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Getting Down to Business:

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By Shannon D. Torgerson*

I. INTRODUCTION

¶1 In mid-2003, the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"), acting under congressional directives,[1] joined

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[1] FCC Report and Order, In the Matter of Rules and Regulations Implementing the Telephone

forces to create, implement, and maintain a national do-not-call registry to limit the 104 million telephone sales calls made to consumers each day.[2] By revising the FTC Telemarketing Sales Rule ("TSR")[3] and amending the FCC rules that implement the Telephone Consumer Protection Act ("TCPA"),[4] the agencies established the "Do-Not-Call Registry" ("the Registry"), which prohibits telemarketers from calling phone numbers listed in the Registry.[5]

¶2 However, both agencies permitted a number of exemptions for telemarketers. This note examines the reasoning behind the "established business relationship" ("EBR") exemption included in the revised TSR and TCPA rules and considers the potential challenges and consequences that may ensue. Part I of this note discusses the legislative history of the recent amendments to the TSR and TCPA and provides an overview of the Registry and its key exemptions. Part II examines the EBR exemption in detail and considers the shortcomings of the exemption within the context of wireless communication and facsimile devices. Finally, Part III addresses the EBR exemption's supporting arguments and contemplates the constitutional questions that ensue from a narrow reading of the EBR exemption.

II. No Solicitations: The Do-Not-Call Registry

A. Legislative Background

¶3 The FTC and FCC joint undertaking to create the Registry began in December 2002 when the FTC announced that the federal government would maintain a national do-not-call registry, which telemarketers would fund by paying fees to access the database.[6] Reacting to dramatic advances in telemarketing technologies since Congress enacted the TCPA in 1991 and the Telemarketing Act in 1994, the FTC amended its

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Consumer Protection Act of 1991, 18 F.C.C. Rcd. 14014, 14018-14028 (2003) [hereinafter FCC Report and Order].

[2] *Id*. at 14021.

[3] The Telemarketing Act of 1994 represented "congressional efforts to protect consumers against telemarketing fraud" and ordered the FTC "to issue a rule prohibiting deceptive and abusive telemarketing acts or practices." Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). The FTC issued the original Telemarketing Sales Rule (TSR) in 1995, and officially amended the TSR on January 29, 2003. Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, *Complying with the Telemarketing Sales Rule*, 4 (2003), *at* http://www.ftc.gov/bcp/conline/pubs/buspubs/tsrcomp.pdf (last visited Nov. 19, 2004) [hereinafter *Complying with the Telemarketing Sales Rule*]. With some exceptions, the TSR "regulates 'telemarketing'—defined in the Rule as 'a plan, program, or campaign . . . to induce the purchase of goods or services or a charitable contribution' involving more than one interstate phone call." *Id*. at 7.

[4] In an effort to curb "telemarketing practices thought to be an invasion of consumer privacy and even a risk to public safety," Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA). FCC Report and Order, *supra* note 1, at 14018. The FCC adopted rules implementing the TCPA in 1992. *Id*. at 14018-14019. On June 26, 2003, the FCC officially adopted revisions to the TCPA. *See generally id*. at 14014. Although the FTC's TSR covers interstate but not intrastate calls, FCC regulations apply to both types of calls. *Complying with the Telemarketing Sales Rule*, *supra* note 3, at 7.

[5] Federal Trade Commission, FTC Facts for Business, *Calling All Telemarketers: Amendments to the FTC's Telemarketing Sales Rule* 2 (March 2003) *at* http://www.ftc.gov/bcp/conline/pubs/buspubs/calling.pdf (last visited Nov. 19, 2004) [hereinafter *Calling All Telemarketers*]; FCC Report and Order, *supra* note 1, at 14017.

[6] FCC Report and Order, *supra* note 1, at 14023. *See also Complying with the Telemarketing Sales Rule*, *supra* note 3, at 38-40.

telephone sales rules "to better protect consumers from deceptive and abusive telemarketing practices, including those that may be abusive of consumers' interest in protecting their own privacy."[7]

¶4 In March 2003, Congress passed the Do-Not-Call Act, which required the FCC to "maximize consistency" with the FTC do-not-call registry rules.[8] Congress noted that, unlike the FTC, the FCC is bound by the TCPA.[9] Thus, Congress recognized that identical rules may not be possible in every instance, but these instances must be noted and addressed by the agencies or legislation.[10] Additionally, the FCC has broader jurisdiction over telemarketing practices than does the FTC.[11] For example, without FCC collaboration, an FTC do-not-call registry would not include common carriers,[12] airlines, insurance companies, and financial institutions.[13]

¶5 On June 26, 2003, the FCC formally adopted revisions to the TCPA, which included establishing a national do-not-call registry.[14] The next day, the FTC opened registration and allowed consumers to list their phone numbers in the Registry.[15]

B. The Do-Not-Call Registry

¶6 Under the rules that established the Registry, consumers may opt to register their phone numbers, and telemarketers, with some exceptions, may not call those numbers.[16] Recognizing that some consumers do not object to receiving sales calls, both the FTC and the FCC retained their requirements for telemarketers to maintain company-specific do-not-call lists for those who do not opt to list their phone numbers in the Registry.[17] These consumers may request individual companies to refrain from calling.[18] Since its inception during the summer of 2003, the Registry has attracted the attention of millions of U.S. citizens; consumers registered over sixty-two million phone numbers as of June 2004.[19] The FTC began enforcing telemarketer compliance with the Registry on October 1, 2003.[20]

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[7] FCC Report and Order, *supra* note 1, at 14023. *See also id*. at 14017-14032; Telemarketing Sales Rule, 68 Fed. Reg. at 4580-4582.

[8] FCC Report and Order, *supra* note 1, at 14027; FCC Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44154 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 and 68) [hereinafter FCC Rules and Regulations].

[9] FCC Report and Order, *supra* note 1, at 14027.

[10] *Id*.

[11] *Id*.

[12] Within the telecommunications industry, the term "common carriers" refers to telecommunication service providers.

[13] FCC Report and Order, *supra* note 1, at 14023.

[14] Press Release, Federal Communications Commission, FCC Authorizes National Do-Not-Call Registry (June 26, 2003), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235841A1.doc (last visited Nov. 21, 2004).

