercial speech. Because the proposed rule in no way confines its disruptive reach to such situations, however, it is significantly–and fatally–overinclusive, in clear violation of *Central Hudson*'s "reasonable fit" requirement.

IV. CONCLUSION

As well intentioned as the proposed creation of the do-not-call list may be, there can be no doubt that it fails to satisfy the established standards for measuring the constitutionality of governmental restrictions of commercial speech. The rule constitutes a significant, content-based disruption of what has been recognized to be a generally legitimate, efficient and effective means of communicating truthful sales information. Moreover, the rule would operate along side a pervasive network of exceptions, even though most or all of the exempted telemarketing categories give rise to the exact same harm that the regulated categories of telemarketing are assumed to cause. As a result, the rule contravenes the Supreme Court's clear and controlling holdings invalidating regulations of commercial speech for the creation of just such exceptions.

Moreover, the list's creation might actually foster, rather than deter, fraudulent telemarketing activities, thereby rendering the rule completely irrational in light of the Telemarketing Act's primary concern with

stopping telemarketing fraud.

Finally, while government may, consistent with the First Amendment, restrict commercial speech in an effort to prevent egregious invasions of personal privacy, the far-reaching privacy interest sought to be protected by the rule hardly rises to the level of egregiousness recognized in prior cases. I therefore have little doubt that, as presently constructed, the proposed creation of the nationwide do-not-call list would be held to violate the First Amendment. It is therefore my view that the Commission should withdraw the proposed provision creating the list.

Very truly yours,

Martin H. Redish
Louis and Harriet Ancel Professor
of Law and Public Policy