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Brief of Amici Curiae — ACA International

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, Defendant-Appellant. UNITED STATES OF AMERICA, Intervenor.	)	No. 03-1429 ON APPEAL FROM THE U.S. DISTRICT COURT, DISTRICT OF COLORADO The Honorable Edward W. Nottingham D.C. No. 03-N-0184(MJW)
U.S. SECURITY, CHARTERED BENEFIT SERVICES, INC., GLOBAL CONTACT SERVICES, INC., INFOCISION MANAGEMENT CORP., and DIRECT MARKETING ASS'N, INC., Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, Defendant-Appellant. UNITED STATES OF AMERICA, Intervenor.	)	No. 03-6258 ON APPEAL FROM THE U.S. DISTRICT COURT, DISTRICT OF OKLAHOMA The Honorable Lee R. West D.C. No. 03-122-W
MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N, Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 03-9571 ON REVIEW OF ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION CG Docket No. 02-278

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,	)	No. 03-9594
Petitioner,	)	ON REVIEW OF ORDER OF
v.	)	THE FEDERAL
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	COMMUNICATIONS COMMISSION
Respondents.	)	CG Docket No. 02-278

BRIEF OF *AMICUS CURIAE* ACA INTERNATIONAL

ADAM L. PLOTKIN, ESQ.
Adam L. Plotkin, P.C.
621 Seventeenth Street, Suite 2400
Denver, Colorado 80293
(303) 296-3566

This Brief is Not in Support of Any Party

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), ACA International states that it does not have a parent corporation, nor is there any publicly held corporation holding ten percent (10%) or more of ACA International's stock.

AUTHORITY FOR FILING THIS BRIEF

ACA International has obtained consent to file this *amicus curiae* brief from counsel for all of the parties to this appeal. Accordingly, ACA International's authority for filing this brief is found at Fed. R. App. P. 29(a).

STATEMENT OF INTEREST

ACA International ("ACA"), formerly known as the American Collectors Association, Inc., is the international trade association for credit and collection professionals. ACA's members provide a wide variety of accounts receivable management services.[1] Headquartered in Minneapolis, Minnesota, ACA represents the interests of approximately 5,300 third-party collection agencies, attorneys, credit grantors and vendor affiliates.

ACA members comply with all applicable federal and state laws and regulations concerning debt collection, as well as the ethical standards and guidelines promulgated by ACA. Specifically, the collection activity of ACA

[1] While the debt collection activities of ACA members do not meet the definition of "telemarketing" found at 16 C.F.R. §310.2(cc), consumers routinely appear to operate under the mistaken belief that creditors and their agents are somehow subjected to the auspices of the national do-not-call registry.

members is regulated primarily by the Federal Trade Commission (the "Commission") pursuant to the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. §1692 *et seq.*, and the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. §1681 *et seq.*, in addition to analogous state laws.

In addition, ACA members who handle accounts receivable for medical service providers comply with the Health Insurance Portability and Accountability Act ("HIPAA") including the Standards for Privacy of Individually Identifiable Health Information codified at 45 CFR Parts 160 and 164 (the "Privacy Standard"). Finally, ACA members who purchase debt comply with the Gramm-Leach-Bliley Act (the "GLBA"), 15 U.S.C. §§6801 *et seq.*

In addition to working under the auspices of various laws and regulations dealing with consumer privacy such as the FDCPA, the FCRA, the HIPAA Privacy Standard, and the GLBA, ACA members are also heavily involved in telephone contact with consumers. ACA members engage in hundreds of millions of telephone calls with consumers each year on behalf of creditors. As such, ACA has closely monitored developments in the area of do-not-call lists.

As part of such monitoring, ACA submitted comments in response to the Commission's Notice of Proposed Rulemaking concerning amendments to the Telemarketing Sales Rule codified at 16 C.F.R. §§310 *et seq.* The Commission promulgated its final amendments to the Telemarketing Sales Rule on January 29,

2003. *Telemarketing Sales Rule; Final Rule,* 68 Fed. Reg. 4580 *et seq.* (January 29, 2003) (the "Final TSR").

As an international trade association whose members are heavily regulated by privacy related laws and regulations, and at the same time heavily involved in telephone contacts with consumers, ACA respectfully submits this brief as *amicus curiae.* ACA does not support either party through the submission of this brief, but rather, hopes to aid this Court in resolution of the appeal at bar through the provision of insight into the issues raised by the Final TSR and the FCC Rules.