[15] Press Release, Federal Trade Commission, National Do Not Call Registry Opens (June 27, 2003), *at* http://www.ftc.gov/opa/2003/06/donotcall.htm. The registration process can be viewed at https://www.donotcall.gov/ (last visited Nov. 21, 2004).

[16] FCC Report and Order, *supra* note 1, at 14034-14049.

[17] *Id*. at 14018.

[18] *Id*.

[19] Press Release, Federal Trade Commission, National Do Not Call Registry Celebrates One-Year Anniversary (June 24, 2004), *at* http://www.ftc.gov/opa/2004/06/dncanny.htm (last visited Nov. 19, 2004).

[20] FCC Rules and Regulations, *supra* note 8, at 44144. *See also Calling All Telemarketers*, *supra* note

¶7 Telemarketers, attempting to retain control over a practice that generates an estimated $600 billion annually,[21] have challenged the Registry in the courts. In *U.S. Security v. FTC*, decided in September 2003, several telemarketing companies and the Direct Marketing Association[22] sought to enjoin the FTC from enforcing the Registry and other provisions of the revised TSR.[23] Plaintiffs argued that 1) the FTC did not have an "unambiguous grant of authority by Congress" to establish the registry, and 2) the Registry "presents a serious or grave constitutional question."[24] Thus, argued the plaintiffs, "the FTC's actions are entitled to no deference."[25] Finding for the plaintiffs, the U.S. District Court of the Western District of Oklahoma held that Congress had not authorized the FTC to establish a do-not-call registry.[26]

¶8 However, within days of the *U.S. Security* decision, a unanimous Senate gave the FTC express authorization to implement the Registry, the House voted 412-8 in favor of authorization, and President Bush signed the legislation on September 29, 2003.[27]

¶9 Just hours after this legislative boon for consumers, however, in *FTC v. Mainstream Marketing Services*, the U.S. District Court for the District of Colorado declared the national Do-Not-Call Registry unconstitutional and prohibited the FTC from implementing the Registry.[28] But just days later, the Tenth Circuit Court of Appeals granted the FTC's request to stay the district court's order.[29] The appellate court found a substantial government interest in "preventing abusive and coercive sales practices,"[30] and held that the FTC "established a likelihood of success on its contention that the do-not-call list bears a reasonable fit with these interests."[31] On February 17, 2004, the Tenth Circuit reversed the district court's order, and held that the Registry "is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech."[32] In October 2004, the U.S. Supreme Court rejected the telemarketers' appeal and thus ended the legal challenges to the Registry.[33]

5, at 2.

[21] FCC Report and Order, *supra* note 1, at 14021.

[22] Founded in 1917, the Direct Marketing Association (DMA) is the largest trade association for direct marketing businesses. Direct Marketing Association, *What is the Direct Marketing Association?*, *at* http://www.the-dma.org/aboutdma/whatisthedma.shtml (last visited Nov. 19, 2004). The DMA represents the interests of its 4700 member companies, which include consumer and business-to-business marketers, commercial and nonprofit marketers, companies that serve as vendors to marketers, and companies from the U.S. and fifty-three foreign nations. *Id*.

[23] U.S. Security v. FTC, 282 F. Supp. 2d 1285, 1289 (W.D. Okla. 2003).

[24] *Id*. at 1290 (citing U.S. West v. FCC, 182 F.3d 1224, 1231 (10th Cir. 1999)).

[25] *Id*.

[26] *Id*. at 1292.

[27] Press Release, President Signs Do Not Call Registry (Sept. 29, 2003), *at* http://www.whitehouse.gov/news/releases/2003/09/20030929-10.html (last visited Nov. 21, 2004).

[28] FTC v. Mainstream Marketing Services, Inc., 345 F.3d 850, 851 (10th Cir. 2003).

[29] *Id*. at 860.

[30] *Id*. at 855.

[31] *Id*.; *see also id*. at 860-861.

[32] Mainstream Marketing Services, Inc. v. FTC, 358 F.3d 1228, 1233 (10th Cir. 2004). For a concise summary of the legal history, see *10th Circuit Upholds Constitutionality of Do Not Call Registry*, TECH LAW JOURNAL, Feb. 17, 2004, *at* http://www.techlawjournal.com/topstories/2004/20040217.asp (last visited Nov. 19, 2004).

[33] Robert S. Greenberger, *High Court Won't Revisit Damages*, WALL ST. J., Oct. 5, 2004, at A6.

¶10 Meanwhile, amidst the excitement and debate over the Do-Not-Call Registry, key components of the revised FTC and FCC rules that established the Registry have received little attention. In revising the TSR and TCPA the agencies provided, in addition to the Registry, several commendable pro-consumer mandates for telemarketers.[34] For example, in an effort to reduce the number of "hang-ups"[35] and "dead air"[36] calls that frustrate and frighten consumers, the FCC limited the abandoned call rate for automated telephone dialing equipment to three percent of calls answered by a person,[37] and mandated that prerecorded information identifying the caller must accompany the abandoned call.[38] Additionally, both the revised TSR and TCPA require telemarketers to transmit caller identification ("caller ID") information, if available.[39]

C. Exemptions from the Do-Not-Call Registry

¶11 A number of exemptions permit certain types of unsolicited sales calls and unsolicited facsimile advertisements even if the called number is listed in the Registry.[40]

1. Exemption for Tax-Exempt, Nonprofit Organizations

¶12 The TCPA specifically excludes calls or messages by a tax-exempt nonprofit organization from the definition of telephone solicitations.[41] In similar fashion, the TSR exempts charitable organizations.[42] Arguably, unsolicited calls from nonprofit organizations create the same inconveniences as do unsolicited calls from for-profit

