

# HANGING UP TOO EARLY: REMEDIES TO REDUCE ROBOCALLS

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## INTRODUCTION

Despite the prevalence of the National Do Not Call Registry, telemarketing still plagues millions of Americans. “Rachel” from “Cardholder Services” has a constant presence in American homes. Inevitably, “Rachel,” a theoretical representative from “Cardholder Services”<sup>2</sup> or a “government agency,” will call families with a prerecorded telemarketing message just as a family is sitting down to dinner. Some consumers attempt to report these “robocalls,”<sup>3</sup> but the callers are persistent. Even if a phone number is on the Do Not Call Registry, Rachel and Ann keep calling back, night after night.<sup>4</sup> Because “Cardholder Services” or another similar company has spoofed, or faked, the number, the calls are hard to trace and even harder to stop. The Federal Trade Commission (FTC) Chairman Jon Leibowitz claimed, “[a]t the FTC, Rachel from Cardholder Services is public enemy number one.”<sup>5</sup> Although

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  2. The “Rachel” from “Cardholder Services” scam was settled in July 2013 after the FTC introduced five complaints against the companies associated with the scam in November 2012. It is used for illustration purposes throughout this Note because it is representative of many other similar telemarketing scams. *See* Press Release, Fed. Trade Comm’n, FTC Settles ‘Rachel’ Robocall Enforcement Case (July 12, 2013).
  3. “Telemarketing calls” and “robocalls” are used interchangeably throughout this Note. Telemarketing calls are referenced in a number of different ways in the media, including “robocall,” “spam call,” “telemarketers” or “automated calls.” “Robocall” is the shorthand name for telemarketing calls that is most relevant to this Note. *See Robocalls*, FED. TRADE COMM’N, <http://www.ftc.gov/bcp/edu/microsites/robocalls/> (last visited Mar. 25, 2014). The Federal Trade Commission also used “robocall” throughout its Summit on October 18, 2012 discussing the problem.
  4. *See, e.g.*, Alina Tugend, *Resilience of Robocalls Leaves a Lot of Ears Ringing*, N.Y. TIMES (June 1, 2012), [http://www.nytimes.com/2012/06/02/your-money/telemarketing-calls-keep-mounting-up-along-with-consumer-irritation.html?\\_r=0](http://www.nytimes.com/2012/06/02/your-money/telemarketing-calls-keep-mounting-up-along-with-consumer-irritation.html?_r=0) (describing the failed attempts of consumers to stop the constant robocalls); Christina Chaey, *The FTC Continues Its Crackdown on Robocall Scams*, FAST CO. (Nov. 2, 2012), <http://www.fastcompany.com/3002644/ftc-continues-its-crackdown-robocall-scams> (describing the annoying nature of constant robocalls).
  5. Chaey, *supra* note 4.

the individual calls themselves may be minor intrusions, the consistency and frequency of the calls frustrates many consumers nationwide.<sup>6</sup> The robocalls drive some recipients to extreme behaviors, including asking for the automated caller's home phone number, putting the call on speaker phone and screaming into the phone, and blowing a whistle into the phone.<sup>7</sup> One states, "[t]hose Rachel calls . . . I would like to murder that person."<sup>8</sup> Another recipient of robocalls claimed, "I was getting more calls from robots than people."<sup>9</sup>

Although the FTC's Do Not Call Registry, the national list of consumers who do not wish to receive telemarketing calls,<sup>10</sup> has "significantly reduced the number of unwanted telemarketing calls . . . from legitimate marketers who honor the system and recognize the importance of respecting consumer choice,"<sup>11</sup> illegitimate companies and telemarketers with fraudulent intent continue to abuse the market with growing frequency.<sup>12</sup> From January through June 2012, over 1.2 million fraudulent robocalls were reported—a 29% increase from the same period in 2011.<sup>13</sup> Despite telemarketing regulations prohibiting such calls, there is "an increase in calls from fraudsters who are apparently willing to both violate the laws against robocalls and ignore the Do Not Call Registry."<sup>14</sup>

As the Do Not Call Registry reaches its tenth birthday, another serious assessment of telemarketing regulation is warranted. Although the Telephone Consumer Protection Act originally gave the FCC authority to create a national do-not-call list, a national list was not created until 2003, when the Do Not Call Implementation Act gave the FTC authority to create

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6. Tugend, *supra* note 4 (detailing consumer behaviors as a result of robocalls).
  7. *Id.* (describing the unorthodox methods consumers employ to combat robocalls).
  8. *Id.*
  9. Adrienne Jeffries, *Who Can Stop Robocalls? FTC Tries to Crowdfund a Solution but Falls Flat*, THE VERGE (Jan. 28, 2013), <http://www.theverge.com/2013/1/28/3924544/who-can-stop-robocalls-ftc-attempt-to-crowdfund-a-solution-falls>.
  10. See NATIONAL DO NOT CALL REGISTRY, <https://donotcall.gov> (last visited Mar. 16, 2013) (allowing phone number registration and providing a mechanism for filing complaints).
  11. Jon Leibowitz, Chairman, Fed. Trade Comm'n, Introductory Remarks at Robocalls: All The Rage Summit (Oct. 18, 2012).
  12. This Note focuses on commercial robocalling. Issues related to robocalling from political candidates, most frequent during election seasons, are beyond the scope of this Note.
  13. Vijay Balasubramanian, *Caller ID Spoofing and Caller Authentication* (Oct. 18, 2012), [http://www.ftc.gov/sites/default/files/documents/public\\_events/robocalls-all-rage-ftc-summit/robocalls-part5-caller-id-spoofing.pdf](http://www.ftc.gov/sites/default/files/documents/public_events/robocalls-all-rage-ftc-summit/robocalls-part5-caller-id-spoofing.pdf).
  14. Kati Daffan, *Answering Your Questions About Robocalls*, U.S. GOVERNMENT BLOG (Aug. 28, 2012), [blog.usa.gov/post/3039077932/answering-your-questions-about-robocalls](http://blog.usa.gov/post/3039077932/answering-your-questions-about-robocalls).

and enforce such a list.<sup>15</sup> With authority divided between the FCC and FTC, both agencies constantly revised their respective telemarketing regulations throughout the 2000s in an attempt to reach regulatory consistency.<sup>16</sup> However, constant revisions and inconsistent standards have left consumers frustrated, telemarketers confused, and efforts to enforce fraudulent telemarketing delayed.<sup>17</sup> The regulatory authority of both agencies—and the First Amendment issues associated with regulating commercial speech—has been challenged in court throughout the last decade.<sup>18</sup> Any valuable analysis of telemarketing regulation must weigh the interests of the government, the free speech of the telemarketer, and the individual consumer’s right to be free from unwanted intrusions in the home.

In particular, an evaluation of the legal and technical solutions available to consumers is needed regarding the influx of telemarketing calls made in the form of automated, pre-recorded voice messages. These messages, already illegal, are often the hardest to track and prevent as they are routed through faked numbers and blocked locations.<sup>19</sup> The FTC acknowledged the exigency of the issue when it announced a nationwide “Robocall Challenge” in late 2012, encouraging individuals and small businesses to develop a technical solution to reduce robocalling for a cash prize of \$50,000.<sup>20</sup> While this contest was widely heralded in the media as innovative<sup>21</sup> and brought robocalling into the public eye, this Note advocates that the technical solution developed for the purpose of the

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15. *See infra* text accompanying note 91 (describing the collaborative effort by the FTC and FCC to create the Do-Not-Call Implementation Act in 2003).
  16. *See infra* text accompanying note 89 (“while a period of relative rulemaking calm followed the promulgation of the TSR, both the FTC and the FCC began rulemaking revisions to regulate telemarketing at a rapid pace in the early 2000’s).
  17. *See* Tugend, *supra* note 4. Julianne Pepitone, *FCC Cracks Down On Cell Phone Robocalls*, CNN MONEY (Mar. 15, 2013), [http://money.cnn.com/2013/03/15/technology/mobile/fcc-robocalls/?source=cnn\\_bin](http://money.cnn.com/2013/03/15/technology/mobile/fcc-robocalls/?source=cnn_bin) (referencing the “FCC’s enforcement efforts and contest to find the best solution for robocalls.” This information is incorrect. The FTC coordinates enforcement efforts and initiated the Robocall Challenge. This article, published on a national news media site, is only one example of misinformation provided to consumers about robocalls).
  18. *See infra* Part III (detailing the judicial history of challenges to the FTC and FCC’s regulatory authority).
  19. *See infra* text accompanying notes 32-33 (describing the methods Robocallers use to make it difficult to trace their calls).
  20. *See* Press Release, FED. TRADE COMM’N, *FTC Challenges Innovators to Do Battle with Robocallers* (Oct. 18, 2012).
  21. *See* Tod Sperry, *Feds Offer \$50,000 Prize For New Plan To Block Robocalls*, CNN (Oct. 18, 2012), <http://edition.cnn.com/2012/10/18/us/robocall-contest/index.html> (outlining the FTC robocall challenge). *See also* Chaey, *supra* note 4 (outlining the FTC effort to crackdown on Robocalls).

contest is only part of the solution.<sup>22</sup> Part I of this Note will address the technologies and processes associated with robocalling and the impact these technologies have on the rise of robocalls. Part II will analyze the current statutory and regulatory structure that addresses robocalling and the detrimental effect of inconsistent regulation. Part III will consider these regulations—and a potential ban on robocalling – in light of First Amendment considerations. Part IV will weigh the pros and cons of a sampling of proposed solutions to reduce robocalls. Finally, Part V will address potential legal, technical, and practical remedies to reduce robocalls.

## I. CURRENT ROBOCALL TECHNOLOGIES ARE QUICKLY OUTPACING THE LAW

Unlike traditional “live” telemarketing, robocalls allow companies to reach thousands of potential consumers in a short period of time. Formally defined as “a telephone call from an automated source that delivers a prerecorded message to a large number of people,”<sup>23</sup> a robocall can include an entirely prerecorded message, offer a prerecorded message after a consumer responds in some way, or offer a prerecorded message before transferring the call to a live operator. This flexibility allows companies to easily and cheaply record a message offering a specific product or service, send out hundreds of calls at the same time, and monitor which calls may lead to possible business.<sup>24</sup>

While traditional marketing “cold calls” involve one live telemarketer and one consumer, a robocalling scheme usually involves at least three players. A marketing company or agent first obtains a list of phone numbers before sending it to a “qualifier.”<sup>25</sup> This “qualifier,” or lead generator, is either a person or a machine, and pares down the list of phone numbers that are sent to a predictive dialer.<sup>26</sup> After a consumer answers the phone or responds to the call, the call may be transferred to a live

22. *Challenge Dates*, FTC ROBOCALL CHALLENGE, <http://robocall.challenge.gov/details/dates> (last visited Mar. 25, 2014).