SUMMARY OF ARGUMENT

The Commission, through the implementation of a national do-not-call registry, has sought to protect the privacy rights of consumers. Clearly, the protection of consumer privacy rights is a substantial government interest. However, it is equally clear that commercial free speech is also a substantial interest entitled to certain protections.

One of the issues presented for this Court on appeal is whether the provisions of the Final TSR establishing the national do-not-call registry have been narrowly tailored enough so as to strike the appropriate balance between consumer privacy rights and the commercial free speech rights of telemarketers. Restrictions on commercial free speech that are not sufficiently narrowly tailored to achieve a substantial government interest can not pass constitutional muster.

ACA's concern is that the provisions of the Final TSR establishing the national do-not-call registry may be deemed by this Court as not narrowly tailored enough to achieve the government's stated interest, and therefore unconstitutional. A finding of unconstitutionality would likely result in further legislative efforts by Congress to recreate the national do-not-call registry. Herein lies ACA's greatest concern—that in the event of further legislation concerning the establishment of a national do-not-call registry, the scope and applicability of the provisions of the Final TSR may be allowed to escape the strict confines of telemarketing calls.

In the event that this Court deems the provisions of the Final TSR establishing the national do-not-call registry to be unconstitutional, ACA hopes that this Court will provide guidance as to alternatives that this Court would consider constitutional. Such guidance may possibly include the less restrictive alternatives available to achieve the goal of protecting consumer privacy such as the approach to allowing consumers to cease communications employed by the FDCPA, or the company-specific do-not-call list approach adopted in the original Telemarketing Sales Rule. ACA hopes that such guidance would also state the importance of ensuring that the national do-not-call list not spill over from telemarketing calls into other arenas such as collection calls on behalf of creditors who have delivered goods or performed services, but have not been paid for such goods or services.

ARGUMENT

I. An Issue Exists as to Whether the Provisions of the Final TSR are Constitutional

A. Has the Government Demonstrated that the Proposed Restriction on Commercial Speech Directly and Materially Advances the Government's Stated Substantial Interest?

Resolution of the appeal at bar requires an examination and balancing of the privacy rights of consumers and the commercial free speech rights of the business community. The Commission clearly realized this when it stated:

> Similarly, by directing that the Commission regulate the times when telemarketers could make unsolicited calls to consumers in the second enumerated item [footnote 393—15 U.S.C. 6102(a)(3)(B)], **Congress recognized that telemarketers' right to free speech is in tension with consumers' right to privacy within the sanctity of their homes, but that a balance must be struck between the two that meshes with consumers' expectations while not unduly burdening industry.**

68 Fed. Reg. 4613 (emphasis added).

As a trade association whose members are governed by a diverse array of privacy-related laws and regulations including without limitation, the FDCPA, the FCRA, the HIPAA Privacy Standard, and the GLBA, ACA is keenly aware of and supportive of the privacy rights enjoyed by consumers. In addition, as a trade association whose members spend their work day in communication with consumers, ACA is equally aware of and supportive of free speech rights. Accordingly, ACA agrees that the above-referenced tension exists, and further

agrees that an appropriate balance must be struck between these two vital and competing interests.

The question on appeal is whether the proper balance has in fact been struck. If the government's own numbers are accepted, the telemarketing industry's right to free speech has already been chilled to the tune of over 50 million[2] subscribers to the national do-not-call registry. By all accounts, the number of subscribers to the national do-not-call registry will continue to grow over time. A question for this Court's consideration is whether a regulatory framework that concentrated on restricting the telemarketing industry's free speech rights, as opposed to completely banning such rights, would better serve the Commission's stated goal of striking the appropriate balance between consumers' privacy rights and the business community's free speech rights.

In *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), the Court set forth a four part test for determining the constitutionality of a restriction on commercial speech. The *Central Hudson* Court held that commercial speech may be regulated if: (1) the speech at issue is not untruthful and does not concern unlawful activity; (2) the government asserts a substantial interest in support of the regulation; (3) the government demonstrates that the

[2] *See,* footnote 7.

restriction on commercial speech directly and materially advances that interest; and, (4) the regulation is narrowly tailored. *Central Hudson,* 447 U.S. at 564-565.

