April 17, 2002

Office of the Secretary
Federal Trade Commission
Room 159
600 Pennsylvania Avenue, N.W.
Washington D.C. 20580

Re: Telemarketing Rule-Making – Comment FTC File No. R411001

Ladies and Gentlemen:

We represent Hudson Bay Company of Illinois, Inc. ("HBC"). HBC is a for-profit fund-raiser that would be covered by the proposed amendments to the FTC's Telemarketing Sales Rule, 16 CFR Part 310.

HBC started business in 1972. HBC does not engage in telemarketing for commercial businesses. Instead, the 95 phone canvassers at its calling center in Lincoln, Nebraska make telephone calls for non-profits who advocate environmental, consumer, civic, political and social causes. Its current clients include, to name just a few:

- American Civil Liberties Union of Ohio
- Sierra Club, Dakota Chapter
- Citizen Action of Ohio
- U.S. Congressman Mark Udahl
- U.S. Senator Paul Wellstone
- National Abortion Rights Action League (various State chapters)
- Florida Consumer Action Network
- New York Citizens Campaign for the Environment
- Michigan Consumers Federation
- Organic Consumers Association
- New York Chapter of the Defenders of Wild Life
- Government Accountability Project
- Florida NOW
- Clean Water Action
- Colorado Gubernatorial Candidate Raleigh Heath (2002 election)
- Many others

These organizations are useful to our national life and they are not known for fraudulent practices or greed.

The HBC calling often involves fundraising but not always. HBC is hired to call for a variety of reasons, including voter identification surveys; get-out-the-vote-drives; membership renewal; public education on client issues; and to urge its clients' members and previous donors to contact legislators, governmental officials, or corporations on issues important to those organizations. Each client's telephone canvass usually has several goals with fundraising often but not always as one of them.

Although HBC has never been accused of fraud, it recognizes the need to prevent fraud in connection with telephone canvassing. And because calling is its business, HBC knows, as well as anyone, how fed up the public is with telemarketers.

HBC's phone canvass is mostly for smaller non-profit organizations (and the State chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC's clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC's fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC's fee.

Permanent calling facilities are beneficial to non-profits because they are available on a moment's notice to, for example, alert their membership to contact legislators regarding a bill that might come up for a vote in a matter of weeks. For financial reasons, these services are only available through companies such as HBC. Similarly, non-profits use commercial printers, so they do not have to own and maintain their own printing facilities.

HBC is now faced with the prospect of having to deal with the proposed TSR. For HBC to operate within the proposed TSR means deciding whether a particular client is or is not exempt from the TSR, whether that client's appeal to the public makes the governmentally required disclosures promptly enough to conform with the proposed TSR, and whether a particular member of an organization is cut off from phone contact by the organization because of the do-not-call list.

Therefore, HBC has asked us to review the proposed amendments to the TSR and make comment. Accordingly, we have reviewed the proposed TSR and the relevant case law.

In our opinion, the proposed amendments to the TSR are undoubtedly unconstitutional in several important respects. We defend that view in this letter and we hope these comments are helpful. The underlying cause of most of the constitutional problems with the TSR is the statutory mandate to sweep constitutionally protected non-commercial speech in with the telemarketing regulations on commercial speech. This creates inherent, unsolvable constitutional problems for the proposed TSR changes. We do not believe this is a gray area.

Who Is Regulated And What They Are Saying

HBC's clients seek to promote all manner of progressive and civic-minded programs, including consumer protection, environmental rights, civil liberties, wildlife protection, societal, and good-government causes. To take a more or less random specific example for illustration, HBC's client, Citizens Campaign for the Environment ("CCE"), provides important leadership in the area of water quality, waste management and public health.[1] That non-profit has been working on specific water issues since 1985 and it has valuable accomplishments to its credit, many of which are revealed on its website.[2] CCE is and ought to be proud of what it has accomplished. (The executive director of CCE is a former New York State Water Commissioner, a P.hD. in biology, and a lawyer. About a dozen paragraphs of New York State's water protection code have been written by CCE technical staff.)