23. *Robocall*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/robocall> (last visited Mar. 25, 2014) (stating that the first known use of the word was in 1993).

24. See Alicia Hatfield, Note, *Phoney Business: Successful Caller ID Spoofing Regulation Requires More than the Truth in Caller ID Act of 2009*, 19 J.L. & POL’Y 827, 840 (2010). See also Henning Schulzrinne, Chief Tech. Officer, Fed. Comm’ns Comm’n, *The Network Presentation at Robocalls All The Rage: An FTC Summit* (Oct. 18, 2012) (arguing that an attractive feature of robocalling is its cheap transport costs).

25. These numbers could be numbers from its own marketing activities, numbers purchased from the Do Not Call Registry, or numbers of specific groups of individuals, such as seniors or people with financial difficulties.

26. See Schulzrinne, *supra* note 24.

telemarketing agent.<sup>27</sup> Then, the agent may try to complete a sale or ask for a consumer's information,<sup>28</sup> tagging the number as one that is more likely to respond.<sup>29</sup> "By the time the call reaches a live human agent . . . you already have somebody. . . [who is] willing to at least listen to the pitch."<sup>30</sup> By remaining on the line, pressing a button, or responding to the call in some other way, the consumer essentially marks his or her phone number as receptive to future marketing calls.<sup>31</sup> Many telemarketers capitalize on the counterintuitive nature of this process: "if you press whatever button they offer to actually get out of it, what it means really is you've just qualified yourself even more so for the next call."<sup>32</sup>

While the many steps in this process may disguise a robocall as a complicated endeavor, the automated nature of the calls allows each step to be located in a different place from the rest of the system.<sup>33</sup> Because the qualifier may be in one city while the agent is in another, robocalls are necessarily harder to track; phone companies sell the predictive dialers, caller identification blockers, and other equipment that allow telemarketers to make calls without being traced.<sup>34</sup> Even if the same number calls the same consumer more than once, existing technology makes it difficult for the consumer to report the fraudulent number.

Because a phone number is not tied to a specific landline,<sup>35</sup> a number may be faked or "spoofed" to display an incorrect phone number on a consumer's caller ID.<sup>36</sup> Although caller identification technologies have

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27. *Id.*

28. Hatfield, *supra* note 24, at 830-31.

29. This technique leads to the same numbers; often the least receptive consumers, repeatedly receiving the most robocalls from the same numbers.

30. Schulzrinne, *supra* note 24.

31. This philosophy is exactly the opposite of the perspective taken by the consumers referenced in this Note's introduction; by responding to the robocall or remaining on the line, consumers are more likely to receive additional phone calls from the same marketing companies. *Id.* (noting that individuals are "at least willing to listen to the pitch.").

32. *Id.*

33. *Id.* (nothing that a call can be routed someplace completely different).

34. See *Telemarketing and The Telephone Consumer Protection Act*, ELECTRONIC INFORMATION PRIVACY CENTER, <http://epic.org/privacy/telemarketing/> (last visited Mar. 25, 2014) (Predictive dialers, as described by Ameritech Predictive Dialers, allow companies to "place calls specified by your computer database, screen non-productive calls such as busy signals, answering machines and no answers, and connect your agents with live respondents." Another service, Quest Residential "New Telephone Hookups" Marketing List, "provides detailed information about new residents within 24 hours of their arrival so you can reach them first.").

35. In VoIP software, the phone call is made through an internet connection.

36. Hatfield, *supra* note 24, at 836.

previously helped consumers screen some unwanted sales calls,<sup>37</sup> technologies that block numbers or insert a fraudulent number prevent caller identification from successfully eliminating robocalls. While a consumer may think that a telephone number originates from his or her home area code – increasing the likelihood some consumers would answer the unknown number – any attempt to return the call will result in an error message.<sup>38</sup> If the marketing company has obtained a specific list of numbers, it may attempt to imitate a well-known or trustworthy number to the consumer, such as the Social Security Administration, a doctor,<sup>39</sup> or placing a call “on behalf of the police or homeowners’ association.”<sup>40</sup> Robocalls are increasingly more efficient and harder to track as a result of this process as this false or misleading information masks the caller’s true identity or the calls’ origin.<sup>41</sup> In fact, “although technology has improved to assist consumers in blocking unwanted calls, it has also evolved in such a way as to assist telemarketers in making greater numbers of calls and even circumventing such blocking technologies.”<sup>42</sup> As a result, “it is impossible to trace spoofed calls except by subpoenaing the spoofing company’s records to determine the identity of the customer.”<sup>43</sup> Text-based spoofing, or SMS spoofing, is accomplished through the same process; although the information is within a text that can be stored in a cell phone, the text contains information that is impossible to trace.<sup>44</sup>

Telemarketers can make these calls cheaply and quickly thanks to Voice-Over-IP (VoIP) or internet-based calling software such as Skype and Google Voice. VoIP reduces geographic restrictions and removes the expense associated with landlines.<sup>45</sup> VoIP-originated calls are now the most

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37. Vanessa Miller, *Robocalls Complicate Do-Not-Call Rules in Iowa*, THE GAZETTE (Jan. 23, 2013, 6:30AM), [thegazette.com/2013/01/23/robocalls-complicate-do-not-call-rules-in-iowa/](http://thegazette.com/2013/01/23/robocalls-complicate-do-not-call-rules-in-iowa/) (“Johnson said caller identification has been a great way to screen out unwanted sales calls in the past . . .”).

38. *Id.*

39. See Schulzrinne, *supra* note 24 (noting that a company may use the numbers of an “entity where the call person is more likely to both pick up the phone and believe, at least initially, the sales pitch.”).

40. Better Business Bureau of Southern Arizona, *Consumers’ Phones Being Flooded with Illegal ‘Robocalls,’* TUSCON CITIZEN (Jan. 15, 2013), [tusconctizen.com/bbbconsumeralert/2013/15/consumers-phones-being-flooded-with-illegal-robocalls](http://tusconctizen.com/bbbconsumeralert/2013/15/consumers-phones-being-flooded-with-illegal-robocalls).

41. Schulzrinne, *supra* note 24. Hatfield, *supra* note 24, at 831-32.

42. FED. COMM’NS COMM’N, CG DOCKET NO. 02-278, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, at 30 (Feb. 15, 2012).

43. See Hatfield, *supra* note 24, at 831.

44. See *id.* at 832-33 (explaining how text message spoofing is accomplished and why this technique is difficult to trace).

45. See Vijay Balasubramaniyan, *The Network Presentation at Robocalls All The Rage: An FTC Summit* (Oct. 18, 2012) (“The reason they are using Voice over IP . . . is [it] allows you to be anonymous, . . . [it is] largely automatic, and it’s

common type of robocalls, representing 46% of all reported robocalls.<sup>46</sup> Ultimately, “with the combination of [VoIP] calls, cloud computing, auto dialing software, and other advances, it is now possible to make robocalls for one cent per call or less.”<sup>47</sup> Because of the cheap methods for transporting information, the easy access to blocking equipment and software, and the minimal live labor required, robocalling is an ideal tool for companies looking to reach the maximum number of consumers at minimal cost.<sup>48</sup> As robocalling technology continues to advance, telemarketing statutory and regulatory structure must progress as well.

## II. CURRENT TELEMARKETING REGULATORY AND STATUTORY STRUCTURE: HANGING UP TOO EARLY

### A. *The Telemarketing Consumer Protection Act of 1991 Introduces Federal Telemarketing Regulation*

Before The Telemarketing Consumer Protection Act of 1991 (TCPA), a patchwork of state laws regulated telemarketing with varying levels of severity and enforcement.<sup>49</sup> Although some state statutes and do-not-call lists were both effective means of reducing telemarketing calls, others were “so riddled with exceptions that the law had been rendered ‘practically unenforceable.’”<sup>50</sup> The TCPA does not preempt state law,<sup>51</sup> but it introduced broad federal telemarketing regulation authorizing the FCC to enact rules to regulate telemarketing in greater detail.<sup>52</sup> TCPA was

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extremely inexpensive.” Further explains that Voice over IP allows users to select the geographic area they want to call.”).

46. *See id.* (presenting a chart outlining the most frequent methods of robocalling).
47. Daffan, *supra* note 14.
48. *See* Schulzrinne, *supra* note 24 (“[W]e have three key components that make robocalling particularly attractive now and increasingly so; normally with cheap transport in switching, the ability to spoof numbers, and because of the ability to move internationally, to use cheap labor where labor is necessary . . . . Those three things are what make robocalling much more scalable than the old boiler room ever was.”).
49. *See* Jason C. Miller, Note, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?* 16 MICH. TELECOM. TECH. L. REV. 213, 231-32 (2009) (“[M]ost states that do have regulations rarely enforce them, further adding to the confusion.”).
50. Douglas C. Nelson, Note, *The Do-Not-Call Implementation Act: Legislating the Sound of Silence*, 16 LOY. CONSUMER L. REV. 63, 66 (2003) (quoting Michael E. Shannon, *Combatting Unsolicited Sales Calls: The “Do-Not-Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 411 (2001)).
51. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3) (2006) (permitting party to bring claim in state court).
52. *Id.* § 227(c) (“Within 120 days after December 20, 2001, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”).

necessary because telemarketers' were "avoid[ing] the restrictions of State law, simply by locating their phone centers out of state. Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps."<sup>53</sup> TCPA specifically forbids calls "using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party."<sup>54</sup> The statute also forbids the use of predictive dialers to make commercial telemarketing calls. TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity A) to store or produce telephone numbers to be called, using a random sequential number generator; and B) to dial such numbers."<sup>55</sup> Automated calls to cell phones are also specifically forbidden,<sup>56</sup> but the legality of VoIP calls and text messages are not addressed.<sup>57</sup> Although this prohibition seems rather broad, the TCPA exempts robocalls made for necessary mass communications such as weather emergencies, flight cancellations, and other calls that are not explicitly commercial.<sup>58</sup>

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53. Yuri R. Linetsky, *Protection of "Innocent Lawbreakers:" Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB L. REV. 70, 77 (2011) (quoting *Bonime v. Avaya Inc.*, No. 06 CV 1630(CBA), 2006 E.D.N.Y. WL 3751219, at \*5).
54. 47 U.S.C. § 227(b)(1)(B) (2006) ("It shall be unlawful for any person within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or pre-recorded voice to deliver a message without the prior consent of the called party . . .").
55. *Id.* § 227(a) (defining "automatic telephone dialing system").
56. *Id.* § 227(b)(1)(A)(iii) (forbidding automated calls made to cellular telephone services, or "any service for which the called party is charged for the call"). This provision may not be currently relevant, to pre-paid cell phone plans and unlimited minutes – unlike in older cell phone plans or landlines, consumers may not be specifically charged for each call.
57. FED. COMM'NS COMM'N, CG DOCKET NO. 92-90, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (Sept. 17, 1992) (providing information on how developing technology might soon require the Commission to revise its rules "in order to more effectively carryout Congress's directives in the TCPA"). VoIP and text message technology was not prevalent at the time of the enactment of the TCPA; the Act has not been revised since that time to include such technology.
58. 47 U.S.C. § 227(b)(2)(B) (2006) (listing specific prerecorded calls that are exempt from the statute). *See also Robocalls*, FED. TRADE COMM'N (2012), <http://www.consumer.ftc.gov/articles/0259-robocalls> (listing specific calls that are exempt from telemarketing regulation in general); 47 § 227 (b)(2)(B)(ii)(I-II) (2006) (advising that the FCC may proscribe rules that exempt categories of calls made for commercial purposes that "will not adversely affect the privacy rights that this section is intended to protect; and II) do not include the transmission of any unsolicited advertisement"). The definition of what is not 'explicitly commercial' is still debated—while telemarketers may argue that a call providing 'information' about a product is not explicitly commercial, it most often delivers an additional message asking a consumer to purchase something or offer credit card information in exchange for some 'free' product or service.