It is the third and fourth prongs of the *Central Hudson* test that raise the constitutional issues presently before this Court. This is in large part due to the dichotomy set forth in the Final TSR for the treatment of commercial telemarketing calls as opposed to charitable telemarketing calls. As stated by the Commission itself in the Final TSR:

> The Commission believes that the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls **regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution.**

68 Fed. Reg. 4637 (emphasis added). The Commission further stated that "A great many consumer email comments expressed the view that unsolicited calls disturb their privacy, and did not distinguish between sales calls and other types of solicitation calls, such as those for charities." *Id,* at footnote 685.

Based upon the Commission's own commentary to the Final TSR, a question clearly exists as to whether the Final TSR meets the third part of the *Central Hudson* test.

While the Commission's stated reason for promulgating the national do-not-call registry was clearly the protection of consumer privacy rights, the Commission stated in a footnote that the national do-not-call registry will also serve the

substantial government interest of preventing fraud and abuse. 68 Fed. Reg. 4635, footnote 669. However, even if prevention of fraud and abuse had been the Commission's stated goal in promulgating the national do-not-call registry, the Commission's own commentary to the Final TSR still calls into question the constitutionality of the divergent treatment afforded to commercial telemarketers as opposed to charitable telemarketers. *See,* 68 Fed. Reg. 4628, footnote 569 (charitable telemarketers refusing to honor requests to be placed on company-specific do-not-call lists). *See also,* 68 Fed. Reg. 4585 ("The Commission believes that concerns about bogus charitable fundraising in the wake of the events of September 11, 2001, in large measure propelled passage of §1011 of the USA PATRIOT Act[3]."); *Id.*, at footnote 52 ("The Commission believes the necessary implication of modifying the definition of 'telemarketing' in the USA PATRIOT Act is to have all provisions of the [Telemarketing Sales] Rule apply to charitable solicitations.").

[3] USA PATRIOT ACT, Pub. L. 107-56, 115 Stat. 272 (Oct. 26, 2001) (the "Patriot Act"). §1011(b)(3) of the Patriot Act specifically amended the definition of "telemarketing" appearing in the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§6101 *et seq.*) (the "Telemarketing Act") at 15 U.S.C. §6106(4) to include charitable telemarketing. §1011(b)(1) of the Patriot Act amended 15 U.S.C. §6102(a)(2) of the Telemarketing Act directing that fraudulent charitable solicitations be regulated as deceptive practices under the Telemarketing Sales Rule. §1011(b)(2) of the Patriot Act added a new section to the Telemarketing Act directing the Commission to include new requirements governing charitable telemarketing within the abusive telemarketing acts or practices provisions of the Telemarketing Sales Act.

Based upon the Commission's own comments cited above, even if the substantial government interest advanced by the Final TSR is assumed to be prevention of fraud and abuse, an issue exists as to whether the Commission's divergent treatment of commercial and charitable telemarketers under the Final TSR directly and materially advances such interest. As such, an issue also exists as to whether the Final TSR meets the third part of the *Central Hudson* test.

B. Is the Proposed Restriction on Commercial Free Speech Sufficiently Narrowly Tailored?

Notwithstanding the foregoing analysis, it is the potential for the Final TSR to effectuate a complete and utter prohibition on commercial free speech that gives ACA the greatest concern. The fourth part of the *Central Hudson* test requires that an otherwise permissible government regulation of commercial speech be narrowly tailored. It is this narrowly tailored component of the *Central Hudson* test that raises the most serious question for this Court to resolve.

It is clear that in regulating commercial speech, the government does not need to employ the least restrictive means available. *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). However, as stated by the Court:

> What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends…a fit that is not necessarily perfect, but **reasonable;** that represents not necessarily the single best disposition but **one whose scope is in proportion to the interest served…**that employs not necessarily the least restrictive

> means but, as we have put it in the other contexts described above, **a means narrowly tailored to achieve the desired objective.**

Id. (Emphasis added; internal citations omitted).

A question clearly exists as to whether the national do-not-call registry provisions are tailored narrowly enough to withstand analysis under *Central Hudson* and *Fox*. This question is based upon a fundamental issue of whether a regulatory framework that effectuates the potential for a complete and utter ban on commercial free speech can by its very nature be considered "narrowly tailored."

Similarly, is the national do-not-call registry, as currently structured, a regulation "whose scope is in proportion to the interest served"? *Fox, supra*. There is no question that the protection of consumer privacy rights is a substantial government interest. That being said, ACA's concern is the parade of horribles that may result from a system that allows a consumer to preemptively and completely shut the door on legitimate commercial speech, prior to even having had the opportunity to know the content of the commercial speech.