[34] *See generally* FCC Report and Order, *supra* note 1, at 14017-14018.
[35] Telemarketing operations often use automated telephone dialing technologies that dial telephone numbers at intervals based on calculations that predict when a sales representative will be available. *See* FCC Rules and Regulations, *supra* note 8, at 44161. An auto-dialer can immediately connect a sales representative to a new sales call when the system indicates that he or she has become available. Although the calculations for agent availability rely on advanced statistical models, the calculations are, nonetheless, merely predictions. Occasionally, the automated equipment dials a phone number and no sales representative is available. The auto dialer disconnects the call when the consumer answers the phone. Although consumers widely refer to these calls as "hang-ups," the FTC and the FCC refer to them as "abandoned calls." However, in a call center, an "abandoned call" is an inbound call in which a caller waiting on hold hangs up before speaking to an agent.
[36] Similarly, upon answering the phone, a consumer may be greeted with silence or "dead air" for several seconds while the automated dialing system connects the call to a sales representative. The revised FTC and FCC rules consider a call abandoned if it is not transferred to a sales representative within two seconds of the called party's greeting. *See id*. at 44164; Telemarketing Sales Rule, 68 Fed. Reg. at 4641.
[37] The FTC prohibited abandoned calls altogether, but provided a "safe harbor" if the telemarketer meets certain requirements, such as abandoning no more than three percent of calls. Telemarketing Sales Rule, 68 Fed. Reg. at 4642. The FCC established virtually the same rule for abandoned calls, but instead of banning all such calls and providing a "safe harbor," it simply prohibited abandoning more than three percent of calls. FCC Rules and Regulations, *supra* note 8, at 44164.
[38] FCC Report and Order, *supra* note 1, at 14017; Telemarketing Sales Rule, 68 Fed. Reg. at 4623.
[39] FCC Rules and Regulations, *supra* note 8, at 44166. *See also Complying with the Telemarketing Sales Rule, supra* note 3, at 47. Effective January 29, 2004, telemarketers may no longer block caller identification information. *Id*.
[40] FCC Report and Order, *supra* note 1, at 14039-14046; Telemarketing Sales Rule, 68 Fed. Reg. at 4628-4638.

[41] 47 U.S.C. § 227(a)(3) (2004).
[42] Telemarketing Sales Rule, 68 Fed. Reg. at 4637.

entities.[43] However, legislative history, by emphasizing that "commercial calls constitute the bulk of all telemarketing calls,"[44] seems to reveal congressional intent to exempt such calls. Moreover, evidence suggests that "calls from nonprofit organizations are less intrusive to consumers because they are more expected."[45] Thus, Congress has reasoned that excluding calls from tax-exempt nonprofit organizations is "both rational and related to" protecting residential privacy.[46] Calls from nonprofit organizations do not significantly contribute to the primary dilemma—sales calls that are unexpected and overwhelming in number.[47]

2. Exemption for Personal Relationships

¶13 The FCC's personal relationship exemption permits unsolicited sales calls to individuals personally known to the caller.[48] Presumptively, a sales call from a relative who sells Tupperware is more welcome and less frequent than calls from unknown businesses using predictive dialers and other call center technologies.[49] However, the FCC declined to extend the personal relationship exemption beyond persons who know the caller.[50] Thus, "referrals to persons that do not have a personal relationship with the marketer will not fall within the category of calls discussed above."[51]

¶14 The test for a personal relationship with the called party includes "whether a reasonable consumer would expect calls from such a person because they have a close or, at least, a firsthand relationship. . .[and] a strong presumption against those marketers who make more than a limited number of calls per day."[52] These criteria also reflect the reasoning behind the exemption for tax-exempt nonprofit organizations: the calls from these types of entities are more expected and less voluminous than random telemarketing solicitations.[53]

¶15 It remains to be seen how the limited scope of this exemption will affect businesses that rely primarily on referrals. The terms "network marketing," or "relationship marketing," are often used to describe referral-based business models. Many of these business plans focus on home-based, independent-contractor situations that may provide extra sources of income for students and homemakers.[54] Obtaining referrals expands the customer base beyond personal acquaintances and offers the incentive to provide high quality service to current customers.

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[43] *See id*.
[44] FCC Report and Order, *supra* note 1, at 14044 (citing H.R. REP. NO. 102-317, at 16 (1991)).
[45] *Id*. at 14055 (citing H.R. REP. NO. 102-317 at 16 (1991)).
[46] *Id*.
[47] *Id*.
[48] *Id*. at 14045-14046.
[49] *See id*. at 14175 (Separate Statement of Commissioner Kathleen Q. Abernathy. "I believe the record shows that Congress was concerned about anonymous calls using autodialers; it did not intend to put the Avon Lady out of business. Consumers generally expect and welcome calls from family, friends, and acquaintances who want to promote products and services. Restricting such calls therefore would impose a more extensive burden on speech than is necessary to achieve Congress' goals.").
[50] FCC Rules and Regulations, *supra* note 8, at 44149.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *See, e.g.,* Michael L. Sheffield, *Direct Sales vs. Network Marketing*, ENTREPRENEUR.COM (May 19, 2003) *at* http://www.entrepreneur.com/article/0,4621,308813,00.html (last visited Nov. 19, 2004).

¶16 The limited scope of the personal relationship exemption forces businesses to create new ways of building customer bases and developing business relationships. Undoubtedly, this places heavy burdens on some operations. However, extending the personal relationship exemption to include third-party referrals would open the door for abuse of the exemption. Large telemarketing operations could easily use vague relationship chains to dramatically increase their number of permitted sales calls.

¶17 Unlike the FCC, in amending the TSR the FTC did not include a personal relationship exemption.[55] Instead it indicated that it "does not contemplate enforcing the National Do Not Call Registry provisions against individuals who make sales calls out of their own homes to personal friends, family members, or small numbers of personal referrals."[56] The FCC's personal relationship exemption more effectively addresses the desire to permit sales calls from family or friends by expressly exempting such calls, rather than simply stating that it will not enforce the rules in certain situations. However, the conflict between the FCC rule and the questionable FTC policy on personal relationship sales calls poses a problem only in the case of interstate calls since the FCC exemption covers interstate calls.[57] And, as the FTC anticipates, most sales calls made by friends and family members "probably would be local or 'intrastate' calls."[58]

3. Miscellaneous Exemptions

¶18 The FCC's Prior Express Permission exemption permits sellers to call consumers who have previously authorized them to do so.[59] The FTC similarly permits a telemarketer to call a phone number listed on the Registry if the consumer has provided the telemarketer with express written permission.[60]

¶19 Additionally, the statutory definition of "telephone solicitation" does not include calls made for market or survey research, or political or religious speech calls.[61] As these calls would not be considered "unsolicited," "sales calls," or "advertisements," these exclusions are not within the scope of this note and will not be discussed in detail.[62]

¶20 As discussed, the exemptions for tax-exempt, nonprofit organizations and personal relationships offer balanced solutions that limit the number of intrusive sales calls but do not prohibit the types of sales calls that consumers would be more likely to expect or welcome. However, as discussed in the next section, the Established Business Relationship exemption disrupts this balance and tips the scales in favor of the telemarketer.