When HBC employees call New York citizens on behalf of CCE, they promote legislation, request letters to legislators, renew memberships, inform the public of latent threats to or mismanagement of their local water resources and explain what can be done locally. Funds are usually solicited in the call, but the information exchanged in the telephone call is, as often as not, the primary purpose for the call. The request for funds in a call enables the next call. The funds also pay for the salaries of CCE staff who sit on local water quality commissions and the like and do the legwork, research, and administrative work and lobbying of the organization. The track record is good, the organization is valuable, fraud is not involved, and donations are voluntary. HBC's calling for CCE is similar to a get-out-the-vote campaign. Any request for funds enables the calling – but the message in the call is as important as its fundraising aspect.

The proposed TSR would define the calls by HBC for CCE as a call for a "charitable contribution."[3] This is true even though CCE has no specific beneficiaries of its programs other than the public at large. Similarly, the Civil Liberties Union, the Organic Consumers Association and other organizations seek to benefit only the general public. They are not "charities" in any conventional sense of the word (they do not benefit any needy person or group of people) but they are defined as such in the proposed TSR only because they seek funding by telephone.

The Proposed Changes To The TSR Are Unconstitutional

The FTC's attempt in the proposed TSR to regulate non-commercial speech automatically brings with it the established law relating to governmental restrictions on such speech. Although the Notice of Proposed Rulemaking makes some reference to this body of law,[4] for the most part the law relating to the constitutional limits on governmental regulation of non-commercial speech has been neglected there.

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[1] www.citizenscampaign.org.
[2] *Id.*
[3] Proposed Rule §310.2(f).
[4] See note 51, p. 15 of the Notice of Proposed Rule Making.

Commercial versus non-commercial speech.

The government is allowed to regulate commercial speech more broadly than non-commercial speech. "Advertising is less vigorously protected than other forms of speech."[5] As a general proposition, this point is not subject to challenge[6] and we assume the Commission will agree.

Fundraising for non-profit advocacy groups is fully protected free speech.

Speech does not become "commercial" just because one is paid to say it. In ***New York Times Co. v. Sullivan,*** the Supreme Court held that a paid political advertisement was not a "commercial" advertisement merely because the newspaper was paid to print it.[7] The advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of highest public interest and concern."[8] It was the advertisement's content, not the fact that the newspaper was paid to publish it, that controlled whether or not the message was "commercial". It is HBC's message over the telephone that determines whether or not the speech is commercial and thus vulnerable to greater regulation.

In ***Schaumburg v. Citizens for a Better Environment***, the Village of Schaumburg, Illinois prohibited door-to-door solicitation of charitable contributions if the charity did not use a fixed percentage of the donations for "charitable purposes."[9] The professional fundraiser sued the village on the grounds that the Schaumburg ordinance was unconstitutional and violated the First Amendment. In an 8 to 1 decision the Supreme Court held that the ***Schaumburg*** law violated free-speech rights. The ***Schaumburg*** court held, among other things, that charitable solicitation was within the full protections of the First Amendment.[10]

In ***Riley v. National Federation of the Blind of North Carolina, Inc.,***[11] a North Carolina law required professional fundraisers (like HBC) to disclose certain information to potential donors. The Supreme Court refused to enforce the governmentally mandated speech regulation.

In that case North Carolina argued that the professional solicitor voiced "commercial speech," insofar as it related only to "the professional fundraiser's profit from the solicited contribution."[12] But the court refused to characterize professional fundraisers' speech as "commer-

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[5] *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), affirm'd without opinion sub nom; *Capital Broadcasting Co. v. Acting Attorney General Kleindienst*, 405 U.S. 1000, (1972). See Note, The First Amendment and Legislative Ban of Liquor And Cigarette Advertisements, 85 Colum.L.Rev. 632 (1985).
[6] 4 Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law § 20.31 (3rd ed. 1999).
[7] *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).
[8] ***Id.*** at 266.
[9] *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 618 (1980).
[10] ***Id.*** at 633.
[11] *Riley v. National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988).
[12] ***Id.*** at 795.

cial" merely because they are paid to speak. It is the nature of the message that makes speech "commercial" (and therefore subject to regulation), not the nature of the speaker. The Supreme Court held:

