

FTC Rulemaking: Three Bold Initiatives and Their Legal Impact

By

Teresa Moran Schwartz and Alice Saker Hrdy

90th Anniversary Symposium of the Federal Trade Commission
Consumer Protection Panel

September 22, 2004

I. Introduction

In the past four decades, the Federal Trade Commission (FTC) has undertaken a number of ambitious legislative rulemakings. Three that stand out as especially bold are the subject of this article: (1) the rule promulgated in 1964, requiring that cigarette advertising and labeling warn of the health risks of smoking (Cigarette Rule);¹ (2) the proposed rulemaking on children’s advertising, issued in 1978, that would have put limits on, and even banned, certain advertising directed to children (Children’s Advertising Rulemaking);² and (3) the rule promulgated in 2003 that puts in place a National Do Not Call (DNC) Registry to protect consumers from unwanted telemarketing calls (Do Not Call Rule).³ These diverse proceedings have two things in common: they were all high-profile initiatives that provoked considerable attention from the media, Congress and the public, and each significantly influenced the development of FTC law.

This article, which is the first of three on these rulemaking proceedings, focuses on the legal impact of these initiatives. In the first two rulemakings, the Commission proceeded under the broad authority of Section 5 of the FTC Act that declares unlawful “unfair or deceptive acts or practices in or affecting commerce.”⁴ Although the Commission relied on both deception and unfairness to support these proceedings, it was its articulation and application of far-reaching unfairness theories that had the greatest long-term legal impact. While these early approaches to unfairness ultimately did not prevail, they were important in the evolution and the formulation of the unfairness doctrine as we know it today.

¹ 29 Fed. Reg. 8324 (July 2, 1964).

² 43 Fed. Reg. 17,967 (Apr. 27, 1978).

³ 68 Fed. Reg. 4580 (Jan. 29, 2003).

⁴ 15 U.S.C. § 45(a)(1) (2004).

In the case of the rule establishing the DNC Registry, the Commission did not rely on Section 5, but on a similarly broad statutory provision in the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act)⁵ that authorizes the FTC to prescribe rules prohibiting “abusive” telemarketing acts or practices.⁶ The FTC’s approach here, as in the other two proceedings, was to interpret the statute liberally to give the Commission broad authority to establish the Registry. In this instance, unlike the others, support from Congress was extremely positive. When the rule was challenged in court, Congress acted with unprecedented speed to approve the Commission’s interpretation of its authority.⁷

This article examines how the Commission articulated the legal grounds for these proceedings, and how its legal analysis influenced their success or failure and the future development of FTC law. In the next two articles, our colleagues will explore broader ramifications of these ambitious proceedings for the Commission and for its consumer protection mission.

II. The Cigarette Rule

A. Overview

The cigarette rulemaking began on January 17, 1964, with the publication of a Notice of Proposed Rulemaking (NPRM).⁸ The notice was published one week after the Surgeon General’s Advisory Committee on Smoking and Health issued its landmark

⁵ 15 U.S.C §§ 6101-6108 (2004).

⁶ *Id.* at § 6102 (a)(1). The statute also authorizes the Commission to prescribe rules prohibiting “deceptive telemarketing acts or practices,” but the DNC Registry was based on the prohibition on abusive telemarketing practices. See notes____, *infra*, and accompanying text.

⁷ An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82, 117 Stat. 1006 (2003).

⁸ 29 Fed. Reg. 530-32 (Jan. 22, 1964).

report,⁹ establishing that cigarette smoking is a substantial health hazard, associated with increased death rates, lung cancer, chronic bronchitis and coronary disease, and concluding that the hazards are “of sufficient importance in the United States to warrant appropriate remedial action.”¹⁰

The FTC moved with extraordinary speed, issuing the NPRM even before the Surgeon General had officially accepted the findings of the report.¹¹ As originally proposed, the rule would have required that one of two specific warnings appear “clearly and prominently” in every advertisement and on all cigarette packages.¹² Both warnings were strong, linking smoking with increased risks of death. Six months later, after receipt of written comments and three days of public hearings, the Commission issued the final rule.¹³ It retreated from the proposed rule in several respects. Instead of specific warning language, the rule described requirements in more general terms, providing that all cigarette advertising and packages disclose “clearly and prominently” that “cigarette smoking is dangerous to health and may cause death from cancer and other diseases.”¹⁴ It left advertisers “free to formulate the required disclosure in any manner that intelligibly

⁹ Smoking and Health : Report of the Advisory Committee to the Surgeon General of the Public Health Service (1964).

¹⁰ *Id.* at 33.

¹¹ 29 Fed. Reg. 530 (Jan. 22, 1964).

¹² The two optional warning were:

CAUTION – CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General’s Advisory Committee on Smoking and Health has found that “cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate;” or

CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases.

29 Fed. Reg. 530, 531 (Jan. 22, 1964). The proposed rule also would have prohibited deceptive advertising claims. *Id.*

¹³ 29 Fed. Reg. 8324 (July 2, 1964).