Government restrictions on commercial speech are subject to an intermediate level of scrutiny. *Central Hudson,* 447 U.S. at 573 (Blackmun, J., concurring). While the *Fox* Court held that the government is not required to use the absolute least restrictive means to achieve its desired end, *Fox,* 492 U.S. at 480, the Court certainly did not prohibit inquiry into whether less restrictive means are available to meet the government's goal in enacting the challenged restriction on

commercial speech. On the contrary, the *Fox* Court noted that "almost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means'". *Fox,* 492 U.S. 469. As such, in order to determine whether the Commission's regulation of commercial speech in the Final TSR is "reasonable", "in proportion to the interest served", and "narrowly tailored to achieve the desired objective" as required by *Fox,* we must examine whether less restrictive means are available for achieving the Commission's goal of protecting consumers' privacy rights with regard to telemarketing calls.

II. There are Less Restrictive Means Available that Would Serve the Government's Interests in Protecting Consumer Privacy Rights with Regard to Telemarketing Calls

A. The FDCPA's Approach

As noted above, ACA is no stranger to severe restrictions on commercial speech. Pursuant to the FDCPA, a consumer may unilaterally require a debt collector to cease communications with the consumer concerning a particular debt simply by notifying the debt collector in writing that the consumer refuses to pay the debt or that the consumer desires the debt collector to cease further communication with the consumer. 15 U.S.C. §1692c(c).

Once a consumer has so notified a debt collector, the debt collector may not communicate further with the consumer with respect to the debt in question except:

(1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. *Id.*

The FDCPA seems to strike a better balance between consumer rights and the business community's free speech rights than the Final TSR. Under the FDCPA, a debt collector has an absolute right to make an initial contact with a consumer in order to attempt to collect money owed by the consumer based upon a transaction initiated by the consumer with a creditor. Obviously, any attempt to curtail this initial right of contact would have devastating consequences upon creditors attempting to obtain payment for goods they had previously delivered or services they had previously rendered to consumers.

Upon receipt of a debt collector's initial communication, the consumer then immediately obtains the right to cease any unwanted communications from the debt collector pursuant to the provisions of 15 U.S.C. §1692c(c).

Upon receipt of a consumer's written request to cease communication, the debt collector must cease any and all communication with the consumer concerning the debt except for one (1) of the three (3) limited exceptions set forth in 15 U.S.C. §1692c(c).

Assuming the debt collector has invoked one (1) of the exceptions stated above[4] and made a final communication with the consumer, and the debt remains unpaid, the debt collector now has a choice to make: either take appropriate legal action to collect the debt in question, or cease all activity on the account in question. One thing for certain at such juncture is that the debt collector absolutely may not communicate further with the consumer concerning the debt in question outside of the ambit of a legal proceeding.

ACA is convinced the FDCPA strikes an appropriate balance between the rights of consumers and the commercial free speech rights of creditors and their agents. As shown above, while the right to commercial free speech is severely regulated under the FDCPA, there is no outright prohibition on commercial free speech that would prevent a creditor or its agent from at least making an initial communication attempting to collect money owed. In short, the consumer is provided with an opportunity to determine the nature and potential value of the communication, as well as the identity of the caller, thereby allowing the consumer to make an informed decision as to whether he wishes to communicate further with the caller, or to require the cessation of further communications concerning the debt in question.

[4] Although not required by the FDCPA, many debt collectors do not take advantage of the extra communication allowed by 15 U.S.C. §1692c(c), choosing instead to either initiate a legal proceeding or cease all activity on the debt in question.

The Final TSR on the other hand, allows for a consumer to shut the door on commercial free speech before any such speech has even occurred. As such, the question becomes whether a complete prohibition on commercial free speech can possibly be considered "a means narrowly tailored to achieve the desired objective" so as to withstand the requirement set forth in *Fox*?

B. The Problems with the Company Specific Do-Not-Call Lists Have Been Cured by the New Provisions of the Final TSR Requiring the Transmission of Caller Identification Information

Clearly, the company-specific approach to do-not-call lists taken under the original Telemarketing Sales Rule is far less restrictive than the national do-not-call registry adopted by the Final TSR. Under the company-specific approach, to prevent telemarketing calls from a company, consumers had[5] to request that a specific company not contact the consumer any further.