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. Cf. *Bigelow* v. *Virginia,* 421 U.S. 809, 826 (1975) (state labels cannot be dispositive of degree of First Amendment protection). But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of *Schaumburg* and *Munson,* in which we refused to separate the component parts of charitable solicitations from the fully protected whole. Regulation of a solicitation "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . ., and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Schaumburg, supra,* at 632, quoted in *Munson,* 467 U.S., at 959-960. See also *Meyer* v. *Grant,* 486 U.S. 414, 422, n. 5 (1988); *Thomas* v. *Collins,* 323 U.S., at 540-541. Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.[13]

With the exception of someone literally standing on a street corner and shouting a message, speech is never "free" in the financial sense. Paid ads in newspapers, printing companies, advertising agencies, delivery services, mail order houses, or calling companies such as HBC are always in the chain of speech. The companies are commercial but that is not to say that the message they convey is a commercial. The messages these companies deliver for their advocacy clients are "fully protected expression."[14]

"Supporting" a cause means more than simply speaking in favor of it or voting for it, it means supporting it financially as well. Without financial support, speech is impossible. That is why fundraising is fully protected free speech.[15] The words uttered by the callers at HBC's Lincoln calling center for its environmental, consumer and political clients are the fully-protected,

[13] *Riley*, 487 U.S. at 795.
[14] *Id.*
[15] *Id.*

non-commercial speech of those clients, the same as though HBC were a printing company, a newspaper, or a radio announcer.

For-profit fundraisers enjoy the same protections as their clients.

In ***Secretary of State of Maryland v. Munson***, the U.S. Supreme Court overturned a charitable solicitation statute imposing expense of solicitation limitations.[16] Not only did the Court apply the full First Amendment constitutional protections in favor of the paid for-profit fundraiser, but the Court held that the fundraiser had its own standing to challenge the statute. And in ***Riley***, the Supreme Court refused to recognize any distinction for regulatory purposes between speech by professional fundraisers and the clients for whom they work.

The government may not force edits on protected non-commercial speech.

The proposed TSR forces speakers to say certain things they might not otherwise say and to do so in a governmentally mandated sequence. According to § 310.4(e), it is a violation of law for the HBC callers "to fail to disclosure truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information: (1) the identity of the charitable organization on behalf of which the request is being made; and (2) that the purpose of the call is to solicit a charitable contribution."

The governmental purposes behind this forced speech rule are Constitutionally insufficient to justify it. This precise issue was litigated in ***Riley***. In ***Riley***, the statute sought to force fundraisers to "disclose" various facts about the fundraising to potential donors. The Supreme Court in striking down the forced speech held that "free and robust debate cannot thrive if directed by the government. We perceive no reason to engraft an exception to this settled rule for charities."[17] The Supreme Court held that "we presume that speakers, not the government, know best both what they want to say and how to say it."[18]

Whether CCE chooses to have an HBC caller "disclose" that funds are requested before rather than after it "discloses" an identifiable threat to local water quality is, constitutionally speaking, entirely up to CCE, not the government. Besides, when a non-profit calls several weeks before a crucial legislative vote to notify, inform, warn, create letters to legislators, build membership, poll public opinion, seek volunteers, and seek contributions, what is "***the*** purpose of the call"? As the court held in ***Riley***, "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."[19] And "there is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the dif-

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[16] *Secretary of State of Maryland v. Munson*, 467 U.S. 947 (1984).
[17] *Riley*, 444 U.S. at 791.
[18] *Id*.
[19] ***Id.*** at 795.

ference is without Constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[20]

In examining the governmental purpose behind the new TSR changes, the prevention of fraud is not well served. Those who make fraudulent calls for bogus charities always give some name which, if false, already violates the law. The "promptly" part of the proposed TSR seems to be designed solely to enable residents to hang up more quickly. While it is certainly a resident's right to hang up quickly, it is also the right of the non-commercial caller to do his or her best to keep that from happening by whatever words, facts, or ideas the caller chooses to point out. This is one of our essential freedoms enshrined in the First Amendment of the Constitution. Freedom ***of*** speech can be found there, freedom ***from*** speech cannot. Telephone canvassing is often successful to arouse citizens to support worthwhile causes they may never have heard of otherwise. If a call is fraudulent, it can be prosecuted.