The TCPA mandates the FCC to “consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent.”<sup>59</sup> It also specifically authorizes the FCC to create exempt from regulation calls that are not made for a commercial purpose, calls that “will not adversely affect the privacy rights that this section is intended to protect,” and calls that do not include the transmission of unsolicited advertisement.<sup>60</sup> Consumers with “an established business relationship”<sup>61</sup> with a company may receive telemarketing calls from that company. Finally, the TCPA gives the FCC authority to establish a single national do-not-call database<sup>62</sup> if it should find that it is an “effective and efficient”<sup>63</sup> remedy to accomplish the purposes of the act. Although a long road of rulemaking and revisions was ahead, Congress took the first step in creating uniform national telemarketing policy with the passage of federal telemarketing legislation.

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59. *Id.* § 227(b)(2)(A). *See also supra* Part (II)(V) (noting that although the 1991 act gives the FCC this power, the FCC did not enact similar regulations to this end until early 2012—nearly 19 years later).

60. *Id.* § 227(B)(2)(A-B) (listing the exceptions from the statute).

61. *Id.* § 227(b)(2)(G) (giving free reign to the Commission to determine the details of this ‘established business relationship;’ the Act lists a number of factors for the Commission to consider, including considering the number of complaints the Commission has received, the benefits of establishing such a relationship, and the possible costs of such a limitation on small businesses). *See also* 47 C.F.R. § 64.1200(f)(5) (2013) (defining an ‘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 the subscriber’s purchase or transaction with the entity within the eighteen 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 months immediately preceding the date of the call, which relationship has not been previously terminated by the party.”).

62. 47 U.S.C. § 227(c)(3) (2006) (granting the FCC authority to establish “a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.”).

63. *Id.* § 227(c)(1)(E) (“Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall . . . develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.”).

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B. *The FCC's Initial Telemarketing Rules of 1992: Minimal Rulemaking Following National Legislation*

After the passage of the TCPA, the FCC promulgated its first set of telemarketing rules in 1992.<sup>64</sup> Although the TCPA gave the FCC power to establish a national do-not-call registry,<sup>65</sup> the FCC instead required businesses to begin to maintain business-specific do-not-call lists that honored consumer requests to be excluded from calls from an individual company for ten years from the date of the request.<sup>66</sup> Among other restrictions, these rules also require identification of “the individual, or other entity, that is responsible for initiating the call, and include a contact phone number”<sup>67</sup> at the beginning of the call, restrict calling hours to after 8 a.m. or before 9 p.m., and require telemarketers to initiate adequate training processes for employees to comply with these restrictions.<sup>68</sup> These business-specific do-not-call lists fulfilled the requirements of the TCPA but added to consumer confusion. Throughout the 1990s, consumers could add their phone numbers to multiple company do-not-call lists and multiple state do-not-call lists (if they existed), but continued to receive fraudulent pre-recorded marketing calls.<sup>69</sup>

C. *The Telemarketing Consumer Fraud and Abuse Prevention Act: Preventing Fraud, But Adding Confusion*

Only three years after the TCPA was passed, Congress by passing the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAPA) in 1994.<sup>70</sup> Another congressional act became necessary since “interstate telemarketing fraud has become a problem of such magnitude”<sup>71</sup> that “consumers . . . are estimated to lose \$40 billion a year in telemarketing fraud,”<sup>72</sup> and “consumers are victimized by other forms of telemarketing

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64. FED. COMM’NS COMM’N, CG DOCKET NO. 92-90, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (Sept. 18, 2002) (“In 1992, the Commission adopted rules implementing the TCPA, including the requirement that entities making telephone solicitations institute procedures for maintaining do-not-call lists.”).

65. 47 U.S.C. § 227(c)(3) (2006) (giving the FCC authority to establish “a single national database”).

66. FED. COMM’NS COMM’N, CG DOCKET NO. 92-90, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, at 40-41 (Sept. 17, 1992).

67. Miller, *supra* note 49, at 226; 47 C.F.R. § 64.1200(b)(1)-(2) (2013).

68. FED. COMM’NS. COMM’N, CG DOCKET NO. 92-90, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (Sept. 17, 1992); 47 C.F.R. § 64.1200(e)(1) (2013).

69. *See supra* Part (II).

70. Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (2006).

71. *Id.* § 6101(2) (stating the purposes of the act).

72. *Id.* § 6101(3).

deception and abuse.”<sup>73</sup> While the TCPA delegated authority to the FCC, the TCFAPA empowered the FTC to proscribe rules “prohibiting deceptive telemarketing acts.”<sup>74</sup> Both the TCPA and include similar requirements for FTC rulemaking. However, the TCFAPA also prohibits “calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,”<sup>75</sup> restrictions on the hours of the day when calls can be made,<sup>76</sup> and prompt disclosure of the telemarketer and the purpose of the call.<sup>77</sup> Violations of any of these guidelines could qualify as “abusive” telemarketing; abusive telemarketing can constitute any call made to a consumer who has previously stated that he or she does not wish to receive a call.<sup>78</sup>

Although it also does not preempt state law, the TCFAPA does not address its interaction with the TCPA or any existing FCC rules; the rest of the act deals only with Securities and Exchange Commission rules and addresses state and private rights of action.<sup>79</sup> While the title of the TCFAPA implies an added emphasis on telephone fraud, it does no more to address fraudulent telemarketing practices besides giving another federal agency rulemaking power. Under the TCFAPA, the FTC was given a year to enact appropriate rules.<sup>80</sup> With both federal and state telemarketing statutes, FCC rules, and forthcoming FTC rules, the maze of telemarketing regulation continued to grow.

#### *D. Telemarketing Sales Rule: The FTC Joins Telemarketing Rulemaking*

Following the passage of the TCFAPA, the FTC also promulgated its own telemarketing rules, called the “Telemarketing Sales Rule” (TSR), in 1995.<sup>81</sup> Defined relatively narrowly, telemarketing is described in the rule as “a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or

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73. *Id.* § 6101(4).

74. *Id.* § 6103(a)(1). *See also* 47 U.S.C. § 227 (2006) (granting the FCC authority to make telemarketing rules).

75. 15 U.S.C. § 6102(a)(3)(A)(2006).

76. *Id.* § 6102(a)(3)(B).

77. *Id.* § 6102(a)(3)(C).

78. *See* Angie A. Welborn, CONG. RESEARCH SERV., RL31642, REGULATION OF THE TELEMARKETING INDUSTRY: STATE AND NATIONAL DO NOT-CALL REGISTRIES 2 (July 8, 2003) (describing abusive telemarketing practices).

79. 15 U.S.C. §§ 6107-6110 (2006).

80. *Id.* § 6103(b).

81. 16 C.F.R. § 310.1- 310.9 (2010) *See* ELECTRONIC INFORMATION PRIVACY CENTER, *supra* note 34 (stating that “it is important to note that the TSR does not apply to certain forms of telemarketing, including most business-to-business sales calls, telemarketing by banks, federal financial institutions, common carriers (phone companies and airlines), insurance companies, and non-profit organizations”).

more telephones and which involves more than one interstate telephone call.”<sup>82</sup> As required by the 1994 act – and just like TCPA and the subsequent FCC rules – the TSR states that valid information about the identity of the caller, the caller’s affiliation with any company, and the purpose of the call must be disclosed at the beginning of the call.<sup>83</sup> Among other prohibitions and guidelines, telemarketers are also required to keep extensive records of all calls, employees who make telemarketing calls, and any fake names used to maintain compliance with the law.<sup>84</sup> The TSR also forbids “abandoned calls,” which occurs when a consumer answers a phone call and the telemarketer does not connect the call to a live sales representative within two seconds of the greeting.<sup>85</sup> Just as with the FCC regulations, certain exceptions apply. For instance, telemarketers can still call people from whom they have obtained an express agreement to call that person, and they can also call people with whom they have an established business relationship.<sup>86</sup>

The TSR also includes a type of “safe harbor” provision whereby a company can shield itself from liability by establishing and implementing written compliance procedures, training its employees under these procedures, and maintaining a list of persons who may not be called due to their request.<sup>87</sup> Other than the additional prohibition of abusive telemarketing acts (such as threats or intimidation),<sup>88</sup> the TSR closely mirrors the TCPA and the subsequent FCC rules. With so much similarity between the TSR, the TCPA, and FCC rules, it was not until a number of revisions by both the FTC and the FCC that the purpose of this dual regulatory and enforcement process became clear.

*E. A Flurry of Revisions: FTC and FCC Telemarketing Rule Changes Play Catch-Up.*

While a period of relative rule-making calm followed the promulgation of the TSR, both the FTC and the FCC rapidly made rulemaking revisions to regulate telemarketing in the early 2000s.<sup>89</sup> Although the FCC and the FTC both had the authority to establish a do-not-call registry since 1991

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82. 16 C.F.R. § 310.2(dd) (2010).

83. *Id.* § 310.1-310.9.

84. *Id.* § 310.4(b).

85. *Additional Report to Congress Pursuant to the Do Not Call Registry Fee Extension Act of 2007*, FED. TRADE COMM’N 12 (2009).

86. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii) (2010).

87. *Id.* § 310.4(b).

88. *Id.* § 310.2(dd) (noting that “threats, intimidation, or the use of profane or obscene language constitutes abusive conduct.”).