According to the Commission, one of the problems encountered with the company-specific do-not-call lists was that consumer attempts to sign up for such lists were often frustrated by telemarketers. The Commission described how telemarketers would often hang up on consumers who requested to be added to the telemarketer's company-specific do-not-call list, with the net result being that the consumer had no method for identifying which telemarketer had contacted him,

[5] The company-specific approach to do-not-call lists is still employed in the final TSR as the sole means for consumers to block receipt of telemarketing calls on behalf of charities. 16 C.F.R. §310.4(b)(1)(iii)(A); 16 C.F.R. §310.6(a).

and consequently, no ability to make a formal request to be placed on such telemarketer's company-specific do-not-call list, or to identify a telemarketer who has violated the provisions of the final TSR. 68 Fed. Reg. 4626-4628. These were the main reasons advanced by the Commission for the new provision in the Final TSR requiring all telemarketers to transmit caller identification information ("Caller ID") in every telemarketing call. *Id.*

In discussing its reasoning for requiring the transmission of Caller ID in all telemarketing calls, the Commission also stated that "consumers will receive substantial privacy protection as a result of this [Caller ID] provision." 68 Fed. Reg. 4623. The Commission continued:

> Consumers benefit because Caller ID information allows them to screen out unwanted callers and identify companies that have contacted them so that they can place "do-not-call" requests to those companies. These features of Caller ID enable consumers to protect their privacy…The fact that consumers greatly value the privacy protection provided by receipt of Caller ID information is evidenced by the fact that, as of the year 2000, nearly half of all Americans subscribed to a Caller ID service.

68 Fed. Reg. 4624 (footnote omitted).

The commentary to the final TSR seems to indicate that requiring the transmission of Caller ID in all telemarketing calls achieves the same goals advanced in support of the national do-not-call registry:

> …consumers derive substantial benefit from receiving Caller ID information…Consumers in large numbers subscribe to, and pay for, Caller ID services offered by their telephone companies. Many of

> these consumers subscribe to Caller ID specifically to identify incoming calls from telemarketers and screen out unwanted telemarketing calls…These consumers have, over time, come to the conclusion that an incoming call that fails to provide Caller ID information is commonly a telemarketing call. As a result, some consumers decline to answer these calls.

68 Fed. Reg. 4626 (footnotes omitted). *See also,* 68 Fed. Reg. 4627, footnote 540 ("Consumer prefers current state of affairs where 'most' telemarketers block transmission of Caller ID information because her Caller ID is programmed to refuse calls from parties who block such transmission. Using this arrangement, the consumer reports receiving few telemarketing calls.")

By requiring the transmission of Caller ID information in every telemarketing call, the biggest problems with the company-specific do-not-call lists identified by the Commission have been cured. Now, even if a telemarketer illegally frustrates a consumer's attempt to be placed on the telemarketer's company-specific do-not-call list, the consumer will have a means for identifying and reporting the offending telemarketer. This will allow the consumer to make a formal request to be placed on the telemarketer's company-specific do-not-call list, and will also aid in identifying offending telemarketers for the purpose of actions to enforce the provisions of the final TSR.

Based upon the foregoing, ACA suggests that a return to the company-specific approach to do-not-call would resolve the issues presented in this appeal. A return to this approach would surely cure the constitutional issues raised in

Judge Nottingham's Order in D.C. No. 03-N-0184 (MJW)[6] as all telemarketers would be treated in the same manner. Furthermore, the company-specific approach to do-not-call lists is far less restrictive than the national do-not-call registry provisions set forth in the Final TSR as the telemarketer is able to exercise his commercial free speech rights unless and until the consumer invokes his right to be placed on the telemarketer's company-specific do-not-call list, thereby effectuating a cessation of all communications from the telemarketer. This is an approach similar to the approach taken by the FDCPA as described earlier in this brief.

III. *Rowan* Supports the Company-Specific Approach to Do-Not-Call Lists

Proponents of the national do-not-call registry provisions set forth in the final TSR routinely point to the U.S. Supreme Court's decision in *Rowan v. U.S. Post Office Department,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970) as constitutional support for the national do-not-call registry. Ironically, in actuality, the *Rowan* decision provides constitutional support for the company-specific do-not-call lists espoused in the original Telemarketing Sales Rule.