Of course HBC's clients all want themselves identified to bring name recognition and to build goodwill for their organizations and the causes they promote. But under the Constitution a non-commercial caller engaging in constitutionally protected free speech is *not* required to identify what group he or she represents at all, let alone "promptly" and "conspicuously". In ***Talley v. California*** the Supreme Court struck down a state statute banning anonymous handbills.[21] The Supreme Court recognized that throughout history some persecuted groups have been able to criticize oppressive practices either anonymously or not at all. The right to anonymity is a function of the First Amendment's guarantee of freedom of association.[22] Identification and subsequent fear of reprisal can inhibit legitimate discussion of public importance. The ***Talley*** court specifically left open the possibility of a regulation narrowly limited to identifying those responsible for fraud, false advertising or libel.[23]

McIntyre v. Ohio Elections Commission, invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature.[24] In that opinion, the Supreme Court held that an author is free to decide to be anonymous. Anonymity protects the author from the tyranny of the majority. Fear of economic, official, or social reprisal, or merely a desire to preserve privacy is a sufficient motivation – as is the speaker's wish that the speech be evaluated without regard to its authorship. The Supreme Court held that the decision to exclude the author's name is like any other editorial decision, an aspect of free speech. Nothing suggests this Constitutionally guaranteed freedom is limited to the printed word.

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[20] ***Id.*** [emphasis in original]
[21] *Talley v. California*, 362 U.S. 60 (1960).
[22] See eg., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Louisiana ex rel., Gremillion v. NAACP,* 366 U.S. 293 (1961); *NAACP v. Alabama*, 357 U.S. 449 (1958), on remand 109 So2d 138 (1959), judgment reversed 360 U.S. 240 (1959); *Thomas v. Collins*, 323 U.S. 516 (1945), rehearing denied 323 U.S. 819 (1945); Cf. Note, the First Amendment and law enforcement infiltration of political groups, 56 So. Calif. L. Rev. 207 (1982).
[23] *Talley*, 362 U.S. at 64.
[24] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Like the law involved in ***McIntyre***, the proposed TSR modifications would apply even if there were no hint of falsity or libel. The TSR modifications regulate the content of a constitutionally protected non-commercial message. According to ***McIntyre***, because the proposed TSR restricts "core political expression" it must be subjected to the "exacting scrutiny" (more strict) test.

Laws that prohibit fraud are sufficient, according to ***McIntyre***, to accomplish the government's anti-fraud purpose. Anything more prophylactic violates the First Amendment. Anonymous, unidentified speech is not an evil that the state should stamp out; rather, it is a shield that protects the dissenter from the tyranny of the majority. Anonymity is "not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent."[25] A state may not seek "to punish fraud indirectly, by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."[26]

In short, the proposed TSR delves impermissibly into the governmental editing of protected non-commercial speech. Under the "exacting scrutiny" test to which such activity is subjected, the proposed TSR falls short. Whether and in what order to include "disclosures" is, in our country, up to the speaker.

The Exemptions Contained In the Proposed TSR Impermissibly Exceed Neutral "Time, Place and Manner" Rules. They Purport To Grant Unconstitutional Blanket Exemptions To Governmentally Favored Groups.

The proposed TSR defines its applicability according to a governmentally preferred type of entity (which is not a Constitutionally recognized distinction), instead of whether the message is commercial or non-commercial (which is the only relevant Constitutional distinction). This creates Constitutional anomalies.

Who are the exempt "political clubs, committees, or parties"? Here is a test. The following list of organizations contains many of HBC's clients. When fundraising by for-profit calling centers such as HBC, how many of these organizations are exempt "political clubs, committees, or parties"?

- American Civil Liberties Union of Ohio – protecting and expanding the Bill of Rights.
- Preserve Our Environment – dedicated exclusively to raising funds for litigation to prevent a proposed outdoor amphitheater in a city's residential zone.
- Judicial Watch – non-partisan, non-profit foundation serving as "watchdog" over judicial system.