¹⁴ *Id.* at 8325. The final rule also omitted initially proposed prohibitions regarding safety claims and requirements for substantiating claims.

conveys the sense of the required disclosure.”¹⁵ In the Statement of Basis and Purpose accompanying the rule, the Commission took a conciliatory approach to industry, offering to review proposed advertising and labeling disclosures and to reopen the rule-making if petitioned to do so.¹⁶

Shortly after issuing the final rule, the Commission agreed to delay its effective date so that Congress could consider legislation to regulate cigarette labeling and advertising.¹⁷ A year later, Congress enacted the Cigarette Labeling and Advertising Act of 1965, which replaced the FTC’s warning with a considerably watered-down message, “Caution: Cigarette Smoking May Be Hazardous to Your Health.”¹⁸ It also prohibited the Commission from requiring any disclosures about smoking and health in advertising until 1969.¹⁹

B. A Bold Initiative

The Cigarette Rule was not the Commission’s first effort to address deceptive cigarette advertising. Prior to this rulemaking, the Commission had challenged such advertising in some 25 cases,²⁰ and issued cigarette advertising guidelines.²¹ Still, the final rule, even though a retreat to some extent from the proposed rule, was a very bold

¹⁵ *Id.* at 8373. Originally, the FTC believed that to allow industry members to formulate different statements could be confusing to consumers and cause them to not fully appreciate the risks. 29 Fed. Reg. 530, 531 (Jan. 22, 1964).

¹⁶ 29 Fed. Reg. 8324, 8373 (July 2, 1964). The Commission provided a number of grounds that could warrant reopening the proceedings: “new or changed conditions of fact or law, the public interest, or special circumstances.” *Id.* at 8325.

¹⁷ *FTC Postpones Smoker Warning*, N.Y. TIMES, Aug. 22, 1964, at 19.

¹⁸ Pub. L. No. 89-92 (1965) (codified as amended at 15 U.S.C. § 1333 (2004)).

¹⁹ When the Commission proposed new warnings in 1969, Congress enacted legislation prohibiting the Commission from implementing its rule prior to July 1, 1971. 15 U.S.C. § 1331. In addition, it mandated a new warning for labels: “Warning: The Surgeon General Has Determined that Cigarette Smoking is Dangerous to your Health.” Finally, the statute barred cigarette advertisements from the broadcast media after January 1, 1971. As a result of the ban on media advertising, the Commission did not pursue its proposed advertising rule.

²⁰ 29 Fed. Reg. 8324, 8374 (July 2, 1964) (Appendix A).

²¹ *Id.* (Appendix B).

initiative politically. It was very much “out of character” for the Commission of 1964, which had been criticized for its focus on activities of “marginal significance,” and its inability to act without “excessive delay.”²² Even the harshest critics of the Commission of that era, however, gave credit to the Commission for its “vigorous efforts” and “innovative work” in connection with the Cigarette Rule.²³

The proceeding was also bold legally. It was the Commission’s first significant use of legislative rulemaking²⁴ -- an authority questioned by both industry members²⁵ and scholars.²⁶ Also for the first time, the Commission offered a new formulation of its unfairness authority -- one that was to become a lasting legacy of the Cigarette Rule. Interestingly, Congress did not react adversely to these legal initiatives. Although it overrode the rule’s advertising and labeling requirements,²⁷ it did not limit either the rulemaking authority claimed by the Commission or its use of the unfairness theory. Indeed, the legislation specifically provided that it should not be construed as limiting the Commission’s existing jurisdiction or authority.²⁸

²² Report of the American Bar Association Commission to Study the Federal Trade Commission, Antitrust and Trade Reg. Rep. No. 427 (BNA) (Special Supplement, Sept. 16, 1969) at 5 [hereinafter *ABA Report*]. See also E. Cox, R. Fellmeth, and J. Schulz, *The Nader Report on the Federal Trade Commission* 72 (1969) [hereinafter *Nader Report*] (delay “is a way of life at the Commission”).

²³ *ABA Report* at 38-41; *Nader Report* at 77 (the cigarette rulemaking was a “singularly unusual case” and “indicative of what the FTC would be capable of if properly directed and motivated”).

²⁴ The Commission had issued legislative rules, but only for relatively insignificant matters, *e.g.*, advertising the size of sleeping bags and tablecloths, the use of “leak proof” to describe dry cell batteries, etc. See Note, *The Authority of the FTC to Issue Substantive Rules is Upheld*, 48 TUL. L. REV. 697, 699 n.15 (1974).

²⁵ See *e.g.*, “U.S. to Require Health Warning for Cigarettes,” N.Y. TIMES, June 25, 1964, at 1, 15 (tobacco industry indicating plans to immediately challenge the Commission’s authority to issue the regulation).

²⁶ See *e.g.*, Glen Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 FED. B.J. 548, 567-73 (1964).

²⁷ Cigarette Advertising and Labeling Act, Pub. L. 89-92 (1965) (codified as amended at 15 U.S.C. § 1333 (2004)).

²⁸ *Id.* Within the decade, there was a judicial ruling upholding the Commission’s authority to issue legislative rules. See *Nat’l Petroleum Refiners Ass’n v. Fed. Trade Comm’n*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Shortly thereafter, Congress explicitly gave the FTC rulemaking authority in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. 93-637, 88 Stat. 2183.