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[55] Although Congress indicated that the FCC and FTC must "maximize consistency" in their telesales rules, it did not require the agencies to have identical rules. FCC Report and Order, *supra* note 1, at 14027; FCC Rules and Regulations, *supra* note 8, at 44144; *see* discussion *infra* pp. 3-4.

[56] *Complying with the Telemarketing Sales Rule*, *supra* note 3, at 41.

[57] *Id*.

[58] *Id*.

[59] FCC Report and Order, *supra* note 1, at 14043-14044.

[60] Telemarketing Sales Rule, 68 Fed. Reg. at 4629.

[61] FCC Report and Order, *supra* note 1, at 14040.

[62] 47 U.S.C. § 227(a)(3)(2004); FCC Report and Order, *supra* note 1, at 14039-14040.

III. The Revised Established Business Relationship Exemption

A. What and Why

¶21 The TCPA rules previously defined the "established business relationship" as:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[63]

¶22 The FCC Order amended the TCPA's definition of an established business relationship and defined it as:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.[64]

¶23 The FCC created this exemption from the Registry because it acknowledged that sellers should have the ability to contact their existing customers, and such customer contact "is an important aspect of [a seller's] business plan and often provides consumers with valuable information regarding products or services that they may have purchased from the company."[65] Additionally, consumers who had previously done business with a company "could expect to receive a call from [that entity] in an effort to 'win back' or 'renew' that consumer's business within 18 months."[66]

¶24 In revising the TSR, the FTC included a similar Established Business Relationship exemption, although the proposed rule had not included such an exception. Initially, the FTC sought to limit "exemptions in order to provide consumers with the most comprehensive privacy protection possible."[67] However, telemarketers strongly advocated including an exemption for established business relationships and persuaded the FTC that the "benefits of including [the exemption] outweigh the costs."[68]

¶25 Both the FCC and the FTC rely on the sufficiency of company-specific do-not-call lists: if consumers do not wish to receive unsolicited sales calls from parties with whom

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[63] 47 C.F.R. § 64.1200(f)(4)(2004).
[64] 47 C.F.R. § 64.1200(f)(3)(2004).
[65] FCC Report and Order, *supra* note 1, at 14043.
[66] *Id*. at 14080.
[67] Telemarketing Sales Rule, 68 Fed. Reg. at 4633.
[68] *Id*. at 4634.

they have an established business relationship, they may notify the callers prior to or during the sales calls.[69] The businesses must maintain a record, such as a company-specific do-not-call list, of these requests and refrain from calling again.[70]

B. Practical Problems with the EBR Exemption

¶26 The average consumer has a daunting number of established business relationships. These include relationships with multiple banks, credit card companies, insurance companies, investment brokers, phone companies, cable companies, internet service providers, utilities, magazine publishers, hotels, airlines, and travel agencies. They include relationships established when ordering items from catalogs, filling out contact information when using coupons, entering a drawing or sweepstakes, submitting information for a product warranty, and inquiring about a product or service.[71] Today, nearly every business entity that consumers encounter records purchase and/or contact information.

¶27 While the EBR exemption merely inconveniences residential landline[72] customers, it heightens financial, safety, and privacy concerns when extended to mobile devices or other communication tools for which consumers bear a burden of cost for each advertisement or sales call received.[73]

1. Applicability to Wireless Numbers

¶28 Markedly, neither the TCPA nor the FCC expressly states whether the EBR exemption applies to wireless devices.[74] The FCC makes clear that it has not prohibited "all live telephone solicitations to wireless numbers."[75] However, the TCPA does not permit live sales calls to wireless numbers using automated dialing equipment,[76] nor does it permit calls to wireless numbers using artificial voice technologies or prerecorded messages.[77] Moreover, the Direct Marketing Association ("DMA") urges its members to refrain from making any type of unsolicited sales calls to any wireless number, even if this mandate "go[es] beyond federal law."[78]

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[69] FCC Report and Order, *supra* note 1, at 14043.

[70] *Id*.

[71] The FTC cautions consumers to "carefully read any questionnaires or surveys you submit; they may be an attempt to establish a business relationship. Also be careful to read anything you sign, such as sweepstakes forms or requests for 'free' products; they may be attempts to get your written permission." Federal Trade Commission, FTC Facts for Consumers*, You Make the Call: The FTC's New Telemarketing Sales Rule* 2 (Dec. 2003), *at* http://www.ftc.gov/bcp/conline/pubs/tmarkg/donotcall.pdf (last visited Nov. 19, 2004) [hereinafter *You Make the Call*].

[72] "Landline" or "wireline" phones are traditional telephone lines.

[73] E.g., wireless phones and fax machines.

[74] Direct Marketing Association, *Marketing Mistakes: Reaching Wireless Devices*, *at* http://www.the-dma.org/guidelines/wirelessmarketing.shtml (last visited Nov. 19, 2004).

[75] FCC Rules and Regulations, *supra* note 8, at 44165.

[76] *Id*.

[77] *Id*. As the FCC expressly states, "Both the [TCPA] and our rules prohibit these calls, with limited exceptions, 'to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.' 47. U.S.C. 227(b)(1)(A)(iii)(2004). This encompasses both voice calls and text calls to wireless numbers." *Id*.

[78] Direct Marketing Association, *supra* note 74.

¶29 However, it seems likely that if the FCC had meant to limit the EBR exemption to landline phones, it would have expressly done so. The FCC has avoided "unduly restrict[ing] telemarketers' ability to contact those consumers who do not object to receiving telemarketing calls and use their wireless phones as either their primary or only phone"[79] by not restricting all sales calls to wireless numbers.[80] Rather, the FCC states that listing wireless numbers in the Registry or relying on company-specific do-not-call lists should suffice to limit burdensome sales calls.[81]

¶30 Additionally, in allowing wireless consumers to list their numbers in the Registry, the FCC found that defining "residential subscribers" as "telephone service used primarily for communications in the subscriber's residence" too narrowly construes congressional intent to protect telephone customers.[82] The FCC reasons that if "Congress had intended to exclude wireless subscribers from the benefits of the TCPA, it knew how to address wireless services or consumers explicitly."[83] Similarly, if the FCC had wished to eliminate the EBR exemption for wireless devices, it seems likely that it unambiguously would have done so.