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[25] *McIntyre*, 514 U.S. at 356.
[26] *Id.*

- Citizens Campaign for the Environment – promoting environmental quality and public health through public education campaigns, lobbying and activism.
- New York Chapter of the Defenders of Wildlife – seeking to protect wild life.
- The Care Team – funding litigation against a city to force a thwarted referendum on a zoning ordinance.
- Organic Consumers Association – opposing genetically altered foods.
- Human Rights Campaign – working for lesbian, gay, bisexual and transgender rights.
- Amnesty International – protecting human rights worldwide.
- National Public Radio – national newsgathering.
- San Diego Zoo – conservation, entertainment, and education.
- Human Rights Watch – defending human rights worldwide.
- Hennepin County (Minneapolis Area) Bar Association – voluntary professional association that lobbies, provides member benefits and public legal information, and engages in pro bono activities – calls to build and renew its dues-paying membership.
- Public Employees for Environmental Responsibility – protects government employees who protect the environment.
- Nebraskans Against the Death Penalty – death penalty abolition.
- American Newspaper Guild – an AFL-CIO affiliated newspaper reporters', editors', and photographers' labor union.
- Generation Green – led fight to halt use of arsenic treated wood in playgrounds.
- Ohio Citizen Action – 100,000 dues paying members – dealing with a variety of issues, including utility rate regulation, public health, consumer issues – does not endorse candidates.
- American Automobile Association – non-profit auto club, provides consumer education, pre-paid towing services and lobbies; renews members by phone.

How is one to decide whether any of these are "political clubs"? The very question, impermissibly chills protected speech because a mistake in this area constitutes a criminal violation of Federal law and results in a fine for each violation. Are all exempt? How do we know? Compare your answers with those of other people familiar with the proposed regulations. Remember, this is more than an intellectual exercise; when HBC executives take this test, one wrong answer could mean jail or bankruptcy.

Consider these examples:

- Assume a "constituted religious organization," exempt from the charitable contribution rules under § 310.2(f)(2), hires a national calling center to fundraise to promote school "vouchers." A non-profit foundation that is not religious hires the same national calling center to fundraise to oppose school vouchers. The "religious" organization would not be subject to the proposed TSR but the foundation would be. How does it prevent fraud to regulate only one speaker but not the other in the school voucher debate? Are non-religious organizations inherently more fraudulent? Is there evidence of this? Try this example again with abortion, the death penalty, or a local zoning ordinance.

- The following facts are not hypothetical. Ohio Citizen Action is a non-profit organization that is large enough to have its own calling center. (It also operates large mail and door-to-door canvass operations and has for 25 years.) Because Citizen Action is a non-profit, its calling would not be covered by the telemarketing sales rule.[27] Its fundraising goes to support its lobbying and public information activities. When its internal calling center (about 12 callers) becomes overloaded because the organization is trying to contact all its members quickly (most often to generate calls and letters to public officials), Citizen Action hires HBC to help reach out to its members. When this happens, there are two sets of callers, one in Cleveland and the other – employed by HBC – in Lincoln, Nebraska.

  The callers in Lincoln use the same script as the callers in Cleveland and are hired, trained and governed by the same set of policy manuals. Money raised goes to the same bank accounts. In fact, many of the callers and supervisors in Lincoln and Cleveland have worked at both locations and all of them participate in joint training seminars two or three times a year. The cost of calling is the same at both locations. The only differences are the location of the calling and who pays the callers.

  Under the proposed TSR, the message of the Cleveland callers would not be subject to the proposed changes to the TSR or the do-not-call registry, but the Lincoln message would be. The distinction is based solely on who employs the caller. How does this new regulatory distinction prevent fraud or protect privacy?

- Assume a new non-profit wishes to hire a calling center to spread the word about, say, motorcycle helmet safety, missing children, support for the local community opera, or whatever. This organization must make a decision about

[27] See footnote 50, p. 15 of Notice of Proposed Rule Making.

whether to hire a small for-profit calling center that has never made a "profit" or a large, successful non-profit calling center. If it chooses the latter organization to spread public awareness and fundraise, its message will not be governed by the proposed TSR changes. If it chooses the former organization, its message must conform to the TSR modifications including the do-not-call registry. How does this distinction between the profit or non-profit status of the calling center prevent fraud or protect privacy?