89. FED. COMM’NS COMM’N, 18 FCC RCD. 14014, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (2003) (stating that Commission reviewed the telemarketing rules and adopted modification and changes in the rules).

and 1994, respectively,<sup>90</sup> the 2003 revisions represented the first time the agencies worked together to create a proactive national registry. The Do Not Call Implementation Act, passed on March 11, 2003, implemented a nationwide, online do-not-call list that combined the phone numbers on existing state do-not-call lists and created an easy clearinghouse for consumers who wanted to avoid telemarketing calls.<sup>91</sup>

Both regulatory agencies recognized that company-specific lists were not sufficiently preventing telemarketing calls; a nationwide registry that combined existing, smaller do-not call lists and served as a “one-stop” solution to reduce telemarketing calls provided a more direct remedy. Administered by the FTC, the Do Not Call Registry was widely heralded in the media as the end of telemarketing calls and also proved popular with the public, with over 50 million numbers entered onto the list within the first few months.<sup>92</sup> Because the TCPA only explicitly gave the FCC authority to create such a list and the TCFAPA did not give the same authority to the FTC, the FTC’s authority to enforce a do-not-call list was initially challenged.<sup>93</sup> Despite the dual regulatory power of the FTC and FCC, the Do Not Call Implementation Act was a step to end inconsistencies. The Act requires annual reports from each agency about the progress of telemarketing regulation and enforcement,<sup>94</sup> and mandates that any inconsistencies be resolved administratively by the agencies, or “Congress must address them legislatively.”<sup>95</sup>

As of October 2003, it was illegal for telemarketers to call numbers listed on the registry.<sup>96</sup> After the Do Not Call Implementation Act, the FTC and the FCC both made revisions to their existing telemarketing rules to reflect the impact of the Do Not Call Registry. The FTC’s 2002 revisions to the TSR also made it illegal to interfere with caller ID services although telemarketers can still use the name and number of a legitimate company.<sup>97</sup> Telemarketers must use a version of the National Do Not Call list no more

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90. *See supra* Part (II).

91. Do-Not-Call Implementation Act, 15 U.S.C. §§ 6101-6110 (2003).

92. FED. TRADE COMM’N, *supra* note 85, at 2.

93. *See Welborn, supra* note 78, at 6-7 (stating that after the FTC issued amendments to the Telemarketing Sales Rule, “the Commission’s authority to promulgate regulations imposing fees on telemarketers for use of the do not call list was at issue.”).

94. 15 U.S.C. §§ 6101-6110 (2006) (requiring that the FCC and FTC each submit a report to the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate within 45 days after the promulgation of a FCC final rule).

95. *Id.*

96. *See Welborn, supra* note 78, at 8-9 (stating that “as of October, it will be illegal for telemarketers to call numbers listed on the registry).

97. *See Hatfield, supra* note 24, at 830-31 (stating that the ANI “[i]dentifies which telephone account to charge for incoming phone calls).

than 31 days old to scrub their telemarketing lists.<sup>98</sup> The FCC's revisions also regulated predictive dialers, requiring that telemarketers abandon no more than three percent of calls when using these dialing tools.<sup>99</sup>

Although the TCPA gave the FCC power to initiate rules regarding prerecorded voice messages in 1991,<sup>100</sup> the 2003 revisions explicitly targeted prerecorded voice messages, recognizing that the majority of prerecorded calls offering “free” things (in an attempt to not be regarded as “explicitly commercial”) are “designed with the ultimate goal of soliciting consumers to buy products and services and are therefore prohibited without the prior express consent of the called party.”<sup>101</sup> Like the FTC, the FCC's 2003 revisions also included a requirement that telemarketers transmit correct caller identification information when available; caller ID blocking was prohibited.<sup>102</sup> The exemption for the “established business relationship” was narrowed, limiting the relationship to at most eighteen months and requiring that the “established relationship” be of such a nature “to create an expectation on the part of the consumer that a particular company will call them.”<sup>103</sup> Responding to a telemarketing call in some way (for example, by pressing a button) is not enough to establish a “business relationship.”<sup>104</sup> The Telemarketing Relief Act of 2003 even

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98. FED. COMM'NS COMM'N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 18 FCC Rcd. at n. 37 (2003) (“comparing a do not call list to a company’s call list and eliminating from the call list the telephone numbers of consumers who have registered a desire not to be called.”).

99. *Id.* at 14017. Although telemarketers use predictive dialers in an attempt to minimize the amount of downtime both callers and consumers have during a call, the call often results in a predicate dialer greeting some callers, but not others, leaving some calls silent.

100. *Id.* at 14116 (This revision may have been unnecessary and duplicative, considering the FCC statement regarding the TCPA: “we affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number”). *See also* 47 U.S.C. § 227(b)(1) (stating that “it shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice”).

101. FED. COMM'NS COMM'N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 18 FCC Rcd. at 14097 (2003).

102. *Id.* at 14017 (stating that “the new rules will also require all companies conducting telemarketing to transmit caller identification (caller ID) information, when available, and prohibits them from blocking such information.”).

103. *Id.* at 14081.

104. *Id.* (stating that “an inquiry regarding a business’s hours or location would not establish the necessary relationship as defined in Commission rules.”).

stated that the FCC must establish “substantially similar” regulations to the TSR within 90 days of the act.<sup>105</sup>

It took time before both regulatory structures were “substantially similar.” However, recognizing that “marketplace changes warrant modifications to our existing rules,”<sup>106</sup> the FCC did not stop revising its telemarketing regulations with the implementation of the Do Not Call Registry. The FCC continued to add to and revise its rules, subsequently amending its telemarketing regulations in 2004 by amending the National Do Not Call Registry safe harbor rules,<sup>107</sup> in 2008 by requiring telemarketers to honor do-not-call list registrations indefinitely,<sup>108</sup> and 2012 by adopting five specific customer protections.<sup>109</sup> Although the FCC wrote in 2003, “[w]e intend to develop a Memorandum of Understanding with the FTC in the near future outlining the respective federal responsibilities under the national do-not-call rules,”<sup>110</sup> the FCC and FTC’s constant revisions throughout the 2000s are duplicative and confusing. The FTC revised its own TSR twice in 2008 (first, banning prerecorded messages unless written consent is given and limiting call abandonment to 3%)<sup>111</sup> and second (setting maximum and minimum permanent fees for access to the registry).<sup>112</sup> The Do Not Call Improvement Act in part initiated these

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105. Telemarketing Relief Act, H.R. 526, 108th Cong. (2003) (requiring that “not later than 90 days after the date of enactment of this Act, the agencies identified in subsection (b) shall issue rules that are substantially similar to the Telemarketing Sales Rule promulgated by the Federal Trade Commission.”).
106. FED. COMM’NS COMM’N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 18 FCC Rcd. at 14017 (2003).
107. FED. COMM’NS COMM’N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 19 FCC Rcd. at 19215 (2004) (requiring that the existing safe harbor rules for telemarketers be amended “to require such telemarketers to access the do-not-call list no more than 31 days prior to making a telemarketing call”).
108. Press Release, Fed. Comm’ns Comm’n, Rules Amended to Require Telemarketers to Honor Do-Not-Call List Registrations Indefinitely (June 17, 2008), <http://www.fcc.gov/tools/headlines-archive/2008> (stating that the rules requiring telemarketers to honor Do-Not-Call registry registrations indefinitely).
109. Press Release, Fed. Comm’ns Comm’n, *FCC Adopts Rules to Strengthen Consumer Protections Against Unwanted Telemarketing “Robocalls” to Wireline and Wireless Phones* (Feb. 15, 2012), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-312493A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312493A1.pdf).
110. FED. COMM’NS COMM’N, CG DOCKET NO. 02-278, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, at 46 (2003).
111. Press Release, Fed. Trade Comm’n, *FTC Issues Final Telemarketing Sales Rule Amendments Regarding Prerecorded Calls* (Aug. 19, 2008), <http://www.ftc.gov/opa/2008/08/tsr.shtml>.
112. FTC Telemarketing Sales Rule, 16 C.F.R. § 310.8 (2006) (“The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is \$62 per area code of data accessed, up to a maximum of \$17,050.”).

changes. Signed in early 2008, the legislation focused on necessary changes regarding the FTC's administration of the Do Not Call list.<sup>113</sup> While the FTC's revisions were instigated by acts of Congress,<sup>114</sup> the FCC revisions seemed to occur without a discernible pattern.

Initially, some changes in the FTC and FCC regulations seemed to serve the interests of both consumers and telemarketers; an FTC report, as required by the Do Not Call Implementation Act, reported high effectiveness of Do Not Call outreach focusing on seniors and immigrants, and "consumers who have joined the registry report dramatic reductions in unwanted marketing calls."<sup>115</sup> The FTC's 2008 changes explicitly forbade prerecorded calls;<sup>116</sup> however, these prerecorded calls were already forbidden by the FCC's 2003 revisions to its telemarketing regulations<sup>117</sup> and the TCPA.<sup>118</sup> Despite the FCC's regulation of predictive dialers in 2003, the FTC's 2009 report acknowledged that abandoned calls were still on the rise.<sup>119</sup>

This "catch-up game" of regulations did not end in 2008. While the FTC's 2008 revisions required prior express written consent from a consumer in order for a telemarketer to have permission to make a legal call, the FCC did not make similar revisions until 2012.<sup>120</sup> Among other provisions, these revisions require telemarketers to obtain written consent from the customer (even if it is only on an online form) and provide customers with an automated method to opt out of future calls for the company itself (even if it is at the end of the call). The FTC's 2008 revisions had already required an interactive opt-out procedure for consumers to add their numbers to the Do Not Call list and report the violation using push buttons during the call.<sup>121</sup> The 2012 FCC rules also

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113. *See generally* 15 U.S.C.A. § 6101 (West 2014) (discussing the reasoning for Congressional action regarding the regulation of telemarketing).

114. Telemarketing Relief Act of 2003, H.R. 52, 108th Cong. (2003); Do-Not-Call Improvement Act of 2007, H.R. 3541, 110th Cong. (2008).

115. FED. TRADE COMM'N, *supra* note 85, at 1.

116. *See* FED. COMM'NS COMM'N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 27 FCC Rcd. at 1830-31 (2012) (discussing the previously enacted requirements for prerecorded messages).

117. FED. COMM'NS COMM'N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 18 FCC Rcd. at 1404 (2003).

118. 47 U.S.C. § 227(b)(1)(A)(2006).

119. FED. TRADE COMM'N, *supra* note 85, at 13-14.

120. FED. COMM'NS COMM'N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 27 FCC Rcd. at 1830 (2012) (implementing reactively many of the same provisions the FTC had implemented years earlier; the regulations did not go into effect until early 2013).