¶31 Assuming that the EBR exemption is applicable to wireless devices, several arguments support making the EBR exemption inapplicable. Historically, more stringent rules have applied for unsolicited calls made to wireless devices. Congress, by means of statute, "has indicated its intent to provide significant protections under the TCPA to wireless users."[84] As discussed, the TCPA prohibits calls made by automatic dialing systems and calls with prerecorded messages to any wireless phone number, or to any device "for which the called party is charged for the call."[85]

¶32 In justifying its ban on all auto-dial and prerecorded calls to wireless numbers, the FCC noted that automated dialing systems or prerecorded calls pose a "greater nuisance and invasion of privacy than live solicitation calls"[86] and stated that "such calls can be costly and inconvenient,"[87] yet declined to issue a blanket prohibition of live unsolicited sales calls to wireless devices.[88] However, it remains debatable whether auto-dialed[89] or prerecorded calls are more intrusive than unexpected sales calls made by a live agent; indeed, a live agent has the potential to be even more aggressive or demanding than a prerecorded message.

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[79] FCC Report and Order, *supra* note 1, at 14116.
[80] FCC Rules and Regulations, *supra* note 8, at 44165.
[81] *Id*.
[82] FCC Report and Order, *supra* note 1, at 14037-14038.
[83] *Id*. at 14038.
[84] *Id*. at 14037-14038 (citing 47 U.S.C. § 227(b)(1)(iii)).
[85] 47 U.S.C. § 227(b)(1). Absent any prior express request from the called party that the business entity refrain from calling, but subject to certain identification and abandoned call criteria, automatic dialing systems may be used to call landline numbers. FCC Report and Order, *supra* note 1 at 14101-14110. Similarly, prerecorded calls from entities with whom the called party has an EBR are also permitted to landline numbers. *Id.* at 14108-14109.
[86] FCC Report and Order, *supra* note 1, at 14115.
[87] *Id*.
[88] *Id*. at 14116.
[89] 47 U.S.C. § 227(a)(1) defines the term "automatic telephone dialing system" as "equipment which has the capacity A) to store or produce telephone numbers to be called, using a random or sequential number generator; and B) to dial such numbers."

¶33 Moreover, regardless of whether the call is dialed by an automatic system or by an agent who manually dials the phone number, both types of calls are costly and inconvenient to the wireless phone customer. Some telemarketers have argued that, in some cases, "the incremental cost of receiving a cell phone call is not significantly different from the cost of receiving a non-cellular call."[90] But, as consumer groups and the FCC agree, "telemarketers have no way to determine how consumers are charged for their wireless service."[91] Furthermore, consumers with wireless plans that charge a fixed rate for an allotted number of minutes still bear the cost of sales calls that use a portion of the allotted minutes.[92] As the FCC acknowledged, these minutes "could be exceeded more quickly if consumers receive numerous unwanted telemarketing calls."[93]

2. Facsimile Advertisements

¶34 The regulation of unsolicited advertisements to fax machines should correspond to the regulation of unsolicited sales calls to wireless devices.[94] Incurring time-based charges for usage is directly analogous to the fax context:[95] "just as unsolicited faxes impose the unavoidable and objectively measurable costs of paper and ink on the recipient, so too do unsolicited"[96] calls to wireless devices for which subscribers incur monetary costs, or pay via loss of allotted usage time. Thus, in both instances, consumers bear the burden of the cost of the call. Similarly, faxed advertisements and sales calls to wireless devices pose greater threats of inconvenience to the recipients than do telemarketing calls to non-mobile landline phones.

¶35 The TCPA prohibits faxing any unsolicited advertisement to a fax machine[97] without obtaining prior express permission in writing with the recipient's signature.[98] The FCC's recent amendments to the TCPA reversed the prior rule, which had permitted an entity to fax unsolicited advertisements to recipients with whom the entity had an established business relationship.[99] The revised rule states that an established business relationship alone is no longer sufficient, nor does an "opt-out"[100] scheme provide adequate permission.[101] Effectively, the recipient must "opt-in" and agree to receive fax advertisements by giving prior written consent.[102] As the FCC notes, "[U]nlike the do-not-call list for telemarketing calls, Congress provided no mechanism for opting out of unwanted facsimile advertisements. Such an opt-out list would require the recipient to

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[90] FCC Report and Order, *supra* note 1, at 14114.
[91] FCC Rules and Regulations, *supra* note 8, at 44165.
[92] *Id*.
[93] *Id*.
[94] Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 11 BERKELEY TECH. L.J. 233, 277 (1996).
[95] *Id*.
[96] *Id*.
[97] 47 U.S.C. § 227 (b)(2)(c).
[98] FCC Report and Order, *supra* note 1, at 14126.
[99] *Id*. at 14127.
[100] "Opt-out" schemes imply consent by presumption unless the recipient gives other instructions. *Id*. at 14127-30.
[101] *Id*.
[102] *Id*. at 14128.

possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender."[103]

3. Differences between Wireless and Facsimile

¶36 Prior to the Order, the established business relationship had no limits of duration.[104] Recognizing that consumers felt frustrated and confused by numerous sales calls from companies with whom they had not done business in years, and also striving to reconcile rules with those of the FTC when possible, the FCC adopted the 18-month limit for the EBR exemption.[105]

¶37 However, on August 18, 2003, the FCC extended the effective date to January 1, 2005, for the "determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements."[106] A number of organizations indicated that they needed time to secure written permission from current recipients of their faxed advertisements.[107] Then, in order to permit sufficient time to consider petitions for reconsideration,[108] on September 26, 2003 the FCC stayed, "for an interim period, the limitations imposed. . . on the duration of an established business relationship as applied to the sending of unsolicited facsimile advertisements."[109] The FCC noted that the Order's definition of the established business relationship was chiefly limited to telephone, not facsimile, solicitations.[110]

¶38 Nonetheless, there are key similarities in the reasoning behind the FCC's revision to the EBR exemption for faxed advertisements and the argument that the EBR exemption should be inapplicable to wireless numbers. Moreover, the differences between fax machines and wireless devices justify additional measures of protection for wireless users. The need for these measures supercedes the arguments for staying the EBR exemption rules for faxed advertisements.