C. Legal Analysis

The Statement of Basis and Purpose for the Cigarette Rule was thorough and carefully crafted in anticipation of legal challenges to the rule and ultimately Supreme Court review.²⁹ It laid out a number of different grounds for the rule, both traditional and non traditional, under both deception and unfairness theories, any one of which would be sufficient to sustain the rule.

Deception

The deception analysis drew upon traditional legal principles to address the many forms deception can take.³⁰ Applying these principles, the Commission found that the vast bulk of cigarette advertising was deceptive in representing that smoking was attractive and satisfying, thus fostering an impression of safety, without disclosing the dangers to health from smoking.³¹ The Commission also found it deceptive, even without implied claims of safety, to market such a dangerous product, which consumers generally believe to be safe for normal use, without a warning of its risks.³² The Commission's remedy – requiring the disclosure of the product hazards – was consistent with its long tradition of favoring information remedies to cure deception.³³

²⁹ See Norman I. Silber, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR IN MR. ELMAN'S WORDS 347 (2004) As Commissioner Elman recounted, his "genius assistant," Richard Posner, drafted the Statement of Basis and Purpose, and he hoped the rule would be challenged since he "was sure that the Supreme Court would uphold it." *Id.* at 344, 347.

³⁰ Deception includes: literally accurate claims that convey misleading impressions to the average consumer; claims that convey "half truths" and omit material facts necessary to prevent a misleading impression; and failures to disclose information, even absent any affirmative claims, where a product itself creates a false impression and the seller fails to correct that misimpression. 29 Fed. Reg. 8324, 8351 (July 2, 1964).

³¹ *Id.* at 8356.

³² *Id.*

³³ See, e.g., Nat'l Comm'n on Egg Nutrition v. Fed. Trade Comm'n, 517 F.2d 485 (7th Cir. 1975) (Commission order, as modified by the court, allowing the advertiser to describe the scientific support for its claims but only if it also disclosed that many medical experts believed otherwise).

Unfairness

The Commission's use of unfairness was new. For the first time, it articulated a three-factor approach, based on Commission precedents,³⁴ for determining whether an act or practice should be deemed unfair under Section 5:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).³⁵

The Commission suggested these factors were indicative, although not necessarily determinative, of unfairness. "In the last analysis," it argued, "the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct" and to do so by "defining and preventing breaches of the principles of fair dealing that cause substantial and unjustifiable injury."³⁶

It was this broad duty of "fair dealing" that the Commission found violated by the cigarette manufacturers' failure to disclose the hazards of their products. The duty here grew out of their decades of "massive, continuous, mounting and forceful" advertising that not only "camouflaged" the risks of smoking, but created a "barrier" to public knowledge about the risks, thereby giving the industry tremendous market power over the "buying choice of consumers."³⁷ Acknowledging that the power was lawful, the Commission also found that it imposed on the industry a "special duty of fair dealing"

³⁴ Examples of practices the Commission had found unfair to consumers: wrongfully refusing to return deposits or goods left for repair, shipping unordered merchandise to induce its purchase, and extorting liability releases and falsely threatening to sue. 29 Fed. Reg. 8324, 8354-55 (July 2, 1964).

³⁵ *Id.* at 8355.

³⁶ *Id.*

³⁷ *Id.* at 8357.

with consumers, “especially when the product is dangerous to life and health.”³⁸ The bottom line:

[C]igarette advertising, by virtue of its magnitude, techniques, content, media and other factors, and above all by its failure to disclose the dangers of smoking is unfair to the public and consequently . . . unlawful under Section 5.³⁹

The Commission also articulated, as an independent basis for the rule, the need to protect children from cigarette advertising that “exploits” their vulnerabilities.⁴⁰ Having made the case that the advertising was deceptive and unfair as to adults, it argued the case was even more compelling with respect to children who are more vulnerable and less able to protect themselves. The Commission pointed to the special protection the law has long afforded children⁴¹ and to the need for such protection here where the product poses such serious risks to health and life, is so heavily advertised on television programs with youthful audiences, and is promoted as attractive and satisfying without disclosing the serious hazards to health.⁴² Taking these factors into account, the Commission concluded that even if the marketing practices were not unlawful as to adults, when directed toward minors they were both unfair and deceptive under Section 5.⁴³

To dispel fears that the rulemaking had “sweeping implications for the advertising and labeling of products other than cigarettes,”⁴⁴ the Commission strongly suggested the cigarette rulemaking was *sui generis*. It argued that cigarettes are “clearly distinguishable” from other products, such as candy, food, cars and alcohol, in terms of

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 8358.

⁴¹ *Id.* at 8357-58 (*e.g.*, under the common law of tort and contract, and under FTC case law).