121. *See* Do-Not-Call Improvement Act of 2007, H.R. 3541, 110th Cong. (2008).



eliminated the “established business relationship”<sup>122</sup> exception that allowed companies to call customers for 18 months after a purchase.<sup>123</sup> While companies may still call consumers from whom they have received express written consent, the element of consent must be “clear and conspicuous disclosure” where the customer agrees unambiguously to receive calls.<sup>124</sup> The consent must be obtained in a manner that does not require the agreement be executed as a condition of a purchase decision.<sup>125</sup> Consent is not necessarily difficult to obtain, however; the FTC has ruled that the E-sign Act, where consent may be obtained through telephone buttons, e-signatures on the internet, or other electronic means, will satisfy the “express consent” requirement.<sup>126</sup>

Coming four years after the FTC’s most relevant changes in telemarketing regulation, the FCC’s 2012 revisions were particularly reactive; the FCC even wrote that it was evident that rulemaking changes were needed due to “ongoing consumer frustration reflected in our complaint data and the positive consumer response to the FTC’s proceedings.”<sup>127</sup> As with other revisions by the FTC and FCC, these were hailed as a permanent solution to stop robocalls in the news media. One reporter writes, “those aggravating automated telemarketing calls will be interrupting your dinner a lot less often.”<sup>128</sup> While the multiple revisions to the FTC and FCC telemarketing rules certainly aim to “maximize

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122. FED. TRADE COMM’N, *supra* note 85, at 12 (stating that the established business relationship exemption was often perceived as inconsistent by members of the public, because “the consumers are unaware of these exceptions or are not aware that they have a relationship with the seller that falls within one of these exceptions.”).

123. Press Release, Fed. Commc’ns Comm’n, FCC Adopts Rules to Strengthen Consumer Protections Against Unwanted Telemarketing “Robocalls” to Wireline and Wireless Phones (Feb. 15, 2012), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-312493A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312493A1.pdf) (“Eliminating the ‘established business relationship’ exemption to the requirement that telemarketing robocalls to residential wireline phones occur only with prior express consent from the consumer.”).

124. FED. COMM’NS COMM’N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 27 FCC Rcd. at 1830 (2012).

125. *Id.* (“In addition, the written agreement must be obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.”).

126. FED. COMM’NS COMM’N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 27 FCC Rcd. at 1830 (2012); 15 U.S.C. 7006(4) (2006).

127. FED. COMM’NS COMM’N, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 27 FCC Rcd. at 1830 (2012).

128. Andrea Chang, *New FCC Rules Curb Automated Telemarketing Calls*, L.A. TIMES (Feb. 15, 2012), <http://articles.latimes.com/2012/feb/15/business/la-fi-robocalling-20120216>.

consistency,” consistency has never fully been evident in telemarketing rulemaking.

### III. COMMERCIAL SPEECH ISSUES: DOES “RACHEL” HAVE FIRST AMENDMENT RIGHTS?

Although inconsistent rulemaking provisions from the FTC and FCC may distract from the purpose of telemarketing regulation, its ultimate aim is to balance the right of the telemarketer’s freedom to make calls (as a form of speech) against the consumer’s right to remain free from unwanted intrusions in the home. Many consumers who hear “Rachel” on the other end of the line may not realize the mutterings of this “robots” are protected by the First Amendment, but the constitutionality of regulations concerning this type of robot call has been challenged in court on this exact basis.<sup>129</sup> Telemarketing regulations have been subject to a number of First Amendment challenges over the years and have ultimately remained protected as “consistent with the First Amendment rights of commercial speakers,”<sup>130</sup> but any analysis of potential telemarketing regulations requires an evaluation of the interests at stake.

#### A. *Telemarketing as Commercial Speech in the Home*

While the TCPA exempts calls that are not explicitly commercial,<sup>131</sup> many telemarketing calls – while not an outright solicitation for a product – are an attempt to propose a commercial transaction. Commercial speech is defined narrowly as speech that does “no more than propose a commercial transaction. . . [and are]. . . [r]emoved from any ‘exposition of ideas.’”<sup>132</sup> Robocalls fit this definition. Commercial speech also encompasses “expression related solely to the economic interests of the speaker and its audience.”<sup>133</sup> Robocalls that initially offer a reduction in credit card interest rates or a review of a mortgage might not solely relate to “the economic interests of the speaker and the audience.”<sup>134</sup> Most robocalls aim to motivate the listener in some economic respect – either through gaining credit card information or defrauding the customer in some other way.<sup>135</sup>

129. See, e.g., *Mainstream Marketing Services, Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1250 (10th Cir. 2004) (holding that “the do-not-call list is a valid commercial speech regulation under Central Hudson.”).

130. *Id.* at 1228.

131. See *supra* Part II(I).

132. Stephen M. Worth, Note, “Do Not Call” Laws and the First Amendment: Testing the Limits of Commercial Free Speech Protection, 7 J. SMALL & EMERGING BUS. L. 467, 482 (2003) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (anticipating legal challenges to the National Do Not Call Registry).

133. *Id.*

134. *Supra* Part I(II).

135. See INFORMATION PRIVACY CENTER, *supra* note 34 (discussing privacy, civil rights, and constitutional issues regarding telemarketing).

Determining what qualifies as commercial speech is based simply on “the ‘common-sense’ distinction between speech proposing a commercial transaction . . . and other varieties of speech.”<sup>136</sup> Because the speaker has an economic interest in the matter, and there are often no other purposes to the call beyond simple advertising, most robocalls qualify as commercial speech.<sup>137</sup>

Commercial speech is entitled to protection of the First Amendment – although less than non-commercial speech.<sup>138</sup> If robocalls are defined as “commercial speech,” they are limited by reasonable restrictions;<sup>139</sup> however, the forum in which the commercial speech is given special consideration.<sup>140</sup> Phone lines in the private home are “a device for private communication,” and are therefore not a public forum.<sup>141</sup> Robocalls made to a home phone line are particularly intrusive because the recipient cannot simply tell the caller to go away; the caller, rather than the recipient, elects the time and manner that the message arrives.<sup>142</sup> As much as the robocaller may have the right to express a statement about a commercial product, a consumer must have the right to “have peace and quiet and tranquility in their home.”<sup>143</sup>

The Supreme Court has recognized the sanctity of the home numerous times: “citizens in the privacy of their homes should be able to exercise a high degree of control over the communication to which they are subjected.”<sup>144</sup> Likewise, “the government has an interest in upholding the

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136. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978) (discussing first amendment protection afforded to commercial speech). *See also* *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 637 (1985) (discussing protection of advertisers’ commercial rights).
137. *See* *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 80 (1983) (ruling that mailing of unsolicited contraceptive advertisements is commercial speech).
138. *See* *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 637 (1985) (discussing protection of advertiser’s commercial rights).
139. *See infra* text accompanying note 151.
140. *See* *Van Bergen v. Minnesota*, 59 F.3d 1541, 1552 (8<sup>th</sup> Cir. 1995) (upholding constitutionality of Minnesota’s Automatic Dialing-Announcing Device law); *see also* *Miller*, *supra* note 49, at 229 (discussing the controversial nature of automated robotic calls and their regulation).
141. *Miller*, *supra* note 49, at 229 (2009) (discussing controversial nature of automated robotic calls and their regulation).
142. *See id.* at 241 (2009) (citing *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554-55 (8<sup>th</sup> Cir. 1995)).
143. *See id.* at 240 (quoting Indiana Supreme Court Justice Dixon) (discussing possible political impact on upcoming Indiana Supreme Court ruling regarding automated political robocalls).
144. *Rowan v. U.S. Post Office*, 397 U.S. 728, 737 (1970) (ruling that a recipient of postal mail has unreviewable discretion in deciding whether or not to receive future content from a particular sender, and that the sender does not have a constitutional right to mail unwanted material). *See also* *Nelson*, *supra* note 50

rights of residents in their homes.”<sup>145</sup> Because telemarketing is uniquely intrusive and many other forms of non-direct advertising are available, some courts have found that telemarketing should be subject to uniquely restrictive regulation.<sup>146</sup> Aural communication, made through the personal home phone line, is especially intrusive because it is “extremely difficult to ignore and therefore more intrusive than visual communication.”<sup>147</sup> Even though some skeptics have hesitated to call telemarketing a “serious intrusion”<sup>148</sup> on privacy, the federal government has justified regulation based solely on complaints and outrage by consumers.<sup>149</sup>

*B. Under-Inclusive Regulations for an Overly Intrusive Device:  
Reasonable Restrictions Held Constitutional*

Although laws regulating commercial speech have consistently been challenged, “[t]he Supreme Court has consistently upheld the constitutionality of “underinclusive” regulations.”<sup>150</sup> Most telemarketing

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(discussing the Do-Not-Call-Implementation-Act re-allocation of power between consumers and telemarketers).

145. FED. COMM’NS COMM’N, CG DOCKET NO. 02-278, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, at 41 (June 26, 2003) (reviewing and revising the Telephone Consumer Protection Act by establishing; in conjunction with the Federal Trade Commission, a national do-not-call registry for customers wishing to avoid telemarketing calls); *see also* Rowan v. U.S. Post Office, 397 U.S. 728, 737 (1970) (ruling that a recipient of postal mail has unreviewable discretion in deciding whether or not to receive future content from a particular sender, and that the sender does not have a constitutional right to mail unwanted material), *but see* Martin v. City of Struthers, 319 U.S. 141 (1943) (ruling that a law prohibiting distribution of leaflets advertising a Jehovah’s Witness religious meeting violates a Jehovah Witness’ First Amendment rights).
146. Telemarketing and door-to-door solicitation have been distinguished from other forms of marketing because of the immediate attention they require. *See* Miller, *supra* note 49, at 241 (discussing the controversial nature of automated robotic calls and their regulation).
147. Nelson, *supra* note 50, at 71 (discussing the Do-Not-Call-Implementation-Act re-allocation of power between consumers and telemarketers).
148. Worth, *supra* note 132, at 491 (writing that “it is a bit of a stretch to characterize these interruptions as ‘serious intrusions’ since the solicitations are short and can easily be ended by the consumer at any time by merely hanging up the phone”).
149. Robert McDowell, *Statement Regarding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Feb. 15, 2012), <http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0> (last viewed Feb. 11, 2014) (stating “sometimes it seems like there’s no escape. The minute you sit down at the family dinner table or settle in to watch your favorite basketball team, the phone rings.”). *See also* Mignon Clyburn, *Statement Regarding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Feb. 15, 2012), <http://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-telemarketing-robocalls-0> (last visited Mar. 25, 2014) (stating that the revisions are “yet another victory for consumers”).
150. Nelson, *supra* note 50, at 71.

regulations fall within this category; those short of a ban are upheld because the regulations “only prevent dissemination to the unwilling.”<sup>151</sup> Non-content based bans of truthful, non-misleading messages have been upheld.<sup>152</sup> “We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, and that they leave open ample alternative channels for communication of the information.”<sup>153</sup> The government may place reasonable time and manner restrictions on content neutral speech;<sup>154</sup> for example, reasonable-timing restrictions, such as the restrictions on when a telemarketer can call, such as between 9 A.M. and 8 P.M. are constitutional. Telemarketers challenging the TCPA in the early 1990s claimed the statute was not content neutral—saying it “regulated speech based on substance rather than form”—but these challenges were overturned.<sup>155</sup>

However, robocalls and fraudulent telemarketing messages may not always be truthful, and these types of calls are often harder to track.<sup>156</sup> When evaluating any new potential regulation, the interests of the parties at

