

# arts LAW MEMO

## No-Call for Nonprofits

Just days before the much-heralded National Do-Not-Call Registry was to go into effect on Oct. 1, millions of Americans became outraged when the for-profit telemarketing industry won a legal challenge against the new law. The victory was short-lived; on appeal, the federal government was permitted to enforce the Do-Not-Call Registry.

This issue of *Arts Law Memo* explains the National Do-Not-Call Registry and its interaction with Missouri's similar No Call Law. (The Missouri law was discussed in the Winter 2001 issue of *Arts Law Memo*, [www.vlaa.org](http://www.vlaa.org)).

It suggests that the do-not-call lists may have a tremendous positive impact upon nonprofit organizations. The subject of free speech in the context of charitable versus commercial speech — a major issue in the litigation over the constitutionality of the National Registry — is also addressed. The

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issue concludes with a reminder that nonprofit organizations may want to comply with their applicable state charitable solicitation registration law.

### EARLY STEPS

By the early 1990s, the rapid growth of the telemarketing industry had led a large segment of the public to view unsolicited calls into the home as an inconvenient invasion of privacy. Many such calls were also outright fraudulent. In an effort to provide some measure of relief, Congress

gave two federal agencies, the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), the power to directly regulate various aspects of the telemarketing industry. In fact, the Telephone Consumer Protection Act of 1991 (TCPA) specifically authorized the FCC to create a national do-not-call-list. However, the agency felt that such a step was not yet needed.

### NATIONAL REGISTRY

Despite their new authority, the agencies were unable to keep up with a growing barrage of complaints from an increasingly frustrated public. By 2002, the FTC had decided that the time for a National Do-Not-Call Registry had come.

Although the FTC was not originally given the explicit authority to take this step, Congress quickly agreed and, in early 2003, provided funding for the FTC to administer the Registry. In addition, it directed the FCC to issue its own rules regarding the Registry and to work with the FTC in coordinating its administration and enforcement.

After a short delay caused by legal wrangling, the Registry finally became effective on Oct. 10. Companies that wish to engage in unsolicited telemarketing to residences must purchase the list and are prohibited from making unsolicited phone calls to registered numbers. Companies can be fined up to \$11,000 for each violation.

Currently, more than 50 million phone numbers have been registered. (Individuals can register their residential and wireless numbers by calling 1-888-382-1222 or on the Internet at [www.donotcall.gov](http://www.donotcall.gov).)

Several important exemptions apply, however. Political organizations are exempt, as are calls from businesses that have prior written permission from the consumer or have had an "existing relationship" with the customer in the past 18 months.

Also exempted are nonprofit organizations making charitable solicitation

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- Collaborating on arts advocacy initiatives;
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- Providing access to the national volunteer lawyers for the arts network.



This issue was written by VLAA volunteer John Regenbogen. In his last life, he was a telemarketing manager for arts organizations in several states.

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## Charitable versus Commercial Speech: Is there a First Amendment difference?

Although the FTC and FCC have been allowed to enforce the national Do-Not-Call Registry while a federal appeals court considers arguments challenging the law, the traditional high regard for charitable speech could be weakened if the for-profit telemarketing industry ultimately prevails.

Charitable fund raising, which involves the sharing of views and the advocacy of political and social causes, currently receives the highest level of First Amendment protection. While it is subject to reasonable restrictions, charitable speech generally cannot be prohibited from being made. As the Supreme Court has stated, “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them...beforehand.” Indeed, the FTC exempted charitable speech from the National Do-Not-Call Registry largely because it would be a prior restraint on free speech.

In contrast to charitable speech, commercial speech, which is made to facilitate private economic decisions, is afforded a lesser, “intermediate” amount of constitutional protection. Thus, the government can prohibit commercial speech from being made if the restriction directly advances a substantial public interest and if the regulation is “narrowly tailored.”