⁴² *Id.* at 8358. The Surgeon General’s Report had found that the risks to health and life are greatest for those who begin smoking early. *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 8363.

the seriousness of the risks they pose⁴⁵ and the extent and manner in which they are marketed.⁴⁶ It cautioned against applying “mechanically or uncritically” the principle requiring disclosures of a product’s hazards,⁴⁷ and made clear that the Cigarette Rule “should not be regarded as precedent compelling similar regulation” of other industries.⁴⁸ In short, the Commission was arguing that this politically and legally bold initiative should have little or no impact beyond cigarettes.

D. Long Term Legal Impact

The Commission’s admonition that the Cigarette Rule should have limited precedential effect may have alleviated political concerns. As noted earlier, Congress did not limit the Commission’s general rulemaking or unfairness authority in response to the rulemaking. But the Commission itself did not follow its own admonition. Within a few years, it was using the cigarette rulemaking as precedent to support a number of far-reaching rulemaking proposals,⁴⁹ encouraged in these efforts, no doubt, by the Supreme Court’s 1972 decision in *FTC v. Sperry & Hutchinson Co.*,⁵⁰ upholding the Commission’s unfairness authority and approving the three-factor unfairness test articulated in the cigarette rulemaking.⁵¹ Although the 1964 Commission surely did not contemplate or intend these developments when it issued the Cigarette Rule, it had, in fact, laid the foundation for the subsequent development of the unfairness doctrine.

⁴⁵ *Id.* at 8362. In addition, unlike the risks of other products, the risks of cigarettes were largely unknown to the public. *Id.*

⁴⁶ *Id.* at 8363.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See William J. Baer, *At the Turning Point: The Commission in 1978* in *MARKETING AND ADVERTISING REGULATION: THE FEDERAL TRADE COMMISSION IN THE 1990’S* 94 (1990).

⁵⁰ 405 U.S. 232 (1972).

⁵¹ *Id.* at 244 n.5 (quoting the FTC’s definition of unfairness used to support the Cigarette Rule).

III. Children’s Advertising Rulemaking

A. Overview

In 1978, the Commission issued an NPRM seeking comment on a number of proposals to regulate televised advertising directed to children.⁵² Events leading up to the NPRM included four petitions seeking such a rulemaking,⁵³ and a comprehensive Staff Report addressing issues raised by the petitions and recommending that the Commission begin a rulemaking proceeding to explore possible unfairness and deception in children’s advertising.⁵⁴

The NPRM did not propose a specific rule but invited comment on three specific approaches to children’s advertising recommended in the Staff Report, namely:

1. A ban on all television advertising at times when the audience is composed of a substantial percentage of children “too young” to understand the purpose of advertising (defined by the Staff Report as children under the age of eight);
2. A ban on TV advertising of highly sugared food (posing serious risks of tooth decay) at times when the audience is composed of a substantial percentage of “older” children (defined by the Staff Report as children between ages 8 and 12); and
3. A requirement that TV advertising of other sugared food products be balanced with disclosures about health and nutrition when the audience is composed of a substantial percentage of “older” children.⁵⁵

⁵² 43 Fed. Reg. 17,967 (Apr. 27, 1978).

⁵³ Petitions were filed by four public interest groups: Action for Children’s Television, the Center for Science in the Public Interest, Consumers Union, and the Committee on Children’s Television. They sought various bans, limits, and informational disclosures in televised advertising aimed at children. *See* 46 Fed. Reg. 48,710 (Oct. 2, 1981).

⁵⁴ FTC Staff Report on Televised Advertising to Children (Feb. 1978) [hereinafter *Staff Report*].

⁵⁵ *Id.* at 345. *See also* 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

The NPRM also sought comment on alternative, less far-reaching remedies, *e.g.*, affirmative disclosures or limits on advertisements instead of bans,⁵⁶ and it invited comment on a broad range of fundamental legal and factual issues.⁵⁷

After six weeks of legislative hearings in early 1979,⁵⁸ Congress terminated the rulemaking proceeding. Responding to strong and widespread criticism of what became known as the “Kid Vid” rulemaking, Congress enacted the FTC Improvements Act of 1980,⁵⁹ that allowed the rulemaking to proceed, but only under a theory of deception,⁶⁰ and only if the Commission first published the text of the rule and any alternatives it might adopt.⁶¹

The Commission directed the staff to review the hearing record and consider the options available under the new law. After an unsuccessful attempt to craft voluntary advertising standards, the staff recommended, and the Commission agreed, that the rulemaking proceeding should be ended.⁶²

B. A Bold Initiative

In some respects, the proposed children’s advertising rulemaking was not a singularly bold move for the Commission. By 1978, FTC rulemaking was not

⁵⁶ 43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

⁵⁷ Among the issues the NPRM raised: whether it is unfair or deceptive to direct advertising to children too young to understand it; the impact of the proposed remedies on children’s television programming; the causal relationship, if any, between advertising sugared products and tooth decay; and the constitutionality of the proposed advertising bans under the First Amendment. *Id.* at 17,969-70

⁵⁸ The legislative hearings had produced 6,000 pages of testimony, and another 60,000 pages of written comment also had been filed. *See* FTC Final Staff Report and Recommendation, In the Matter of Children’s Advertising 13 (Mar. 31, 1981) [hereinafter *Final Staff Report*].

⁵⁹ Pub. L. No. 96-252, 94 Stat. 374 (1980).