Rowan does not stand for the proposition that a consumer can preemptively put a halt to any and all commercial speech. Quite to the contrary, pursuant to the

[6] MEMORANDUM OPINION AND ORDER, Mainstream Marketing Services, Inc., et al. v. Federal Trade Commission, et al., Civ. No. 03-N-0184 (MJW) (D. Colo. Sept. 25, 2003) ("Judge Nottingham's Order").

regulation under review in *Rowan*, a consumer could not request that further mail from a particular vendor be ceased until the vendor had in fact mailed an advertisement to the consumer. *Rowan,* 397 U.S. at 730, 734-735, 739; *see also, id.,* 397 U.S. at 739, footnote 6. *Rowan,* like the approach taken by the FDCPA and the company-specific do-not-call list provisions in the original Telemarketing Sales Rule, requires an affirmative request by a consumer to cease communication from a particular party. In addition to being a far less restrictive curtailment of commercial free speech than the national do-not-call registry provisions, such an approach still achieves the government's stated goal to protect consumer privacy rights, as the consumer maintains the ability to require any or all telemarketers to cease contacting the consumer. As this alternative results in a regulation of commercial free speech, as opposed to a complete prohibition on such speech, ACA urges this Court to consider this solution or a similar alternative.

IV. The Need to Guard Against Unintended Consequences of the Final TSR

Regulations at times seem to take on lives of their own. Many times, when a new regulation is passed, it quickly becomes apparent that the new regulation has unintended and undesirable consequences.

By way of example, and certainly not limitation, this is exactly what has happened with the Federal Communications Commission's (the "FCC") recent revisions to its regulations implementing the Telephone Consumer Protection Act,

47 U.S.C. §227 (the "TCPA"). *See, Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991; Final Rule,* 68 Fed. Reg. 44144 (July 25, 2003).

In its rules implementing the TCPA, the FCC included restrictions governing the use of prerecorded telephone messages. 47 C.F.R. §64.1200(b) requires in pertinent part:

> All artificial or prerecorded telephone messages shall: (1) At the beginning of the message, **state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.** If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated…

47 C.F.R. §64.1200(b)(1) (emphasis added).

While this regulation seems innocuous enough on its face, the problem for ACA members is that it is in direct conflict with 15 U.S.C. §1692c(b) of the FDCPA. 15 U.S.C. §1692c(b) provides that:

> …without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person **other than** a consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. §1692c(b) (emphasis added).

Since many debt collection companies have names that indicate they are in the debt collection business (i.e., ABC Collection Services, Inc.), many debt collectors are faced with an impossible compliance scenario when leaving a prerecorded telephone message. If a debt collection company named ABC Collection Services, Inc. leaves a prerecorded telephone message and complies with 47 C.F.R. §64.1200(b)(1) of the FCC rules implementing the TCPA, the debt collection company risks that a third party hears the prerecorded telephone message thereby violating the third-party communication prohibition contained within 15 U.S.C. §1692c(b) of the FDCPA. Conversely, if the same debt collection company, in an effort to comply with the FDCPA leaves a prerecorded telephone message and does not identify the company's name, the debt collection company has violated 47 C.F.R. §64.1200(b)(1).

Simply put, ACA members have been placed in the untenable position of choosing which federal law to comply with, the FDCPA or the TCPA. Ironically, nothing in the administrative record of the FCC's rules implementing the TCPA indicates any intent to regulate debt collection activities. *See,* 68 Fed. Reg. 44144 *et seq.* Yet, as described above, ACA members find themselves not only potentially subject to the provisions of the TCPA, but also mired in a conflict between the TCPA and the FDCPA. It is unintended consequences such as this that ACA fears most with the Final TSR.

V. The Final TSR Must Remain Limited Solely to Telemarketing Calls

Obviously, limitations on free speech are always fraught with peril. Society places a high value on the free exchange of ideas. As the *Central Hudson* Court stated: "commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson,* 447 U.S. at 561-562.

Due to the current structure of the national do-not-call registry, the framework is in place to effectuate a complete ban on commercial free speech espoused by telemarketers. Given the sweeping prohibitions on commercial free speech which are allowed under the national do-not-call registry, as opposed to the more narrowly tailored restrictions on commercial free speech allowed under the FDCPA, ACA is concerned with ensuring that the final TSR never escapes the strict confines of telemarketing calls in its scope and applicability.

Based upon the legal analysis contained in the Order entered by Judge Nottingham in D.C. No. 03-N-0184 (MJW), as well as ACA's own independent legal research and analysis, ACA is concerned about the ramifications that may ensue in the event that this Court affirms Judge Nottingham's Order and finds the Final TSR to be unconstitutional. Given the recent statements of various members

of Congress[7] concerning the strong Congressional desire for the national do-not-call registry to continue in effect as set forth in the final TSR, it seems certain that Congressional reaction to this Court finding the national do-not-call registry to be unconstitutional would be swift.