¶39 First, unsolicited sales calls are "intrinsically more invasive of privacy" than other unsolicited messages[111] because "a junk call requires an immediate response."[112] Second, the very nature of mobile communication technologies makes unsolicited sales calls to these devices more intrusive, inconvenient, and dangerous than similar calls made to stationary, landline residential phones.[113] Thus, whereas an unsolicited fax advertisement inconveniences the consumer and forces the consumer to bear the associated costs, an unsolicited sales call to wireless devices impose on the consumer the same cost burden, but additionally pose safety risks and greater inconveniences.

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103 *Id.*
104 *See* 47 C.F.R. § 64.1200(f)(4).
105 FCC Rules and Regulations, *supra* note 8, at 44158.
106 FCC Order, 2003 WL 21961003 (Aug. 18, 2003).
107 *Id.*
108 FCC Order, 2003 FCC Lexis 5369, 3 (Oct. 3, 2003).
109 *Id.* at 1.
110 *Id.* at 4.
111 Carroll, *supra* note 94, at 246.
112 *Id.*
113 *See* FCC Report and Order, *supra* note 1, at 14116.

¶40 The majority of consumer groups who responded to the FCC's Notice of Proposed Rulemaking advocated prohibiting all telemarketing calls to wireless numbers.[114] Reasoning that making telemarketing calls to wireless phones is not a widespread practice at this time, the FCC ruled that the Registry would sufficiently limit the number of unsolicited sales calls made to wireless phones.[115] But, as discussed next, this policy does not adequately reflect changes in the marketplace that seem likely to increase the number of sales calls to wireless devices.

4. Potential Changes to the Wireless Market

¶41 Relying on company-specific do-not-call lists as the sole means of managing EBR-exempted telemarketing calls to wireless numbers forces the consumer to pay the cost of each initial call. As noted previously, the number of initial calls from each entity with whom a consumer has an established business relationship could be staggering. Furthermore, even if telemarketing to wireless phones is not currently a widespread practice, telemarketing calls to wireless phones will undoubtedly become more frequent due to the November 24, 2003 implementation of the FCC's local number portability rule.[116] This rule allows customers to retain their phone number if they change wireless service providers or switch their local exchange carrier to a wireless provider.[117]

¶42 The FCC estimated initially that "six million customers may 'port' their landline number to their cellular phone within the first week alone."[118] However, although customers had ported 3.5 million numbers as of May 2004, most of these changes involved switching from one wireless carrier to another.[119]

¶43 This does not suggest that the wireless and landline markets will not change dramatically in the near future. On May 24, 2004, the number portability requirements, which had previously applied to telecommunications markets in the 100 largest U.S. cities, expanded to cover the entire country.[120] Moreover, a recent study conducted by a telephone service provider indicates "that more than sixteen percent of Local Exchange Carriers' residential customers would definitely or probably 'port' their landline number to a cellular provider."[121] As customers edge toward relying primarily on wireless devices, the FCC notes that, due to the rules that have for over twelve years prohibited telemarketers from making calls to wireless devices by means of automatic dialing

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[114] *Id.* at 14114.

[115] *Id.* at 14113.

[116] Press Release, Federal Communications Commission, Statement of Commissioner Kathleen Q. Abernathy On the Implementation of Wireless Local Number Portability (Nov. 24, 2003), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241537A1.doc (last visited Nov. 19, 2004).

[117] *Id.*

[118] Direct Marketing Association, *Number Portability Could Mean Lawsuits for Marketers*, *at* http://www.the-dma.org/cgi/dispnewsstand?article=1660 (last visited Nov. 30, 2003).

[119] Press Release, Federal Communications Commission, FCC Chairman Powell: Another 70 Million Americans to Have Freedom to Switch Wireless Carriers and Keep Their Phone Number on Monday (May 21, 2004), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-247463A1.doc (last visited Nov. 19, 2004).

[120] *Id.*

[121] Direct Marketing Association, *supra* note 118.

systems and prerecorded messages, telemarketers have developed technologies that identify wireless numbers.[122]

¶44 Eliminating the EBR exemption from wireless and fax communications devices would not, by any means, prohibit consumers from receiving sales or advertising information. Willing wireless or fax consumers may refrain from listing their numbers in the Registry, or may give businesses express written permission to fax advertisements or place sales calls to their wireless devices. Nonetheless, telemarketers undoubtedly will oppose the views advanced in this section by raising constitutional questions. The following section discusses the primary countering arguments.

¶45

IV. Defending the Indefensible? Addressing the Opposing Arguments

A. Constitutional Issues

¶46 Certainly, constitutional questions arise if the EBR exemption applies to landline calls only. The logical argument begins with the First Amendment, which decrees, "Congress shall make no law . . . abridging the freedom of speech."[123] The Court extends the First Amendment provisions to commercial speech, but subjects it to a three-prong test, as outlined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[124] In *Central Hudson*, the Supreme Court defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."[125] Under the *Central Hudson* criteria,[126] the courts must assess whether the government has a substantial interest in prohibiting businesses from making unwanted sales calls to wireless numbers, whether the prohibition directly advances the government interest, and whether the prohibition is narrowly-tailored for advancing that interest.[127]

1. Substantial Government Interest

¶47 The government has substantial interests in prohibiting unwanted telemarketing efforts where consumers bear the burden of the cost of the call. The primary interest in regulating telemarketing calls is the protection of individual privacy in the home.[128] Because "consumers lose an estimated $40 billion each year due to telemarketing fraud,"

[122] FCC Report and Order, *supra* note 1, at 14116.

[123] Scot M. Graydon, *Much Ado About Spam: Unsolicited Advertising, The Internet, and You*, 32 St. MARY'S L.J. 77, 90 (2000) (citing U.S. CONST. amend. I).

[124] *Id.*

[125] *Id.* at 92 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980)).

[126] *Cent. Hudson*, 447 U.S at 566. This landmark case established the factors used to determine the scope of First Amendment provisions for commercial speech. The Court must ask whether the speech concerns lawful activity and is not misleading, "whether the asserted government interest is substantial,. . .whether the regulation directly advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* The case involved a complete ban on "promotional advertising by an electrical utility." *Id.* at 558. The Court found that completely prohibiting such advertising was a measure more extensive than necessary because it suppressed speech that did not impair the government interest in energy conservation. *Id.* at 570-572.