⁶⁰ *Id.* at § 11(b) (adding subsection (h) to § 18 of the FTC Act, 15 U.S.C. § 57a(h)).

⁶¹ The Improvements Act also imposed additional procedures for rulemaking. *See id.* at § 15 (adding subsection (h) to § 22 of the FTC Act, 15 U.S.C. § 57b-3).

⁶² 46 Fed. Reg. 48,710 (Oct. 2, 1981).

uncommon;⁶³ indeed, the Commission was engaged in over a dozen major rulemaking proceedings.⁶⁴ The Commission's concern about advertising directed to children was not new,⁶⁵ nor was the Commission's use of the unfairness theory.⁶⁶ However, even for the activist Commission of 1978, the children's advertising proceeding was a bold undertaking. The suggested remedy -- a total ban on certain advertising -- was far reaching, and well beyond the kind of information remedies the Commission typically sought.⁶⁷ Further, it raised serious First Amendment concerns.⁶⁸ To be sure, the NPRM was only exploratory, inviting comment on the proposed remedial options and their constitutionality, but it did signal the Commission's willingness, if not its commitment, to adopt a drastic remedy.

Further, the staff was boldly proposing that the FTC take much the same approach to children's advertising that it had taken to cigarette advertising. In doing so, it was largely ignoring the Commission's earlier caution that the Cigarette Rule should not serve as precedent for advertising regulation of products such as candy and food.⁶⁹

⁶³ A judicial ruling had upheld the FTC's rulemaking authority in 1973, and Congress had given the FTC authority to promulgate legislative rules in 1975. See note ____ *supra* and accompanying text.

⁶⁴ See Baer, *supra* note ____, at 96. Rulemaking proceedings were under way to address, among other things, practices involving hearing aids, used cars, over-the-counter drugs, funeral services, and health spas. Arguably, the children's advertising rulemaking stood out *because* of the quantity of Commission activity at the time. It had "quickly [come] to symbolize the Commission's problems in 1978." *Id.* at 100.

⁶⁵ For decades, exploitive marketing affecting children had been a law enforcement priority for the Commission. It was a central concern underlying the 1964 Cigarette Rule and the focus of the Commission's broad informational hearings on televised advertising in 1971. See A. Howard and C. Hulbert, Advertising and the Public Interest: A Staff Report to the Federal Trade Commission (1973).

⁶⁶ See Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1952 N.69 (2000) (citing numerous unfairness cases in the 1970's before the NPRM on children's advertising).

⁶⁷ See note ____ *supra*, and accompanying text.

⁶⁸ The Staff Report argued at length that the proposed remedies would not violate the First Amendment under the Supreme Court's decision two years earlier in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Staff Report, *supra* note ____, at 237-298.

⁶⁹ See notes ____ *supra* and accompanying text.

C. Legal Analysis

The legal analysis in support of the NPRM was contained in the Staff Report. It was not based on a hearing record, but on the staff's study of the extensive research on the issues at stake, nor was it a document formally adopted by the Commission.

Deception

The Staff Report argued that the challenged advertising practices were both unfair and deceptive.⁷⁰ It applied traditional deception principles,⁷¹ but also advanced a broader view of deception reminiscent of the cigarette rulemaking, *i.e.*, that the massive advertising of sugared products to children had created "barriers" to understanding the products' health risks, making the ads, "taken as a whole" misleading and deceptive.⁷²

Unfairness

The staff's unfairness analysis indicated how open-ended the unfairness theory had become since the cigarette rulemaking. By 1978, the Commission had enumerated several tests for unfairness,⁷³ and the staff suggested yet another for this rulemaking, tailored to fit the particular practices at issue.⁷⁴ Although the staff argued that the

⁷⁰ *Id.* at 157. Staff argued that all television advertising directed to children too young to understand its seller purpose was "inherently both deceptive and unfair," and that television advertising of sugared products directed to children was deceptive under Sections 5, 12 and 15 of the FTC Act, as well as unfair under Section 5. *Id.*

⁷¹ Staff first argued "that the advertising of highly sugared products was deceptive in representing to children that such foods are desirable and "fully consistent with good health, without revealing the unknown health hazards associated with such foods. *Id.* at 164-65.

⁷² *Id.* at 174. This approach had been justified in the cigarette ruling where there had been decades of mass advertising of a product whose hazards were life-threatening and largely unknown to the public. Here staff was arguing that the extent of advertising and the health risks of sugared products (*e.g.*, tooth decay and poor nutrition) were sufficiently similar to those in the cigarette rulemaking to warrant this broad approach to deception.

⁷³ See Teresa M. Schwartz, *Regulating Unfair Practices under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 AKRON L. REV. 1 (1977) (describing the various unfairness tests in use following the Cigarette Rule and urging the Commission to adopt a uniform standard of unfairness).

⁷⁴ Staff Report, *supra* note _____, at 176. The test would have required an examination of three factors: (a) the "unique naivete and defenselessness" of the audience; (b) the "purely manipulative -- as opposed to informative -- nature of the advertising," and (c) the potential for harm. *Id.*

advertising practices were unfair under any of these tests, it largely made the case for unfairness by applying the three criteria of the cigarette rulemaking. In doing so, the staff demonstrated how malleable the factors were and how easily each could be met.