The traditional distinction between commercial and charitable speech can be seen in a recent case that challenged an FCC regulation of unsolicited faxes that is very similar to the Do-Not-Call Registry: because the FCC could demonstrate that the vast majority of unsolicited faxes come from businesses, the FCC was allowed to enforce a prohibition of these faxes while allowing unsolicited faxes from charities and political entities.

However, in a surprise to many legal scholars, a lower court judge in the do-not-call case ruled that the National Registry was unconstitutional because it found that there was no “logical, coherent” basis for the FTC to distinguish between charitable and commercial speech. Although the judge found that the FTC did have a substantial interest in creating the Registry — the protection of privacy and the prevention of abusive telemarketing practices — he rejected the FTC’s arguments in its justification of the exemption of charitable solicitation.

The court flatly stated that commercial and charitable calls were equally invasive of privacy and were indistinguishable from each other in the context of telemarketing. Although the court agreed the Registry would greatly reduce the number of calls made to homes because the majority of telemarketing calls are commercial in nature, it said that the government failed to provide evidence that the restricted commercial speech is more harmful than the exempted charitable speech.

In addition to losing this privacy argument, the FTC also failed to persuade the court that commercial telemarketers were more likely to engage in abusive and fraudulent telemarketing practices than charitable solicitors.

Most commentators believe that the government will ultimately prevail in its assertion that it can distinguish between charitable and commercial telemarketing. Essentially, the lower court reached the conclusion that a National Do-Not-Call Registry would be constitutional only if it were to apply to all calls. If upheld and extended beyond the context of telemarketing, such a ruling essentially would cast aside the favored status of charitable speech and require that governments regulate charitable and commercial speech equally. The appellate court is expected to make its final ruling early next year.

calls. However, professional fund raising companies that call on behalf of a nonprofit organization must compile “entity-specific” do-not-call lists of individuals who indicate that they do not want to be called by the nonprofit. Further, the nonprofit should ensure that any other company that is later hired to conduct fund raising receives the do-not-call list from the original company.

While those companies that are covered under the law must pay for the Registry, the cost of which varies by the number of area codes accessed, nonprofits conducting charitable campaigns may access the list for free. (Information about obtaining the list can be found online at <https://telemarketing.donotcall.gov>.)

### MISSOURI NO CALL LAW

In addition to the national Registry, a number of states, including Missouri, have some form of do-not-call list. Other states, including Illinois, do not maintain a separate registry and merely enforce the National Do-Not-Call Registry within their borders.

The National Registry does not preempt these separate state laws. However, the TCPA mandates that the state registries must incorporate the telephone numbers of its residents who have placed their numbers onto the National Registry.

The Missouri No Call Law, which became effective last year, has been very popular with consumers: more than 1.2 million Missouri residential phone numbers have been registered.

Telemarketers that are covered by the law must purchase the state no call list (\$25 quarterly) and may not make unsolicited calls to those numbers. For each knowing violation of the law, a telemarketer is subject to a penalty of up to \$5,000.

The Missouri Attorney General’s Office has aggressively enforced the law and has collected more than \$1 million in fines and settlements.

Although the Missouri No Call Law shares some similarities with the National Registry, Missouri nonprofits should be aware of an important distinction between the two laws

regarding charitable solicitations.

Under the Missouri No Call Law, an otherwise exempt charitable solicitation telemarketing campaign conducted by a tax-exempt organization falls under the law if tangible goods or services are offered to the potential donors in exchange for a contribution.

For example, a dance ensemble's annual fund telemarketing campaign that offers membership benefits such as a pair of concert tickets or a discount on gift shop purchases falls under the law.

Because the Missouri No Call Law also contains an existing business relationship exemption, an organization that is offering goods or services as part of its charitable solicitation calls will not need to obtain the Registry if it limits its calls to current or recent supporters.

Thus, an organization should carefully consider whether or not to incorporate prospects obtained through trade and demographic lists into its calling campaign, which would trigger the need to purchase the state no call list.