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151. *See id.* (discussing “consumer specific restrictions on point-to-point media”); *Rowan v. U.S. Post Office*, 397 U.S. 728 (1970) (ruling that a recipient of postal mail has unreviewable discretion in deciding whether or not to receive future content from a particular sender, and that the sender does not have a constitutional right to mail unwanted material).
152. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (ruling that a ban on distribution of commercial material through news racks is a violation of the first amendment). *See also* 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 502 (1996) (ruling that a complete ban on advertising alcohol prices is a violation of the first amendment).
153. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (ruling that National Park Service regulation banning sleeping in national parks is not a First Amendment violation, even in light of an awareness group’s permit for a seven day protest); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding content neutral and impartially administered city law banning signs on public land because the city’s interests were substantial enough to justify it); *United States v. Grace*, 461 U.S. 171 (1983) (ruling that ban on carrying signs, banners, or devices on public sidewalks surrounding the Supreme Court building is unconstitutional); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (ruling that a states cannot limit pharmacists from providing information about prescription drug prices); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993) (ruling that a ban on distribution of commercial material through news racks is a violation of the First Amendment).
154. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (stating that “[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.”).
155. *See* Joseph R. Cox, *Telemarketing, The First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 *HAMLIN J. PUB. L. & POL’Y* 403, 406-07 (1995) (stating that “the statute was not a proper time, place, or manner restriction.”).
156. Henning Schulzrinne, *supra* note 24.

stake must be weighed in order to evaluate the best solution.<sup>157</sup> A ban on fraudulent telemarketing calls—or at the very least “deceptive” types of calls—may have a genuine justification that would serve millions of frustrated consumers. However, the Supreme Court has stated “protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”<sup>158</sup> Indeed, “while certain regulations short of an outright ban would certainly be unconstitutional, some regulation of robocalls is permissible under the First Amendment.”<sup>159</sup> Simply because alternatives for marketing—such as mass mailings or email—are available and constitutional, however, does not mean that they are ideal: “simple economics tells us that these firms have found that they can be most profitable if they disseminate their messages [through telemarketing].”<sup>160</sup> Although “more people may be more easily and cheaply reached . . . [this] is not enough to call forth constitutional protection of what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.”<sup>161</sup> While a general prohibition on robocalls might be unwise,<sup>162</sup> a careful analysis of the First Amendment interests at stake in any additional telemarketing regulation is warranted.<sup>163</sup>

The Supreme Court first gave protection to commercial speech in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, holding that pharmacists did have a right to advertise the prices of their drugs to consumers.<sup>164</sup> Subsequent cases followed this line of reasoning until *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, which introduced a more concrete test that set forth four considerations for valid commercial speech:

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157. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (weighing the right of the individual householder to make decisions about listening to solicitors, or whether the community should make the decisions for or against solicitors).
158. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980) (discussing the constitutional protection given to commercial speech).
159. *Miller*, *supra* note 49, at 245 (discussing regulations less strict than an outright ban).
160. *Worth*, *supra* note 132, at 476 (stating that “telemarketers use telephonic communication for a reason.”).
161. *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (discussing enforcing freedom of speech at the cost of disregarding the rights of others).
162. *See Hynes v. Mayor*, 425 U.S. 610, 623 (1976) (Brennan, J. dissenting) (stating laws “must encounter substantial First Amendment barriers” and should be scrutinized).
163. Michael E. Shannon, Note, *Combatting Unsolicited Sales Calls: The “Do-Not-Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 383 (2001) (stating “[t]he First Amendment interests of the caller must be weighed against the privacy interests of the consumer.”).
164. *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that the government could not suppress truthful information from being lawfully advertised).

If the communication is neither misleading nor related to unlawful activity. . . [t]he State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitations on expression must be designed carefully to achieve the state's goal . . . First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.<sup>165</sup>

1. Non-misleading commercial speech, not related to unlawful activity

The Supreme Court stated in *Central Hudson* that “[t]he First Amendment’s concern for commercial speech is based on the informational function of advertising.” Although there is no strong constitutional basis for forbidding messages that are inaccurate, the “government may ban forms of communication more likely to deceive the public than to inform it.”<sup>166</sup> All robocalls made by prerecorded dialers may not be explicitly unlawful, but some calls (like those offering reduced credit card rates or special insurance offers), may mislead consumers. On these grounds a more specific ban or additional regulation of robocalls may be justified.

2. Substantial governmental interest in regulation

The second prong in the *Central Hudson* test, which addresses whether the government has a substantial interest in the regulation at stake, further supports increased regulation. In *Rubin v. Coors Brewing Co.*, the Supreme Court found that disclosure of more information, rather than less, served both the government and consumer interests at stake in the regulation of alcohol.<sup>167</sup> Because the government has a substantial interest in protecting the health and safety of its citizens, disclosure of more information about

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165. *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm.*, 447 U.S. 557, 566 (1980).

166. *Id.* (stating “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity”). See also *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464-65 (1978) (stating “the justifications for prohibiting truthful . . . [advertising] are insufficient to override . . . the First and Fourteenth Amendments, in assuring the free flow of commercial information.”); *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 (1973) (“On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.”).

167. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 484 (1995) (“In the Government’s view, restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic.”).

the content of the beer was warranted.<sup>168</sup> Likewise, since the government has an interest in protecting its citizens from fraud—while also protecting small businesses—stricter robocalling regulation could protect the individuals receiving the calls as well as restore the public’s trust in legitimate small businesses that may be making genuine sales calls.<sup>169</sup>

### 3. Directly advances the governmental interest

The third element in the *Central Hudson* test addresses whether the regulation is “narrowly tailored” to achieve a government interest. This element does not directly support more regulation as “[t]he State cannot regulate speech that poses no danger to the asserted state interest.”<sup>170</sup> Arguably, fraudulent telemarketing calls pose no direct danger to state interests, and a complete ban on robocalls would only interfere with the government’s interests.<sup>171</sup> Telemarketing calls are a valuable tool for companies to reach consumers easily and cheaply; a more explicit ban would not clearly advance the interest of the government.<sup>172</sup> Here, the proactive Do Not Call registry, a simple mechanism for registry and reporting, is a remedy more narrowly tailored toward protecting both the interests of the government and the businesses at stake in the matter.<sup>173</sup>

### 4. Not more extensive than necessary to serve that interest

Finally, regulation must not be more extensive than necessary to serve the governmental interest at stake. In *Turner Broadcasting System v. FCC*, the Supreme Court held that regulations must not burden more speech than is necessary to further the government interest they promote.<sup>174</sup> This element does not support broad-based bans. In *Central Hudson*, for

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168. *Id.* at 488 (“While the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising.”).

169. See Statement of Julius Genachowski, Chairman, Fed. Commc’ns Comm’n, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (Feb. 15, 2012) (“At the same time that we help consumers avoid unwanted robocalls, we do so in a manner that is minimally burdensome to businesses, including small businesses.”).

170. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 565 (stating “the First Amendment mandates that speech restrictions be ‘narrowly drawn.’”).

171. i.e., in notifying residents about emergency situations.

172. *Fla. Bar v. Went For It, Inc.*, 15 U.S. 618 (1995) (discussing the balance between the legislature’s ends and the means used to reach them).

173. Implementing the Telephone Consumer Protection Act, 23 F.C.C.R. § 559 (2003).

174. *Turner Broad. v. Fed. Commc’ns Comm’n*, 520 U.S. 180, 213-14 (1997) (stating “the Government may employ the means of its choosing” as long as the regulation upholds a substantial governmental interest and only goes as far as is necessary to promote that interest).



example, the Court found that as important as the energy-conservation rationale is, it cannot justify suppressing information.<sup>175</sup>

Although all of these interests might be fulfilled through telemarketing regulation, the government might be justified in offering more extensive telemarketing regulation based on the government's interest in protecting the public from "commercial harms."<sup>176</sup> Here, while some telemarketing calls are fraudulent, other telemarketing calls serve a valuable purpose of informing customers about valuable deals and promotions. As the government still has an interest in promoting business, a complete ban on robocalling would likely be deemed more extensive than necessary to serve governmental purposes. Although irate recipients of constant robocalls may think otherwise, "a statute cannot foreclose an entire medium of expression."<sup>177</sup>

#### IV. CONSIDERATION OF A SAMPLING OF PROPOSED REMEDIES TO REDUCE ROBOCALLS

Absent a complete ban on robocalls, any effective remedy to reduce fraudulent robocalls must bridge *both* the technical and legal gaps in the market. Although inconsistent regulation may have caused consumers and telemarketers to think otherwise, certain calls made through the use of prerecorded voice messages have been illegal for decades.<sup>178</sup> But consumers still receive millions of these calls a year despite multiple forms of regulation and growing enforcement efforts.<sup>179</sup> One proposed solution illustrates this paradox: absent a complete ban, regulation that treats the Do Not Call Registry as a digital "no solicitation" sign has also been proposed; this solution would make it impossible to call a telephone number on the Do Not Call Registry.<sup>180</sup> While not altogether practical since this number would still need to receive legitimate robocalls, this suggestion impedes legitimate telemarketer access to numbers on the Do Not Call Registry and

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175. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 570 ("But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use.").

176. *44 Liquormart v. R.I.*, 517 U.S. 484, 499 (1996) (explaining why commercial speech can be subject to more regulation than noncommercial speech); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993) (stating "preventing commercial harms by regulating the information distributed . . . is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.").

177. Miller, *supra* note 49, at 244; *City of Ladue v. Gileo*, 512 U.S. 43, 55 (1994).

178. *See supra* Part II(I).

179. *See supra* text accompanying note 2 (One robocall firm bragged of calling 10% to 20% of the American population daily).

180. Cox, *supra* note 156, at 424 (stating "Telemarketing should be banned until the technology is available to put a "no solicitation" sign on your phone number as well.")

ignores the realities of direct marketing.<sup>181</sup> While it may reduce the number of solicitations made, even physical “no solicitation” signs do not prevent canvassers from walking up to a door, thus it is unclear that a digital version would have any true impact on solicitations.