The “substantial injury” here, the staff argued, was to children’s dental health,⁷⁵ which it analogized to the risks of smoking.⁷⁶ It argued that the injury was not reasonably avoidable by parents, pointing to research showing that parental control was not effective to counter powerful television advertising.⁷⁷ Another injury, staff argued, was to the parent-child relationship. It was unfair, the staff argued, to put parents to a choice between buying products advertised to their children on television and “enduring the conflict that goes with a refusal to buy the products [or to] allow television watching.”⁷⁸ With this argument, the staff seemed to render almost meaningless what had been the most significant and measurable of the three criteria, “substantial injury.”

The other two criteria were similarly easily met. The advertising practices here, staff argued, were “offensive” to the same public policies to protect children that were identified in the cigarette rulemaking.⁷⁹ And the practices met the third criterion, *i.e.*, they were unconscionable,⁸⁰ because of the “highly disparate” power exercised by

⁷⁵ *Id.* at 190-94.

⁷⁶ *Id.* at 174-75. The Staff Report acknowledged that in the 1964 cigarette rulemaking, the Commission had distinguished cigarettes as a hazard from such foods as candy, but argued that the record before it now showed the serious detrimental effects of sugar consumption – effects not known to the Commission in 1964.

⁷⁷ See Staff Report, *supra* note _____, at 195-203.

⁷⁸ *Id.* at 202.

⁷⁹ *Id.* at 206. The Report pointed to many of the same common law and statutory provisions relied on to support the Cigarette Rule. See note _____ *supra*, and accompanying text.

⁸⁰ Staff argued that the adjectives used in the third criterion, *i.e.*, whether the practices were “immoral, unethical, oppressive or unscrupulous” were adjectives that described unconscionable practices; hence the test was one of unconscionability.

advertisers over children through their use of the powerful medium of television to promote their potentially harmful products.⁸¹

Finally, the staff argued that all advertising to children too young to understand the selling purpose of advertising is “inherently unfair and deceptive.”⁸² Among the staff’s arguments: that the advertising directed to such young children was a subversion of the “classical justification for a free market . . . that assumes at least a rough balance of information, sophistication and power between buyer and seller.”⁸³ To address this problem, staff argued that an informational remedy, *i.e.*, giving notice of the commercial nature of the advertising message, would be ineffective for very young children.⁸⁴ Although acknowledging the difficulty of crafting advertising bans based on the make-up television audiences, the staff left the problem for later.⁸⁵

The NPRM and Staff Report were only preliminary documents in the rulemaking proceeding, but they did signal the direction the Commission was taking. Critics claimed the rulemaking symbolized the “unbounded scope of the term ‘unfair.’”⁸⁶ The Staff Report was criticized for a number of unfairness theories posited by the staff.⁸⁷

⁸¹ *Id.* at 220.

⁸² To support this position, staff looked to the position taken by the Federal Communications Commission that “advertisers would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message”, and were thus unable to consider the paid status of the latter in assessing the message.” *Id.* at 221 (citing FCC, Report of Policy Statement: Children’s Television Program, 39 Fed. Reg. 39,401). FTC staff argued that if it was unfair or deceptive to advertise to adults who do not recognize a commercial message, then certainly it is unfair or deceptive to advertise to children incapable of understanding the purpose of the message. Staff Report, *supra* note ____ , at 221.

⁸³ Staff Report, *supra* note ____ , at 225.

⁸⁴ *Id.* at 300.

⁸⁵ *Id.* at 228.

⁸⁶ Statement of the American Association of Advertising Agencies, Unfairness: Views on Unfair Acts and Practices in Violation of the Federal Trade Commission 151-52, Senate Committee on Commerce, Science, and Transportation (Committee Print) (1980) [hereinafter *Senate Unfairness Report*].

⁸⁷ Caswell O. Hobbs, *Unfairness at the FTC: The Legacy of S&H*, Senate Unfairness Report, at 27, 31-32 (pointing to, *inter alia*, the staff’ broad claims of unfairness where there is an “imbalance of sophistication” between advertisers and children, and “*ex cathedra*” statements that advertising sugared foods for children “achieves a high level of offensiveness”).

The most frequent target of critics was the staff's conclusion that it was unfair to put parents in a position to have to say "no" to children's nagging.⁸⁸

Analysis in Terminating the Rulemaking

When the staff recommended termination of the rulemaking in 1981, it did so on the grounds that the hearing record did not support viable regulatory solutions to the problems identified.⁸⁹ It chose not to opine on the legal analyses in the Staff Report, focusing instead on the practical difficulties of crafting and implementing the proposed remedies.