#### **EFFECT ON NONPROFITS**

Because the national and Missouri no-call registries largely exempt bona fide charitable solicitation campaigns, they promise to be of great benefit to nonprofits.

The number of telemarketing calls already has been reduced by a significant amount, and nonprofits now face less "competition" in their effort to gain the attention of a prospective donor.

No longer having to devise ingenious strategies for thwarting seemingly endless pitches for vacation packages and changes in long distance carriers, an organization's potential donor likely will be more relaxed and willing to engage a telemarketing call regarding a cause that she supports.

Nevertheless, each organization, even if it is wholly exempt from the law, should develop a policy regarding whether or not its fund raising campaign should call potential donors who have signed up for a no-call registry.

While many such individuals would not mind receiving a call from an organization that they support, the institution should carefully consider whether or not to honor the no-call lists.

#### **COMMON SENSE**

By following just a few common sense steps, such as compiling and implementing an up-to-date entity-

specific no-call list and ensuring that the representatives — whether in-house or employed by a professional company — are polite and ethical, an arts organization can look forward to increased results for its fund raising telemarketing campaigns as a result of the no-call laws.

## Missouri's Charitable Solicitation Law

**B**efore a nonprofit organization begins a charitable solicitation campaign, it should be aware of the applicable state charitable solicitation registration law. Almost all 50 states have a law addressing the registration of charities. But many, including Missouri and Illinois, largely exempt nonprofit organizations.

Missouri's Charitable Organizations and Solicitations Law exempts nonprofits that have obtained a federal income tax exemption under section 501(c)(3), 501(c)(7) or 501(c)(8) of the U.S. tax code. Nevertheless, it may be prudent to abide by the registration law.

In encouraging all nonprofits to register, even if they are exempt, the Association of Fundraising Professionals (AFP) notes that, "registering shows your willingness to be open and accountable to your community and donors, and signifies a strong belief in ethical fund raising and nonprofit administration."

Exempt organizations in Missouri that choose to register submit an initial registration fee and an annual report to the Missouri Attorney General. Each filing has a fee of \$15. Forms can be downloaded from the Attorney General's web site at [www.ago.state.mo.us/charities/charities.htm](http://www.ago.state.mo.us/charities/charities.htm).

The initial registration discloses various pieces of information, including the organization's charitable purpose, directors, financial institutions and account names into which funds will be deposited, and any professional fund raisers that will be hired. The organization must attach its Articles of Incorporation as well as any prepared phone scripts, direct mail pieces or other solicitation materials.

The annual report simply asks for the total amount of funds collected, the percentage of funds directly spent on fund raising, and the name, address and phone of the professional fund raisers used during the course of the year and planned to be used in the upcoming fiscal year.

Missouri's Charitable Organizations and Solicitations Law also applies to all outside professional fund raisers. The initial and annual renewal statements for professional fund raisers are \$50 each. One final note about the Missouri law: professional fund raisers who solicit on behalf of a charity must disclose that relationship to prospective contributors.

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## RESOURCES

*Fundraising for Dummies* by John Mutz and Katherine Murray

This helpful book devotes an entire chapter to working the phones. It provides guidance in organizing a telephone campaign (including calculating your costs), creating a phone script, and troubleshooting difficult calls. Following the authors' list of seven common sense principles can increase donations and your organization's good will: respect the donor; be friendly; familiarize yourself with the script; believe in the cause; smile; get the donor's name right; and don't take "no" personally.

*Standing Room Only* by Philip Kotler and Joanne Scheff

Although this book was published in 1997, its treatment of arts marketing concepts remains practical and even inspirational. The few pages devoted to telemarketing explain why it can increase subscription sales and emphasize the importance of using well-trained callers. A thoughtful discussion of how organizations should look at in-coming calls to provide more and better information to ticket buyers also is included.

These books and many others on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library**, located within the Regional Arts Commission office, 6128 Delmar.