The ideal telemarketing solution must also capitalize on relative societal norms, taking into account expected consumer and telemarketer behavior. While an “opt-in” system would be ideal, it would essentially make the telemarketing system defunct.<sup>182</sup> As consumers are not accustomed to “opting-in” to ideas that may be perceived as harmful or annoying; the average consumer is far more likely to “opt-out” of such a scheme. Because “consumers are accustomed to being solicited at home and virtually everywhere else,”<sup>183</sup> opting in to telemarketing calls would not prevent any more robocalls than the Do Not Call Registry already does. Additionally, with the addition of the “express written consent” element of the 2008 FTC revisions and 2012 FCC revisions, an opt-in solution essentially already exists;<sup>184</sup> consumers who give their express written consent can receive telemarketing calls from that company. This “consent” can also be manipulated in many ways, however; “express written consent” can be obtained through obtained by telemarketers through an online form, credit card signature, or a “terms” agreement on a website.<sup>185</sup> Although an “opt-in” solution may reduce some telemarketing calls, the suggestion is far from ideal. This proposed solution is most likely to impede free speech by telemarketers: “when limitations on speech are requested or mandated by individual listeners rather than the government, the First Amendment protection afforded to the speaker is less.”<sup>186</sup>

Another suggested solution would quite literally “capitalize” on societal norms: a “pay-me-to listen” solution, such as that advocated by New York Times columnist James B. Rule, “would allow consumers to put a price tag on their time spent listening to telemarketing calls.”<sup>187</sup> This “low tech” solution would require telephone providers to offer consumers

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181. *Q&A For Telemarketers & Sellers About DNC Provisions in TSR*, BUREAU OF CONSUMER PROTECTION BUSINESS CENTER, <http://www.business.ftc.gov/documents/alt129-qa-telemarketers-sellers-about-dnc-provisions-tsr> (last visited Mar. 25, 2014).

182. See Nelson, *supra* note 50, at 76 (noting that an opt-in proposal would remedy the current situation in which all consumers are vulnerable to calls unless they have affirmatively acted otherwise).

183. *Id.*

184. See *Telemarketers and Robocalls*, FED. COMM’NS COMM’N, <http://www.fcc.gov/encyclopedia/telemarketing> (last visited Mar. 25, 2014) (“most recently, in 2012, the FCC revised its TCPA rules to require telemarketers to obtain prior express written consent from consumers before robocalling them.”).

185. *Supra* text accompanying note 124.

186. Worth, *supra* note 132, at 476.

187. Nelson, *supra* note 50, at 76.

the option of only accepting “bonded” calls, or calls that had already been screened as a valid telemarketing call.<sup>188</sup> If the recipient of the call designates the call a nuisance, then the telemarketer would then be billed for the call.<sup>189</sup> Here, the burden of compliance and expense is placed almost entirely on the telemarketer, who would have to demonstrate “willingness and ability to compensate the recipient – should the latter designate the call a nuisance” before placing any telemarketing calls.<sup>190</sup> Although Rule suggested that this “would require only modest alteration[s] of existing technology,” he has not “vetted the scheme with a technical expert.”<sup>191</sup> Technical considerations aside, the scheme likely would not pass constitutional muster; paying the consumer to listen to telemarketing calls would make telemarketing cost-prohibitive for small and fledgling businesses. This likely impermissibly constrains commercial speech. Although some consumers may agree to participate in this suggested scheme as a potential source of income, it is more likely that few consumers would agree to participate. In order to receive the suggested compensation for listening to “nuisance” telemarketing calls, the consumer must agree to listen to the nuisance – a counterintuitive process.<sup>192</sup>

Clearly, since consumers do not want to listen to robocalls and they value privacy within their home, the ideal remedy to reduce robocalls would weigh the value of this privacy against the utility of the solution. One researcher used data from the Do Not Call Registry in an attempt to monetize the exact privacy interest at stake, measuring what value a telemarketer must provide in order to convince a consumer not to join the Do Not Call Registry.<sup>193</sup> This research found that “if the privacy cost is \$8.25 per year (per consumer), then the direct marketing industry must increase the expected consumer surplus to exceed \$8.25 a year in order to persuade consumers to accept telemarketing and remove themselves from the do not call registry.”<sup>194</sup> Unless enough telemarketers offer legitimate, non-fraudulent business considerations, “each telemarketer will provide too

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188. James B. Rule, Op-Ed., *Call Me, Pay Fee*, N. Y. TIMES, June 21, 2012, at A25. This proposal was also submitted to the FTC Robocall Challenge.

189. *Id.* (stating that “institutional callers that now offend thousands to obtain a positive response from a tiny majority would be obliged to weigh the effects of their entreaties on all those whose attendance they commandeer.”).

190. *Id.*

191. Jeffries, *supra* note 9.

192. Nelson, *supra* note 50, at 77 (noting that although this proposal would allow only those telemarketers willing to pay the consumer’s price to speak to them, it is unlikely to be successful as there is little indication of consumers being interested in participation).

193. Ivan P.L. Png, *On the Value of Privacy from Telemarketing: Evidence from the ‘Do Not Call’ Registry* 3 (2007) (unpublished manuscript) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1000533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000533) (using econometric methods to estimate the value of state and federal do not call registries).

194. *Id.*

little benefit to consumers, and hence, the number of consumers who accept telemarketing will fall short of the social optimum.”<sup>195</sup> Regardless of the \$8.25 in “privacy costs,” however, the ultimate interests at stake are much harder to calculate as “there is the . . . cost of having one’s personal space invaded by a robocaller that one never wished to summon.”<sup>196</sup>

When the FTC announced its “Robocall Challenge” on October 18, 2012, the FTC stepped outside of its rulemaking power to advocate for a “crowd-sourced” solution to robocalling.<sup>197</sup> Offering \$50,000 for a technical solution to reduce robocalls, the Robocall Summit expressed the first perspective from an agency that a solution to end robocalling must be a combination of technical, legal, and practical remedies. The FTC is certainly not the first agency to advocate for a crowd-sourced solution to a public policy problem and offer money for the solution;<sup>198</sup> however, many crowd-sourced solutions often fall flat.<sup>199</sup> With the challenge, the FTC recognizes the ways in which the Do Not Call Registry is limited: “The companies that use this technology don’t bother to screen for numbers on the Do Not Call Registry. If the company doesn’t care about obeying the law, you can be sure they’re trying to scam you.”<sup>200</sup> At the summit, the FTC Bureau of Consumer Protection Director David Vladeck stated, “we think this will be an effective approach in the case of robocalls because the winner of our challenge will become a national hero.”<sup>201</sup> A “national hero” is certainly what is needed: because of the call spoofing, inefficient tracking mechanisms, and the sheer number of robocalls, the FTC has consistently had trouble tracking these callers.<sup>202</sup> An ideal solution would require telephone providers and government regulators to work together. However, “[t]he legacy infrastructure of the public switch telephone

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195. *Id.* at 7 (concluding, ultimately, that “[e]ach telemarketer will provide too little benefit to consumers, and hence, the number of consumers who accept telemarketing will fall short of the social optimum.”).

196. Randall Stross, *Robocalls Instigate a Cellphone Fight*, N.Y. TIMES, Nov. 12, 2011, at BU3.

197. Press Release, Fed. Trade Comm’n, FTC Challenges Innovators to Do Battle with Robocallers (Oct. 18, 2012).

198. Miller, *supra* note 37 (stating that the government currently has 237 open public challenges, as of January 23, 2013).

199. Jeffries, *supra* note 9 (giving the example of a Netflix challenge that encouraged consumers to create an ideal algorithm to create the video suggestions for consumers).

200. *Robocalls*, FED. TRADE COMM’N (July 2012), <http://www.consumer.ftc.gov/articles/0259-robocalls> (discussing how technology allows companies to make thousands of automated calls per minute at negligible costs, which explains the spike in robocalls).

201. Sperry, *supra* note 21 (describing the FTC Robocall Challenge).

202. *See* Schulzrinne, *supra* note 24 (explaining how automation has been on the side of companies that perpetrate robocalls, and how the means currently employed by law enforcement are not adequate to match what robocallers use).

network, and the fact that carriers and government must coordinate, make” cooperation extremely difficult.<sup>203</sup> But with the Robocall Challenge, a solution that helps telephone service providers, telemarketers, and the government work together to reduce robocalls, such coordination may be successful.

In addition to any technical solution, an ideal remedy to reduce robocalls would also include streamlined enforcement methods. The enforcement methods the FTC currently employs are slow and cumbersome. While robocall telemarketers may be international operations with automated computer and numbering systems in multiple locations,<sup>204</sup> the FTC must fax its efforts to enforce robocall regulations via subpoenas and injunctions one document at a time, slowly moving through complicated manual trace back methods.<sup>205</sup> Unlike email spam enforcement efforts - which could possibly be traced back to one IP address or encrypted metadata - it is much harder to track spoofed phone numbers.<sup>206</sup> The FTC has brought over 100 enforcement actions against telemarketing in the ten years since the Do Not Call Registry went into effect,<sup>207</sup> but many more enforcement actions could come to fruition if the FTC has an efficient method to track fraudulent numbers. These cases have resulted in \$6.9 million in penalties,<sup>208</sup> but this number pales in comparison to the 3.84 million robocall complaints, 2.26 million of which included recorded messages.<sup>209</sup> Although an “opt-in” or “pay me to listen” solution is unlikely to stand up to constitutional challenges or technical realities, the FTC’s Robocall Challenge, paired with additional regulation, has potential.

## V. PROPOSED REMEDIES TO REDUCE ROBOCALLS AND ADDITIONAL CONSIDERATIONS

Inconsistent and duplicative regulations, First Amendment considerations, slow methods of enforcement, and the complicated nature of proposed solutions prove that any remedy to reduce robocalls must include a multi-layered combination of legal and technical remedies in order to stop the constant invasion of “Rachel” and “Ann” into America’s

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203. Jeffries, *supra* note 9 (arguing that technology gives robocallers a net advantage over law enforcement). <http://www.theverge.com/2013/1/28/3924544/who-can-stop-robocalls-ftcs-attempt-to-crowdsource-a-solution-falls>

204. *Supra* Part I.

205. See Schulzrinne, *supra* note 24 (referring to the laborious and often inefficient process law enforcement employs when trying to trace back robocalls).

206. *Id.* (explaining why, despite the ease with which we can block email spam today, applying similar processes to phone calls is very difficult or even impossible).

207. Jeffries, *supra* note 9 (discussing why the Robocall Challenge was unsuccessful in providing the FTC with a solution to stop robocalls).

208. *Id.*

209. Miller, *supra* note 37 (discussing the Robocall Challenge).

homes. At best, these remedies would reflect the purpose of the TCPA, recognizing that “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”<sup>210</sup> The Robocall Challenge aims to search out a technical solution to reduce robocalls; the ideal solution, however, needs to be a technical solution that involves cooperation between telephone service providers and the government, easy reporting methods for consumers who receive consistent robocalls, and a streamlined statutory and regulatory structure that enables clear easy-to-understand preventative measures and enforcement of violations. Ideally, a multi-faceted approach would anticipate changes in technology so that consumers are at peace from “Rachel” for years to come.