The record had revealed that children six or under make up such a small percentage of any viewing audience that no ban would be meaningful unless it applied to audiences where only about 20% of the audience was so young. Such a ban would have been over-inclusive, restricting the flow of information to 80% of the audience with more advanced cognitive skills; a higher percentage cut-off, *e.g.*, 30 to 50%, would have affected only one network program, making this approach under-inclusive.⁹⁰ Although staff's analysis was not based on the First Amendment, it reflected the serious constitutional concerns raised by the proposed remedy.⁹¹

With regard to proposals to ban or regulate the content of advertising of sugared products, the staff found that evidence was insufficient in several respects. First, there was not solid evidence regarding the impact of such advertising on children's attitudes

⁸⁸ See *e.g.*, Statement of the American Association of Advertising Agencies, Senate Unfairness Report, at 151-52; Hobbs, *supra* note ____, at 32.

⁸⁹ Final Staff Report, *supra* note ____, at 2-4.

⁹⁰ *Id.* at 38.

⁹¹ Staff understandably stayed clear of First Amendment analysis that might later be used against its exercise of regulatory authority. However, under the commercial speech doctrine of *Central Hudson*, discussed at note ____ *infra*, neither proposed remedy would seem to past muster. It is unlikely that the 20% cut-off would be found no more restrictive than necessary or that the 30-50% cut-off would be found to directly advance the government's interest.

toward nutrition,⁹² or on harmful consumption.⁹³ As to dental harm from sugared products, the record revealed no scientifically accepted methodology for determining the extent to which any individual product contributes to dental caries – a determination that would have been crucial in crafting a rule aimed at cariogenic foods.⁹⁴

D. Long Term Legal Impact

The decision not to proceed meant that the staff’s legal analyses were never adopted by the Commission, nor subject to judicial review. But the widespread negative reaction to the rulemaking was a “turning point” for the Commission, spurring not only new legislative limits on the FTC,⁹⁵ but also a serious effort to reformulate the unfairness doctrine. In 1980, the Commission issued a policy statement that articulated a new, more demanding test for unfairness.⁹⁶ It made use of the criteria of the Cigarette Rule but reversed their order, making consumer injury the primary factor, limiting the use of public policy, and diminishing considerably the issue of whether practices are immoral or unethical. Further, it imposed a more rigorous, three-part test for consumer injury, requiring that it be “substantial,” not “outweighed by any countervailing benefits to consumers or competition,” and not reasonably avoidable by consumers themselves.⁹⁷ In short, the test involved a cost-benefit analysis of the conduct, in which the benefits of the conduct are weighed against the injury it causes consumers and the ability of consumers to avoid it. In 1994, Congress added Section 5(n) to the FTC

⁹² *Id.* at 54-55.

⁹³ Staff acknowledged that no reliable studies established or disproved a link between the advertising and harmful consumption of the advertised products. *Id.*

⁹⁴ *Id.* at 82-86.

⁹⁵ See note ___ *supra* and accompanying text.

⁹⁶ Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *reprinted in* International Harvester Co., 104 F.T.C. 949, 1070-76 (1984).

⁹⁷ *Id.* at 1071.

Act⁹⁸ which further refined the test for unfairness. It adopted the Commission's three-part test for consumer injury, but made it the sole test for unfairness. It allowed consideration of "established public policies" but not as a primary basis for determining whether practices are unfair.⁹⁹ It omitted entirely consideration of whether conduct was "unethical, immoral, oppressive, or unscrupulous."

The final formulation of unfairness, both in the policy statement and the legislation, was not created out of whole cloth. Its foundation was the first formulation of the unfairness test in the cigarette rulemaking. Of course, it was a considerable departure from the original, but its evolution began with that early, first effort to give structure to the unfairness doctrine. Today, unfairness is crucial to the Commission's law enforcement program, and its use is not controversial.¹⁰⁰

Broad legal principles, like unfairness and deception, inevitably need to evolve to keep pace with changing times. Had the unfairness doctrine evolved incrementally through case law, as the deception theory did, it is likely that it would not have been so controversial. But such incremental legal development could not occur through high profile legislative rulemakings with potentially broad impact on the marketplace.

IV. The Do Not Call Rule

A. Overview of the Rulemaking

⁹⁸ FTC Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified as amended at 15 U.S.C. § 45(n) (2004)).

⁹⁹ *Id.* Specifically, the provision states:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that [it] is unfair unless such act or practice causes or is likely to cause substantial injury to consumers which is not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

¹⁰⁰ See Howard Beales, *The FTC's Use of Unfairness: Its Rise, Fall, and Resurrection*, available at <http://www.ftc.gov/speeches/beales/unfair0603.htm> (reviewing the renewed use of unfairness by the Commission since the late 1990s).

The FTC's National DNC Registry, established by the Commission in a rule promulgated in 2003, is the most innovative tool created by the Commission to deal with unwelcome telemarketing calls. It was one of the latest initiatives in its decades-long efforts to fight deceptive and abusive telemarketing practices. In the first decade and a half of this effort, the Commission focused on bringing cases in federal court under Sections 5 and (13(b) of the FTC Act to halt telemarketing fraud and obtain redress for victims.¹⁰¹

In 1994, the Telemarketing Act gave the Commission broad new authority to issue rules that would define and prohibit “deceptive” and “other abusive” telemarketing practices.¹⁰² Among the specific abusive practices the Act required be addressed was “a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive to such consumer’s right to privacy.”¹⁰³ When the Commission issued the Telemarketing Sales Rule in 1995 (original Rule), it used that privacy provision to support a prohibition on the practice of soliciting “a person when that person previously has stated that he or she does not wish” to be called -- a “company specific” do not call requirement.¹⁰⁴ The original Rule took effect without legal challenge.