- Assume an organization represents itself fraudulently as the Red Cross. It calls for itself and raises millions of dollars in this illegal fashion. Now, assume that it must, as a result of the proposed modifications to the TSR, comply with the proposed TSR changes and must now announce its identity "promptly" if it uses a for-profit fundraiser (which it never had plans to use in the first place). How does the TSR prevent the organization from continuing its fraud?

- Assume a "constituted religious organization" hires a for-profit fundraiser to assist in its fight against the death penalty. The call would be unaffected by the proposed changes to the TSR. Now assume a non-religious membership organization, such as Nebraskans Against the Death Penalty, sought to hire the same fundraiser to make the same call for the same purpose. The foundation would be governed by the proposed TSR. What is the justification for the distinction in favor of the religious organization? How does this prevent fraud or protect privacy? Why favor the religious organization when the message, the cause, and the for-profit caller of both organizations is precisely the same?

The proposed changes to the TSR establish a completely unique set of categories based upon the type of speaker, rather than the message. Thus, whether or not a caller is a "religious organization" matters more to the regulations than whether the message is religious. This is completely inconsistent with the First Amendment. But even if the TSR definition of charitable contribution were to exempt a type of speech, rather than a type of speaker, it would still be restricted to regulating within the Constitutionally recognized exceptions to First Amendment protections. The recognized exceptions to First Amendment guarantees include commercial speech; time, place, and manner restrictions; rules prosecuting libel or fraud; "fighting words"; and so forth. None of these categories are properly used by the proposed TSR which contains its own non-conforming distinctions and exceptions.

The Do-Not-Call Registry Would Violate the 14th Amendment and First Amendment if Applied to Non-Commercial Speech.

HBC's clients could hire their own callers to perform the same type of telephone canvassing performed by HBC. Most cannot afford this option because the efficiencies and economies of scale inherent in the use of a large calling center make that choice more efficient and economical, even if a small fee is involved.

Under the proposed TSR modifications those non-profits that decide to use a professional fundraiser like HBC would have to comply with the do-not-call registry, while those who use their own employees to do the calling would not. This distinction is based solely on whether the individual caller's employer is a for-profit or not-for-profit fundraiser or whether the client is "religious" or "political" enough according to government standards. This result is at least partially a by-product of the FTC's statutory jurisdictional limits. But whatever the reason, the result is that the government is preferring some groups over others and prohibitedly discriminating against the choice to use a professional fundraiser.

Under ***Schaumberg***, ***Munson***, and ***Riley*** these distinctions cannot be used by the government as a basis for regulation of protected non-commercial speech. Non-commercial speakers, even charities, are entitled to use professional fundraisers without discrimination.

By regulating organizations differently based on arbitrary distinctions, the government denies due process and equal protection. We do not opine on whether the FTC might constitutionally restrict ***all*** non-commercial calling through neutral time, place and manner regulations designed to treat ***all*** individuals and organizations alike.[28]

But establishing governmentally preferred groups, such as religious organizations or political parties, and providing them with superior access to the public, is in our opinion unquestionably a violation of the 14th Amendment's guaranty of equal protection and of the First Amendment.

As a practical matter, it is difficult to see how a do-not-call registry, based only on telephone numbers, would work in practice when applied to "fully protected speech." Many phones are shared. Husbands and wives share phones, of course, but so do domestic partners of all kinds, as well as residents of dormitories, rectory houses, convents, and the like. The identity of the "subscriber" to phone service is often a matter of convenience or chance. In the case of apartment roommates, the telephone "subscriber" might have moved out long ago.

Shared phones do not mean shared beliefs. When HBC calls on behalf of the Florida Chapter of National Organization for Women, it sometimes finds annoyed husbands answering the phone, but HBC is calling the wife who is already a contributing member of NOW and perfectly pleased to get the call once she is put on the phone. No matter the gender, age, sexual orientation, or politics of the person who answers the phone, that person is very often not the person whom HBC is trying to reach at that telephone number – and either or neither of them might be the telephone "subscriber."

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[28] *Widmar v. Vincent*, 454 U.S. 263 (1981) (public university's facilities must be open to all groups, not just favored ones); *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983) (school's internal mail system); *United States v. Grace*, 461 U.S. 171 (1983) (public sidewalks).