[127] *See id.* at 566.

[128] Carroll, *supra* note 94, at 271.

Congress "authorized the FTC to prohibit sales calls that a reasonable consumer would consider coercive or abusive to his or her right to privacy."[129] The Supreme Court has "held that individuals are not required to welcome unwanted speech into their homes and the government may protect this freedom,"[130] and that the right of individuals to be left alone in the privacy of their homes "plainly outweighs the First Amendment rights of the intruder."[131]

¶48 Second, in justifying its efforts to curb telemarketing practices, the FCC noted, "Consumers often feel frightened, threatened, and harassed by telemarketing calls. They are angered by hang-ups and "dead air" calls, by do-not-call requests that are not honored, and by unsolicited fax advertisements."[132] These consumer concerns are heightened when intrusive, unsolicited sales calls or advertisements are made to wireless phones or fax lines. Third, consumers pay for each call to these devices, by forfeiting minutes from a pool of allotted usage minutes, or by suffering actual monetary losses, such as maintenance costs for fax machines, or per-call charges for wireless services.[133] A call to a wireless number from an entity with whom the customer has an established business relationship is just as costly as random sales calls made to the same wireless number.

¶49 Fourth, as discussed, calls to mobile, wireless devices pose greater safety concerns than do calls made to stationary landline devices. Many wireless customers pay for these services in order to receive vital calls. Thus, simply turning off the ringer or choosing not to answer an incoming call may not be a desirable option, even if taking the call inconveniences the recipient.

2. Directly Advances Government Interest

¶50 Rendering the EBR exemption inapplicable to wireless numbers directly advances the government interests discussed above. By listing their wireless numbers in the Registry, consumers have indicated that they do not wish to receive unsolicited sales calls. However, the EBR exemption permits a number of unwanted sales calls. These calls may occasionally inconvenience the landline customer; for the wireless customer, these calls become not only an inconvenience but an expense. Thus, making the EBR exemption inapplicable to wireless devices is an effective measure for protecting the consumer's privacy and financial interests.

3. No More Extensive than Necessary

¶51 A government determination that a mode of communication should be completely free from unwanted commercial solicitations is permissible "if necessary to avoid unfair cost-shifting."[134] Nonetheless, the FCC permits business entities with whom called parties have an established business relationship to call landline numbers, obtain

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[129] Mainstream Marketing Services, Inc. v. FTC, 358 F.3d 1228, 1235 (10th Cir. 2004).

[130] FCC Rules and Regulations, *supra* note 8, at 44152 (citing Frisby v. Schultz, 487 U.S. 474, 485 (1988)).

[131] *Id.* (citing FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978)).

[132] FCC Report and Order, *supra* note 1, at 14017.

[133] *See* Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995).

[134] Carroll, *supra* note 94, at 277.

customer consent to call wireless numbers, or reach their customers via other modes, such as e-mail or regular mail. The Supreme Court has rejected the notion that the *Central Hudson* test for measures "no more extensive than necessary" requires the absolute least-restrictive means.[135] Rather, the regulation must be a reasonable fit.[136]

¶52 Prohibiting the EBR exemption within the wireless context is a narrowly-tailored, reasonable means for meeting the government's interest in protecting wireless subscribers from the burden and inconvenience of unwanted telemarketing efforts. Neither the TCPA nor the TSR prohibit, *per se*, sales calls to wireless phones. Consumers who wish to receive these calls may do so by opting not to list their numbers in the Registry. Limiting the EBR exemption to landline calls or calls to devices for which the recipient does not bear the burden of cost merely ensures that consumers do not receive sales calls that they must pay for, absent an express declaration of desire to receive such calls.

¶53 Nothing precludes businesses from making sales calls to their customers who have given express permission. Obviously, an entity who calls a customer with whom a business relationship has been established has acquired that customer's contact information. In acquiring such information, it is not unduly burdensome to also ask for a customer's affirmative consent to receive occasional sales offers at the number provided, even if such number is associated with a wireless device.

¶54 Establishing this new policy may impose costs on businesses that must obtain, via mail or e-mail, consent from current customers. Nonetheless, telemarketers—not the recipients—should bear the costs associated with telephone sales pitches. However, opponents of the Registry could argue that requiring businesses to obtain customers' consent represents yet another economic blow to telemarketers. The discussion below outlines some of the general economic arguments raised by Registry challengers.

B. Economic Concerns

¶55 Telemarketers concerned with economic effects of the Registry have focused little attention on the potential losses that would result from prohibiting unsolicited sales calls to wireless devices. Likely, although the majority of sales calls currently are made to traditional landline phones, a ban on such calls to wireless devices would be perceived as yet another Registry-related economic blow.

¶56 As noted earlier, some data suggest that the telemarketing industry generates as much as $600 billion annually.[137] However, other figures indicate that the number is considerably lower. The Direct Marketing Association estimates that four million telemarketers generate about $100 billion in revenue each year.[138] To explain the discrepancies, privacy advocates and the Bureau of Labor Statistics indicate that telemarketers, in decrying the Registry's potential adverse affects on the industry, may be grossly overstating revenue and employment figures.[139] For example, the Registry does

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[135] Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

[136] *Id*. at 470.

[137] FCC Report and Order, *supra* note 1, at 14021.

[138] Jeffrey Milberg, *There's No Call to Celebrate the Telemarketer Registry*, LOS ANGELES TIMES, Oct. 5, 2003, at M5.