#### A. *Unified Federal Telemarketing Rulemaking Structure*

This Note advocates a moratorium on additional rulemaking by both the FTC and FCC until Congress takes action to give sole authority for telemarketing regulation to one agency. This act should focus first on transparency.<sup>211</sup> With duplicative regulation coming from the TCPA and the TCFAPA, which addressed many of the same topics within a five-year span, transparency in telemarketing regulation has not been present since the early 1990s. Although at the beginning, the Do Not Call Registry aimed to maximize consistency, the duplicative and complicated rulemaking procedures that the FTC and FCC used throughout the early 2000s have only led to more confusion among consumers, the media, and telemarketing companies. In effect, by taking action to create a new and transparent telemarketing act, Congress would essentially be following its own demand in regards to consistencies. When Congress revised the TCFAPA in 2003, it called for the FTC and the FCC to issue new regulations and stated that Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.<sup>212</sup> FCC Commissioner Clyburn spoke to this reactive nature of regulation in 2012: although she wrote that the FCC was “carrying out Congress’ intent to ensure that the FCC’s rules regarding telemarketing ‘robocalls’ are harmonized with those of the Federal Trade Commission.”<sup>213</sup> Clyburn also noted that “[t]his effort makes additional

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210. FED. COMM’NS COMM’N, CG DOCKET NO. 02-278, IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, at 20 (June 26, 2003) (explaining the objectives of the order).

211. Miller, *supra* note 49, at 248.

212. See Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 (2006) (outlining the three ways Congress intended to create more effective regulation in this field).

213. Robert McDowell, Statement Regarding Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (Feb. 15, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-21A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-21A3.pdf).

good sense because . . . Congress told us to do it!”<sup>214</sup> After such inconclusive regulations, constant revisions, and confusing standards, a concrete national standard for prohibiting deceptive telemarketing—one that would preempt state regulations—is the best legal remedy to combat robocalls. Otherwise, the patchwork regulation among the states and the two federal agencies makes legal compliance difficult as a unified standard would make enforcement of robocalls easier.<sup>215</sup>

Because the FTC currently administers the Do Not Call Registry, leads enforcement actions, and introduced the Robocall Challenge, the FTC is the best-equipped agency to hold rulemaking power over telemarketing. As evidenced by the FTC’s enforcement actions targeting illegitimate, fraudulent telemarketers,<sup>216</sup> any act that delegates sole rulemaking power to the FTC must prohibit deceptive telemarketing calls. While not a complete ban, an act that forbids fraudulent calls would pass constitutional muster and appropriately balance the interests of businesses and consumers. While opponents may argue that an exemption for calls from “legitimate” companies is illegally based on content, other similar restrictions, such as the exemptions for political robocalls and calls for charitable solicitations are constitutional.<sup>217</sup> Because the “government may ban forms of communication more likely to deceive the public than to inform it,”<sup>218</sup> a prohibition against deceptive callers that exempts legitimate companies also holds up under the *Central Hudson* test.<sup>219</sup> As FTC and FCC statements show, the government has a direct interest in reducing fraudulent telemarketing through regulation and enforcement. Because an act that would delegate rulemaking authority to the FTC alone would ban fraudulent robocalls—not all robocalls—it would also be narrowly tailored and not more extensive than necessary to serve the interests of the government, consumers, and the businesses at stake. While the act might hurt the efforts of telemarketers intending to defraud consumers, it would reduce the number of robocalls that reach consumers while still enabling small businesses to place legitimate robocalls. Ideally, such a targeted act would create both a “victory for consumers” and a “win for industry.”<sup>220</sup> An act that bans deceptive robocallers would end regulatory uncertainty,

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214. *Id.*

215. *See Miller, supra* note 49, at 247 (arguing that “such inconsistencies make it difficult, if not impossible, for political candidates to be aware of them all.”).

216. As opposed to legitimate telemarketing companies.

217. *See id.* at 246 (indicating that in regards to politics, restrictions on robocalls cannot “suppress legitimate speech and access to informative robocalls.”).

218. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980).

219. *See supra* text accompanying notes 164-174 (applying the four-part *Central Hudson* test).

220. *See Clyburn, supra* note 150 (“The Order before us today is yet another victory for consumers . . . This Order is also a win for industry.”).

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streamline enforcement actions, and reduce consumer and business confusion that ultimately contributes to the rise in robocalls.

*B. Do Not Call Registry Reevaluation and Consumer Education*

There are other practical solutions that do not require an act of Congress. Specifically, the utility of the Do Not Call list needs to be re-evaluated regarding its utility in combatting fraudulent telemarketing calls. At ten years in existence, the use of the registry has helped decrease the number of telemarketing calls from legitimate companies: “consumer surveys show that consumers perceive that the Registry has been very effective in reducing unwanted telemarketing calls, it is also true that consumers who have listed their telephone numbers on the Registry continue to get unwelcome, unsolicited calls.”<sup>221</sup> Consumers report general familiarity with the Registry: an October 2007 poll “reported that 86% of survey participants were familiar with the Registry, and 72% reported that they had registered their telephone numbers.”<sup>222</sup>

Although general familiarity with the registry exists, many consumers are confused about what to do when they receive a robocall. In this regard, the Do Not Call Registry’s ease of use cannot be topped by any other remedy. As a fully automated system that can be completed quickly and easily, the Registry currently provides two ways to register a complaint: an interactive voice response system accessed by a toll-free telephone number and an internet-based system.<sup>223</sup> The FTC has instigated a number of targeted education campaigns to educate consumers about the utility of the Do Not Call Registry;<sup>224</sup> as the Registry reaches a decade in age, additional educational campaigns are warranted. Even if robocalls cannot be reduced in any other way, more educated consumers that report fraudulent robocalls (even if reported numbers end up being spoofed) may bolster the FTC’s enforcement efforts and ultimately reduce robocalls. Even this little effort could reduce robocalls; because “the FTC believes that the robocall industry has very low margins . . . even small steps toward decreasing the effectiveness of robocalls or driving up their costs could wipe out the market.”<sup>225</sup>

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221. FED. TRADE COMM’N, *supra* note 85, at 12.

222. *Id.* at 4.

223. *Do-Not-Call Improvement Act of 2007 Report to Congress: Regarding the Accuracy of the Do Not Call Registry*, FED. TRADE COMM’N 1-2 (2008), available at <http://www.ftc.gov/sites/default/files/documents/reports/do-not-call-improvement-act-2007-report-congress-regarding-accuracy-do-not-call-registry/p034305dncreport.pdf> (stating that the entire process “takes only a few minutes and requires consumers to provide minimal personally identifiable information.”).

224. See FED. TRADE COMM’N, *supra* note 85, at 4-6 (discussing a program targeting senior citizens and immigrant communities).

225. Jeffries, *supra* note 9.



*C. Balanced Assessment of Robocall Challenge Solution*

If the FTC chooses a technical solution from the Robocall Challenge to reduce robocalling, that solution must join seamlessly with the Do Not Call Registry and existing telemarketing regulations. Initial reviews of the proposals are not optimistic. While the challenge received many valid submissions, “most of the actual submissions fell short of genius[, and] . . . [t]he submission gallery is littered with half serious proposals . . . as well as incoherent ramblings . . . and dubious claims . . . Many proposals are lacking in details and riddled with typos.”<sup>226</sup> The most common submission was to simply dial a number to report the call, “which the FTC is considering—it just requires cooperation from carriers who would have to agree to a single standard, then agree to a mechanism for transferring the data to the government.”<sup>227</sup> Ultimately, the best solution is “going to take time, negotiation with carriers, and infrastructure changes.”<sup>228</sup> Whatever solution is chosen from the robocall challenge, the ideal solution must adapt to changing technology; in five or ten years, telemarketing might be phased out by another direct-to-phone marketing technique. While telemarketing may take place over landline telephones today, “Rachel” and “Ann” may soon invade other forms of communication; essentially, there is “a move towards that Facebookian world where a message is a message is a message and there is no differentiation between lengths and genres, platforms and devices.”<sup>229</sup>

The FTC announced two winners to the Robocall Challenge in April 2013, after the agency received nearly 800 submissions. Both of the proposals by the winning individuals, Serder Danis and Aaron Foss,<sup>230</sup> “focus on intercepting and filtering out illegal prerecorded calls using technology to ‘blacklist’ robocaller phone numbers and ‘whitelist’ numbers associated with acceptable incoming calls.”<sup>231</sup> Foss’s proposed solution is called Nomorobo.<sup>232</sup> The free service is a cloud-based mechanism that uses “simultaneous ringing” to allow analysis of the frequency of incoming calls

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226. *Id.*

227. *Id.*

228. *Id.*

229. Alexis C. Madrigal, *Credit Where It’s Due, I Love the New Gmail Design*, THE ATLANTIC (Nov. 1, 2012), <http://www.theatlantic.com/technology/archive/2012/11/credit-where-its-due-i-love-the-new-gmail-design/264416/>.

230. *FTC Announces Robocall Challenge Winners*, FED. TRADE COMM’N (Apr. 2, 2013), <http://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>. Danis’s system is called ‘The Robocall Filtering System and Device with Autonomous Blacklisting, Whitelisting, Graylisting and Caller ID Spoof Detection.’

231. *Id.*

232. *Id.* (stating that Nomorobo is “a cloud-based solution that would use ‘simultaneous ringing,’ which allows incoming calls to be routed to a second telephone line.”).

and appropriate blocking of offending numbers.<sup>233</sup> Details about privacy concerns, intellectual property issues are yet to be fleshed out. However, Charles Harwood, acting director of the FTC's Bureau of Consumer Protection, stated that "[t]he solutions that our winners came up with have the potential to turn the tide on illegal robocalls."<sup>234</sup> Ultimately, these technical robocall solutions will be integrated into the four prongs of the FTC's robocall action plan: 1) continuing law enforcement aggressively; 2) gathering evidence strategically; 3) holding summits with law enforcement, industry members, and other stakeholders; and 4) pursuing other technological solutions.<sup>235</sup> The pursuit of these goals, along with the technical solutions developed through the Robocall Challenge, represent a step in the right direction to reduce robocalls.

## CONCLUSION

Consumers may continue to receive calls from "Rachel" in the immediate future, but realistic remedies exist to reduce and regulate robocalls. Although duplicative and inconsistent regulation have contributed to confusion and inefficient federal telemarketing policy, a unified and concrete regulatory approach that supports the First Amendment rights of both the consumer and the marketer and is backed by targeted enforcement efforts and proactive preventative technical remedies will help to reduce robocalls. While commercial telemarketing calls may be the bane of some families' existences, thoughtful remedies that reduce the number of these calls will ultimately protect consumers' right to peace and quiet.

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233. Jennifer Waters, *Many Robocalls Are Scams*, WALL ST. J. (Aug. 24, 2013, 8:44 PM), <http://online.wsj.com/article/SB10001424127887323665504579028510772525256.html> (estimating the release date as mid-September 2013).

234. Edward Wyatt, *2 Deterrents to Robocalls Win Contest By F.T.C.*, N.Y. TIMES, Apr. 3, 2013, at B4.

235. *Robocall Action Plan*, FED. TRADE COMM'N, <http://www.consumer.ftc.gov/articles/0367-robocall-action-plan> (last visited Mar. 25, 2014) (summarizing the FTC's 4-part plan).