Allowing individuals to make a selection of non-profits exempt from the do-not-call list for a given telephone number is not the answer either. How are individuals to know that they did not receive what would have been a telephone call for them? If an organization decides it must immediately notify its members about a threat to one of its core concerns – such as new zoning legislation or new political or technological developments – the proposed do-not-call registry would prevent new and existing non-profits from building grassroots support by phone as quickly as the developments unfold. Sometimes telephoning is the only way to contact large numbers of people about pressing issues or concerns. Remember, members usually do not mind getting calls from organizations which they voluntarily join and to which they voluntarily contribute.

The point is that each person has an individual, ***separate*** constitutional right to speak and be in association with other like-minded people, and the groups to which they belong also have the right to contact their members and the public at large. When dealing with fully protected, non-commercial speech, any do-not-call list that keeps track only of ***numbers***, rather than ***names and numbers***, needs some way to be certain that everyone who is lawfully and regularly reached at a telephone number has consented to be cut off from the organizations to which they belong. When dealing with core, protected speech, allowing roommates, "subscribers," or various others to interfere between members and the groups to which they would belong fails the "least restrictive means" test. Some non-commercial calls are ***not*** annoying to everyone at a given phone number.

In any event, the entire opt-in system is unconstitutional when it comes to fully protected speech. The same opt-in type of system was tried by the Federal government for the mails when it enacted a postal statute requiring the Postmaster General to detain and deliver only upon the addressee's request defined "communist political propaganda."[29] The statute was held to be an unconstitutional abridgment of the addressee's First Amendment rights in ***Lamont v. Postmaster General***.[30] The Supreme Court held: "The United States may give up the Post Office when it deems fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.[31] No one has to opt-in in advance to get protected speech intended for him or her.

The underlying purpose for a do-not-call list is to protect the "privacy" of those who place themselves on the list. But in balancing the government's interest in protecting the public from the possibility of unwanted, non-commercial speech against the government's interest in promoting and protecting that speech, the government is bound by existing law: "The Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.[32]

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[29] *Postal Service and Federal Employees Salary Act of 1972*, § 305(a).
[30] *Lamont v. Postmaster General*, 381 US 301 (1965).
[31] *Id.* at 305, quoting with approval from *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437.
[32] *Erznoznik v. Jacksonville*, 422 U.S. 205, 210 (1975).

Regarding non-commercial speech, this type of "privacy" can be protected by the less restrictive, non-governmental expedient of: (a) screening calls with an answering machine, (b) using Caller ID, (c) choosing to unlist the number, (d) choosing to turn off the ringer or not answer the telephone, (e) hanging up, (f) asking selected non-profits not to call, or even (g) not owning a telephone. Instead, the do-not-call list would force arbitrary groups of related or unrelated individuals to agree, in advance if they can, on what type of calls they wish to receive and from whom, while some of the organizations to which they would gladly belong have had no need to organize themselves yet.

As currently proposed, some organizations whould have superior access to the public, enabling them to ignore the do-not-call registry. As pointed out above, when dealing with non-commercial speech, all non-commercial speakers must be treated alike. The proposed preference for political parties and churches (and, therefore, against think tanks, campaign reform foundations, environmental movements, consumer groups, etc.), has no basis in the Constitution and seems destined to a short and chaotic legal life.

Many organizations, both conservative and liberal, pay outside organizations to speak on their behalf and write their newsletters and brochures. Political commercials use professional actors, political think tanks use paid staff to write opinion articles. There is no relevant distinction between using paid inside staff and paid outside staff when it comes to non-commercial speech. Regulations based on such arbitrary distinctions – that have no real effect on any legitimate governmental interest or the original purpose of the TSR modifications – are irrational and deny due process and equal protection.

Analysis and Comment

The proposed changes to the TSR are based upon the legitimate premise that most people do not want to be bothered by telemarketers. However, many people do not mind a call when the caller has a legitimate, non-commercial message they wish to support. Indeed, the consistent success of HBC since 1972 and that of other telephone fundraisers for legitimate non-profits prove this point.