Judge Nottingham's Order found the provisions of the Final TSR concerning the establishment of the national do-not-call registry unconstitutional based upon the disparate treatment afforded to charitable as opposed to commercial telemarketers. As such, in the event that this Court affirms Judge Nottingham's decision, ACA feels there will be much debate within Congress over how to amend the provisions of the Final TSR relating to the national do-not-call registry in order to survive further constitutional attacks.

Under the final prong of the *Central Hudson* test requiring restrictions on commercial free speech to be "narrowly tailored" to achieve a substantial government interest, it would seem that a return to the company-specific approach to do-not-call lists would pass constitutional muster. This is especially so in light of the amendment to the final TSR requiring Caller ID information to be transmitted in every telemarketing call. Such amendment appears to cure the

[7] *See,* 149 Cong. Rec. H8916-17 (daily ed. Sept. 25, 2003) (statement of Rep. Tauzin, "The FTC wants this [national do-not-call] list. The President of the United States wants this list, and more importantly, 50 million Americans, who are growing impatient about being interrupted at mealtime by unwanted and unnecessary harassing telemarketing calls, want this list. And this Congress is going to make sure they have this list today.").

concerns with company-specific do-not-call lists enumerated by the Commission in the commentary to the final TSR (see discussion above in Section IIB of this brief).

A return to the company-specific approach would also serve as a regulation or restriction of commercial free speech, as opposed to the current framework of the national do-not-call registry, which acts more as a complete prohibition on commercial free speech. The company-specific approach, which is similar to the approach to commercial free speech restrictions espoused by the FDCPA, is also supported by the U.S. Supreme Court's decision in *Rowan.*

Another potential Congressional approach in response to this Court upholding Judge Nottingham's Order would be to amend the Final TSR by repealing the exemption currently afforded to charitable telemarketers from the provisions of the final TSR relating to the national do-not-call registry. Such a revision would remove the problematic disparate treatment afforded to charitable as opposed to commercial telemarketers in the current version of the final TSR. However, such a revision clearly would not be as "narrowly tailored" as a return to the company-specific approach to do-not-call lists. Such a revision would not address the issue that as structured, the provisions of the national do-not-call registry amount to a prohibition on commercial free speech as opposed to a restriction upon commercial free speech.

The approach to curing any unconstitutionality in the final TSR that concerns ACA most would be any revision to the Final TSR that allowed the provisions of the national do-not-call registry to spread beyond the strict confines of telemarketing calls. As the international trade association for credit and collection professionals, ACA has a profound concern over any expansion of the national do-not-call registry that would prevent creditors or their agents from communicating with consumers in an effort to collect money for services previously rendered or goods previously delivered.

It is clear that there is no intent to regulate debt collection calls in the final TSR. 68 Fed. Reg. 4664, footnote 1020. However, as described above in Section IV of this brief, regulations at times take on lives of their own. This often includes expansion of the scope and applicability of the regulation in question. Expansion of the Final TSR to cover activities by creditors and their agents would wreak havoc upon the nation's credit and collection system.[8]

In the event that the scope of the Final TSR were ever expanded to include telephone calls from creditors and their agents, the most profound repercussion would be that consumers would then have the ability to initiate a transaction for goods or services, receive such goods or services, and then prevent any and all

[8] While ACA does not believe that such a regulation could pass constitutional muster, the potential for future amendments to the Final TSR necessitate a discussion of the ramifications of such a regulation herein.

collection calls simply by listing their telephone number on the national do-not-call registry. Obviously, such an expansion of the Final TSR would severely hinder the ability of creditors to receive payment for goods delivered and services rendered.

It is important to remember that collection calls from creditors and their agents are calls made in response to a transaction that has been initiated by the consumer. Unlike a telemarketing call, a collection call does not happen up front in an attempt to entice a consumer into a business transaction. Rather, a collection call occurs only after a consumer has initiated a transaction, the consumer has received the goods or services that are the subject of the transaction, and the consumer has failed to pay for the goods or services.

