

With respect to telemarketing that solicits charitable contributions, the Commission believes that the applicable analytical framework is more stringent.⁶⁷⁵ “[C]haritable solicitations involve a variety of speech interests . . . that are within the protection of the First Amendment and therefore have not been dealt with as purely commercial speech.”⁶⁷⁶ In considering the more stringent analysis, the Commission notes, preliminarily, that the company-specific “do-not-call” provisions that apply to charitable solicitation telemarketing are content-neutral. “Laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”⁶⁷⁷ The company-specific “do-not-call” provisions apply equally to all for-profit solicitors, regardless of whether they are seeking sales of goods or services or charitable contributions, and regardless of what may be expressed in the solicitation calls

whether they were sexually provocative. The determinative factor was that the mailings were unwanted. The Commission does not advance a theory, however, that *Rowan* should be read here to cover any non-commercial communications.

⁶⁷⁵ *Metromedia* makes clear that a less exacting standard is applied in analyzing a regulation’s constitutionality with respect to commercial speech than in analyzing the same regulation’s constitutionality with respect to noncommercial speech. “[I]nsofar as it regulates commercial speech, the San Diego ordinance meets the constitutional requirements of *Central Hudson*.... It does not follow, however, that San Diego’s ban on signs carrying noncommercial advertising is also valid Commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.” *Metromedia*, 453 U.S. at 513. In *Watchtower Bible and Tract Soc’y v. Village of Stratton*, ___ U.S. ___, 122 S. Ct. 2080 (2002), where the Court invalidated an ordinance that required anyone who wanted to engage in door-to-door canvassing or soliciting to obtain a permit before doing so, the Court went out of its way to suggest that the ordinance might have been constitutional if it were limited to commercial speech. *Id.* at 2089. This may be dicta, but it is significant because the Court seems to have approved a distinction between commercial and noncommercial speech—the same distinction drawn in the amended Rule—and to have done so in the same context as the Rule, *i.e.*, solicitation that threatens to invade the privacy of the home.

⁶⁷⁶ *Riley v. Nat’l. Fed. of the Blind*, 487 U.S. 781 (1988) (internal quotation marks omitted).

⁶⁷⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 648 (1994). “[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner* at 642, citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[The] principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”). See also *Am. Target Adver. v. Giani*, 199 F.3d 1241 (10th Cir. 2000), cert. denied, 531 U.S. 811 (2000) (applying this principle in the context of solicitation).

themselves or the viewpoints of the organizations on whose behalf the solicitation calls are made. Thus, these provisions are content-neutral.⁶⁷⁸

As in the case of commercial speech, the analysis applicable to charitable solicitations also inquires into the nature of the governmental interest that the regulation seeks to advance. The case law indicates that with respect to the higher level of scrutiny applicable to charitable solicitation, privacy protection is a sufficiently strong governmental interest to support a regulation that touches on protected speech.⁶⁷⁹ However, the case law also indicates that, in the case of charitable solicitation, greater care must be given to ensuring that the governmental interest is actually advanced by the regulatory remedy, and tailoring the regulation narrowly so as to minimize its impact on First Amendment rights. In *Riley* and *Schaumburg*, the Court rigorously examined laws that regulated the percentage of charitable contributions raised by a professional fundraiser that could be retained as the fundraiser’s fee. The Court struck down the laws because there was, in the Court’s view, at best an extremely tenuous correlation between charity fraud and the percentage of funds paid as a professional fundraiser’s fee; the laws therefore were unlikely to achieve their intended purposes of preventing fraud and protecting charities. The Court also found that these laws were not tailored narrowly enough to minimize the impact on the charities’ First Amendment rights.

By contrast, a very tight nexus exists between the Commission’s legitimate interest in protecting consumers’ privacy against unwanted telemarketing calls and the company-specific “do-not-call” provisions that apply to telemarketing to solicit charitable contributions. This nexus does not rely on an attenuated theoretical connection between fraud and the percentage of funds raised that a telefunder takes as its fee. Rather, there is a direct correlation between the governmental

⁶⁷⁸ Similarly, the “do-not-call” registry provisions are also content-neutral, because they apply equally to all sellers and telemarketers engaged in the solicitation of sales of goods or services, regardless of the content of the calls, or the viewpoints of the telemarketers or the sellers.

⁶⁷⁹ “The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, and the protection of residents’ privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the village may seek to safeguard through some form of regulation.” *Watchtower*, 122 S. Ct. 2080 (2002); *Schaumburg v. Citizens for Better Env’t.*, 444 U.S. 620, 637 (1980) (protecting the public from fraud, crime, and undue annoyance are indeed substantial).

interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future.

The Commission approaches with extreme care the issue of tailoring “do-not-call” requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. The Commission is concerned that subjecting charitable solicitation telemarketing—along with commercial telemarketing to solicit sales of goods and services—to national “do-not-call” registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.⁶⁸⁰ In the NPRM, the Commission proposed to resolve this problem by including in the Rule a provision enabling consumers who signed up for the “do-not-call” registry nonetheless to choose selectively to receive calls from specific entities from whom they would welcome solicitation calls. This proposed solution met with uniform condemnation from non-profit organizations, who opined that it would be too costly for non-profit organizations to obtain prospective donors’ express permission to call, and too difficult for consumers to exercise their right to hear from them.⁶⁸¹ The Commission is persuaded that these objections may be well-founded, and that this, therefore, would not be an adequate approach to narrow tailoring.

Another solution alluded to in a specific question posed in the NPRM might be to bifurcate the registry into separate categories, one for commercial solicitation and another for charitable solicitation, enabling consumers to sign up separately to stop commercial calls while allowing charitable solicitations.⁶⁸² At this time, however,

⁶⁸⁰ Childhood Leukemia-NPRM at 1 (“I firmly believe if this change is implemented, people attempting to avoid calls from those who sell goods and services over the telephone will put themselves out of reach of our organization, thereby threatening our financial foundation. The victims will be the children because we will no longer have the resources to help them.”)

⁶⁸¹ Non-profit organizations also argued that this proposal was tantamount to a constitutionally impermissible requirement for non-profits to seek permission to speak before speaking.

⁶⁸² “Should the “do-not-call” registry be structured so that requests not to receive