[139] Wells Tower, *Making the Call*, WASH. POST, Jan. 25, 2004, at W12.

not affect inbound calls from consumers, which account for a significant portion of telemarketing transactions.[140]

¶57 Nonetheless, some telemarketers anticipate layoffs and losses in sales. Many businesses would agree with the telemarketer who touted the Registry as a "work-to-welfare program."[141] However, not all telemarketers foresee such dire consequences; in fact, some telemarketers welcome the Registry. "We absolutely will not have to lay off anyone," stated Tom Cardella, the CEO of a Florida-based telemarketing firm with 12,000 employees.[142] "We are huge proponents of the list. It's good for business and great for consumers. We don't want to speak to people who don't want to be spoken to."[143] In upholding the Registry, the Tenth Circuit agreed that the Registry can benefit telemarketers by allowing them to focus their efforts on those who do not object to receiving unsolicited commercial calls.[144]

¶58 On March 26, 2004, WorldCom, Inc., citing the Registry and "ongoing telecom market trends," announced that it will lay off 4000 employees and close three telemarketing call centers.[145] Although telemarketers expect that WorldCom's workforce reduction is the first of many large layoffs to come, financial analysts disagree that the Registry is the driving force behind the cutbacks.[146] Said analyst Patrick Comack of Guzman & Co., the Registry "is just an incremental hit on top of everything else that's slamming the long-distance industry," including increased competition from wireless providers and local exchange carriers.[147] Additionally, WorldCom competitors AT&T and Sprint both have said that the Registry has not adversely affected their telemarketing businesses; indeed, AT&T receives 10 million inbound calls a month and continues to make millions of outbound calls monthly.[148] In short, telemarketers may be eager to blame economic losses on the Registry, but businesses in any industry often counter the threat of any new regulation with the layoffs-and-losses argument. The "threat of massive job loss is standard rhetoric when a business model is threatened."[149]

¶59 Moreover, prior to the national Registry, the majority of the states had their own do-not-call lists, and "the world did not end in those states."[150] Accordingly, some analysts are "highly skeptical of doomsday job loss predictions" and the "worst-case scenario" estimates.[151] Rather, analysts predict that telemarketers will adapt their business models and develop new techniques or mechanisms for obtaining customers.[152] If regulations prohibit telemarketers from making unsolicited sales calls to wireless

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[140] *Id.*
[141] Lisa Bertagnoli, *Business: No Calls, No Work*, CHI. TRIB., Oct. 5, 2003, at 5.
[142] *Id.*
[143] *Id.*
[144] Mainstream Marketing Services, Inc. v. FTC, 358 F.3d 1228, 1241 (10th Cir. 2004).
[145] Caroline E. Mayer, *WorldCom to Lay Off Workers at Call Centers*, WASH. POST, March 27, 2004, at E01.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Glen Kaltenbrun, *Editorial: Telemarketing Advocacy Just Doesn't Ring True*, LOS ANGELES TIMES, Oct. 8, 2003, at B12.
[150] Interview with Anthony Chan, Chief Economist, Banc One Investment Advisors, *National Public Radio: All Things Considered* (Oct. 8, 2003).
[151] *Id.*
[152] *Id.*

devices, businesses will find other ways to reach potential consumers. Just as businesses have learned to exploit new technologies, telemarketers will learn to navigate the new regulatory environment.

V. Conclusion

¶60 Protecting the privacy interests of wireless device users who do not wish to pay for sales calls necessitates protective measures in addition to the Registry. As the FTC states, "It is particularly important to allow consumers an option to reduce unwanted telemarketing calls to cellular phones and pagers."[153] The Registry alone does not offer consumers enough protection from unwanted sales calls. Wireless consumers who have listed their numbers in the Registry can still expect to receive a number of unwanted calls from various organizations.[154] As noted previously, Congress, the FCC and the FTC have been reluctant to limit solicitations from charitable organizations, and neither the TSR nor the TCPA extend to calls made for market or survey research, or for political or religious purposes.[155] However, the revised TCPA and the TSR, as well as the recent congressional mandates, make it quite apparent that Congress, the FCC, and the FTC[156] all recognize the urgent need to provide consumers with options to limit some forms of telemarketing sales calls.

¶61 By precluding telemarketers from using the EBR exemption in the wireless context, substantial government interests are advanced. Even the telemarketers in *FTC v. Mainstream Marketing Services* did not dispute the substantial government interest in "preventing abusive practices and protecting residential privacy."[157]

¶62 The justifications and arguments for these protective measures are similar to those put forth in the context of faxed advertisements. Although the FCC has effectively stayed its revisions to the EBR exemption for faxed advertisements,[158] the revised rules are crucial in the wireless environment. Here, unsolicited sales calls to mobile numbers pose unique safety concerns in addition to the general inconvenience and cost burden. Moreover, an unsolicited sales call from a party with whom the customer has an established business relationship is not necessarily any more welcome than an unsolicited sales call from an unknown party.

¶63 Furthermore, any argument that precluding the use of the EBR exemption for calls to wireless devices would chill speech is "circumvented by . . . [the provision for

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[153] Telemarketing Sales Rule, 68 C.F.R. at 4632.

[154] Anticipating that consumer confusion will ensue after consumers list their phone numbers in the Registry but still receive unwanted sales calls, both the FTC and the FCC have emphasized that the Registry will not stop all telemarketing calls. *See, e.g., You Make the Call*, *supra* note 71, at 2; Federal Communications Commission, *National Do-Not-Call Registry*, *at* http://www.fcc.gov/cgb/donotcall/ (last visited Feb. 13, 2004).

[155] FCC Report and Order, *supra* note 1, at 14040.

[156] On February 13, 2004 the FTC proposed to amend the TSR to require telemarketers to reconcile their calling lists with the Registry every month, as opposed to every quarter. Direct Marketing Association, *FTC Officially Proposes Monthly Do-Not-Call Scrubs* (Feb. 13, 2004), *at* http://www.the-dma.org/cgi/dispnewsstand?article=1849 (last visited Feb. 13, 2004). This means that telemarketers would have only a month, rather than three months, to remove from their calling lists any new phone numbers added to the Registry.

[157] FTC v. Mainstream Marketing Services, 345 F.3d at 854.

[158] *See generally* FCC Order, 2003 FCC Lexis 5369.

obtaining] the consent of the receiving party."[159] This provision reduces cost-shifting and withstands constitutional challenges.[160] Far from chilling speech, the new telemarketing regulations ensure that telemarketers may still reach consumers who do not mind receiving sales calls.

¶64 Consumers pay for wireless service for their personal convenience, not the convenience of telemarketers. Should telemarketers have the option to make sales calls to wireless devices? Ultimately, each consumer should have the ability to make that call.

[159] Michael D. McConathy, Destination Ventures, LTD. v. FCC *and* Moser v.FCC: *How Much Should the Telephone Consumer Protection Act Restrict Your Phone, Fax and Computer?* 26 GOLDEN GATE U. L. REV. 153, 178 (1996). However, McConathy considers acceptable both express consent and "implied consent through prior dealings or an existing business relationship." *Id*.

[160] *Id*.