The Final TSR contemplates and addresses consumer-initiated transactions by exempting from the Final TSR telephone calls initiated by the consumer that are not the result of any solicitation. 16 C.F.R. §310.6(b)(4). Similarly, most telephone calls initiated by the consumer in response to direct solicitations that provided the consumer with specified disclosures are also exempt from the Final TSR. 16 C.F.R. §310.6(b)(6). As such, ACA respectfully suggests preventing the scope of the Final TSR from ever expanding to include telephone calls from creditors or their agents to collect money owed for consumer-initiated transactions. As shown above, maintaining this existing limitation on the scope of the Final TSR

comports with the manner in which the Final TSR already treats consumer initiated telemarketing transactions.

CONCLUSION

The provisions of the Final TSR relating to the establishment of the national do-not-call registry are unlike any prior government regulation on commercial free speech in that they allow a consumer to preemptively block all communications from a commercial telemarketer prior to the telemarketer even making an initial communication. This effectively blocks the flow of information prior to the consumer even being made aware of the content of the communications being blocked. This, together with the disparate treatment afforded to charitable as opposed to commercial telemarketers, raises concerns about the constitutionality of the Final TSR.

ACA suggests that the approach taken by the FDCPA in regulating third-party debt collection activities strikes the appropriate balance between the rights of consumers and commercial free speech rights. With the addition of the requirement for the transmission of Caller ID information in every telemarketing call, ACA further suggests that the company-specific approach to do-not-call lists also strikes such a balance.

In sum, the FDCPA and the company-specific approach to do-not-call lists both effect restrictions upon commercial free speech. On the other hand, the

provisions of the Final TSR relating to the national do-not-call registry allow for a complete prohibition of commercial free speech.

Based upon the above, ACA respectfully suggests that it is imperative that the scope and applicability of the provisions of the Final TSR remain strictly confined to telemarketing calls.

Dated this 28th day of October, 2003.

Respectfully submitted,

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Adam L. Plotkin
Adam L. Plotkin, P.C.
621 Seventeenth Street, Suite 2400
Denver, Colorado 80293
Telephone: (303) 296-3566
Facsimile: (303) 296-3544

ATTORNEYS FOR AMICUS CURIAE ACA INTERNATIONAL

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5.777 words. I relied on my word processor and its Microsoft Word 2002 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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Adam L. Plotkin

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2003, I served two (2) copies of the foregoing Brief of *Amicus Curiae* ACA International by placing same in the United States Mail, first class postage prepaid, addressed as follows:

Sean R. Gallagher, Esq.
Marianne N. Hallinan, Esq.
Hogan & Hartson, L.L.P.
1200 17th Street, Suite 1500
Denver, Colorado 80202

Robert Corn-Revere, Esq.
Ronald G. London, Esq.
Davis Wright Tremaine, L.L.P.
1500 K Street, NW Suite 450
Washington, D.C. 20005-1272

Douglas H. Green, Esq.
Thomas F. O'Neil, III, Esq.
Piper Rudnick, L.L.P.
1200 Nineteenth Street, N.W.
Washington, D.C. 20036-2412

Ian Heath Gershengorn, Esq.
Jenner & Block, L.L.C.
601 Thirteenth Street, N.W.
Washington, D.C. 20005

William E. Kovacic, Esq.
John L. Moore, Jr., Esq.
John F. Daly, Esq.
Lawrence DeMille-Wagman, Esq.
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Jacob M. Lewis, Esq.
Susan L. Launer, Esq.
Laurence N. Bourne, Esq.
Rodger D. Citron, Esq.
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Mark B. Stern, Esq.
Alisa B. Klein, Esq.
United States Department of Justice
Patrick Henry Building
601 D. Street, N.W.
Washington, D.C. 20530

James E. Nesland, Esq.
Jeffrey A. Smith, Esq.
Cooley Godward LLP
380 Interlocken Crescent, Suite 900
Broomfield, Colorado 80021

Deborah M. Zuckerman, Esq.
Michael R. Schuster, Esq.
AARP
601 E Street, N.W.
Washington, D.C. 20049

Bill Lockyer, Esq.
Manual Medeiros, Esq.
Richard M. Frank, Esq.
Herschel Elkins, Esq.
Ronald Reiter, Esq.
Albert Norman Sheldon, Esq.
Attorney General of the State of CA
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

Ken Salazar, Esq.
Alan J. Gilbert, Esq.
Garth C. Lucero, Esq.
Jan Michael Zavislan, Esq.
Maria E. Berkenkotter, Esq.
Andrew P. McCallin, Esq.
Attorney General of the State of CO
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____
Adam L. Plotkin