The Commission stated that it would like comment so it can determine whether "the proposed modifications strike the appropriate balance, maximizing consumer protections while avoiding the imposition of unnecessary compliance burdens on the legitimate telemarketing industry."[33] However, the "appropriate balance" must also take into account the First Amendment rights of the non-commercial clients of the telemarketing industry as well as the rights of the contributing members of those clients. Rather than applying a balancing test, the Supreme Court

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[33] Notice of Proposed Rulemaking, p. 9.

requires the government to use the "least restrictive means" of achieving its legitimate legislative purpose, when dealing with non-commercial speech.[34]

The Notice of Proposed Rulemaking shows that the Commission already recognizes that "the risk of actual or perceived infringement on a paramount societal value – free and unfettered religious discourse – likely outweighs the benefits or protection from fraud and abuse that might result from including contributions to such organizations within the scope of the ["charitable contribution"] definition.[35] But the Constitution protects ***all*** non-commercial discourse, not just religious discourse. The discrimination in favor of religious organizations is blatant, unjustified, and unconstitutional, no matter the legislative mandate.

But apart from the Constitutional legalities, it makes no sense, as a practical matter, to cover non-commercial speech in the rule. There are really two different types of mass calling: One type is engaged in by people trying to sell things – commercial speech, usually by commercial entities. The other type of mass calling is engaged in by people with causes – non-commercial speech, usually by political, charitable, religious, or consumer groups and advocates of all types. These two different types of calling, commercial and non-commercial, give rise to separate regulatory needs.

When a pure commercial transaction is at stake, callers have an incentive to engage in all the things that telemarketers are hated for. But non-commercial speech is a different matter. The success of an advocacy call does not hinge entirely on whether the recipient decides to part with a sum of money. A calling center employee working for a citizens' group is less interested in the volume of calls than in effective communication of the group's concerns. That is the reason the money is needed in the first place, not for profit.

In a non-commercial call the recipient is more than a potential source of income. Rather, he or she is also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution, even if not in the current call. There is more than a sale, there is a cause at stake. It is, therefore, self-defeating for the advocacy caller to engage in the abusive telemarketing practices that motivated the draft TSR. Such a caller risks alienating the recipient of the call against the cause not just against the caller or the organization.

By contrast, a telemarketer selling something has a financial transaction as the sole purpose of the call. Accordingly, he or she has an incentive to end, as soon as possible, those calls that are unlikely to result in a sale – the quicker to reach the next potential buyer. Frustration by the call recipient costs the commercial telemarketer comparatively very little, especially when measured against the relative advantage that jumping to the next call might bring. This explains

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[34] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (legitimate purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); ***See also Schneider v. State***, 308 U.S. 147, 161, 165 (1930).
[35] Notice of Proposed Rulemaking, p. 21.

why "dead air" when answering the phone usually foretells a telemarketer about to pitch a sale but usually does not predict a non-commercial call.

So, the motivation for telemarketer-type abuses is less with non-commercial calling, which explains why the actual instance of such abuses and complaints about such abuses are fewer when it comes to non-commercial calling. Exempting non-commercial calling from the proposed TSR is logical based upon common sense and experience.

Moreover, the total number of non-commercial, advocacy-type calls is insignificant when compared to the huge number of telemarketing sales calls, as any phone owner can attest. Carving out commercial calls from the TSR rules would detract little from the value of the proposed TSR modifications.

Fraud can be prosecuted when it happens. The value of the TSR modifications in preventing charitable fraud is problematic. Perpetrators of fraud *already* promptly disclose an identity to their targets. Unfortunately, in the name of preventing fraud, many struggling, new and small advocacy organizations would be brought into a regulatory scheme that has little to do with them. No one tries to make a fast buck by pretending to solicit memberships on behalf of Nebraskans Against the Death Penalty or the Organic Consumers Association. Whatever reason there was to include true "charities" within the proposed TSR modifications, there is even less reason to include non-charities engaged in pure grassroots protected advocacy.

Conclusion

We request that the proposed modifications to the TSR be clarified and changed to conform with existing First Amendment guarantees. Moreover, there is just not enough guidance in the proposed rule for HBC to know which of its clients must comply and which are exempt. The penalties are too large to simply guess. Exempting non-commercial speech, without regard to the nature of the speaker, would seem to work. It also seems to be required.

Very truly yours,

SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER, P.A.

By: ______________________________
Thomas H. Goodman

THG/pd