In 1999, the Commission commenced a comprehensive, statutorily-mandated review of the original Rule.¹⁰⁵ The Commission’s approach to this review was an

¹⁰¹ See David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC’s 13(b) Fraud Program*, 18 ANITRUST MAG. 43, 44 (Summer 2004). In the 1980’s, the “vast majority” of the FTC’s federal cases involved telemarketers pitching fraudulent investment schemes; in the next decade, an expanded fraud program targeted, *inter alia*, bogus weight-loss products, phony prize promotions, charity scams and credit “repair” schemes. *Id.*

¹⁰² 15 U.S.C. §§ 6101, 6102(a)(1) (2004).

¹⁰³ *Id.* at § 6102(a)(3)(A). To address abusive practices, the Commission also was directed to restrict the hours when unsolicited calls could be made and require telemarketers to make prompt and clear disclosure about the purpose of their calls. *Id.* at § 6102(a)(3)(B)-(D).

¹⁰⁴ 60 Fed. Reg. 43,842 (Aug. 23, 1995) (codified at 16 C.F.R. 310.4(b)(1)(ii) (2003)).

¹⁰⁵ 15 U.S.C. § 6106 (2004).

example of how much the rulemaking process had changed since the Children’s Advertising Rulemaking. The rule review began with public forums to explore with outside experts and interested parties how the telemarketing industry and its practices had changed since 1995, the impact of new technologies, and the effectiveness of the original Rule’s provisions. The first forum focused on the do not call provisions of the original Rule;¹⁰⁶ a second forum focused on all other rule provisions.¹⁰⁷ Thus, by the time the Commission issued its NPRM to amend the original Rule, it had compiled a good deal of information from knowledgeable sources on which to base its proposals.¹⁰⁸ One wonders how the Children’s Advertising Rulemaking might have fared if the Commission had begun with similar public forums to explore the difficult issues involved in that proceeding

The NPRM proposed a number of changes to the original Rule;¹⁰⁹ among the most dramatic was the proposal to establish a National DNC Registry.¹¹⁰ The public response to the proposed rulemaking was overwhelming. The Commission received over 64,000 comments, the vast majority of which spoke to the proposed Registry.¹¹¹ Those who favored the Registry outnumbered those who opposed it by almost three to one.¹¹² The Commission had “struck a nerve,” resulting in the creation of an impressive record to support the need for its bold initiative.

¹⁰⁶ The forum’s roundtable discussion occurred in January 2000, with 17 participants, including associations, individual businesses, consumer groups and law enforcement agencies. 68 Fed. Reg. 4581 n.64 (2003).

¹⁰⁷ *Id.* at 4581.

¹⁰⁸ *E.g.*, the record from the public forums had already revealed concerns about the effectiveness of the original do not call provision. *Id.*

¹⁰⁹ *E.g.*, a ban on disclosing consumer billing information, a prohibition on blocking caller ID information, a requirement that verifiable authorization be obtained for novel payment methods, etc. 67 Fed. Reg. 4492, 4506, 4513-15 (Jan. 29, 2002).

¹¹⁰ 67 Fed. Reg. 4492, 4516-21 (Jan. 30, 2002).

¹¹¹ 68 Fed. Reg. 4580, 4582 (Jan. 29, 2003).

¹¹² Of the approximately 64,000 comments, 44,000 supported the registry, and about 15,000 opposed it. *Id.* at 4630 n.593.

The rulemaking record showed that the company-specific approach was inadequate to carry out the Telemarketing Act's mandate to prevent unsolicited telemarketing that is abusive of consumer privacy. Among its shortcomings: (a) it was burdensome for consumers to request each telemarketer to put them on its do-not-call list; (b) requests to be placed on lists were being ignored; (c) it was difficult for consumers to verify whether their names were on lists; and (d) private rights of action against violators were too costly and difficult for consumers to use to protect their rights.¹¹³ The fact that a growing number of states were establishing state-wide do not call registries was further evidence that problems with the company specific approach were widespread.¹¹⁴ In addition, the evidence showed that with the explosive growth in the number of telemarketing calls (over 16 billion a year),¹¹⁵ consumers now considered even initial calls abusive of their right to privacy.¹¹⁶ Thus, a national Registry could be justified as needed to stop both repeated and initial calls.

The final amended Telemarketing Sales Rule (final Rule) created the National DNC Registry to eliminate most of the problems with the company-specific approach. Its operation is quite simple: consumers may call or email to register their choice not to receive telemarketing calls, and with this one step achieve broad protection from commercial telemarketing.¹¹⁷ The FTC maintains the list of telephone numbers and

¹¹³ *Id.* at 4629. The initial rule review also revealed concerns about telemarketers' use of caller identification and predictive dialer services to thwart consumers' company-specific do not call rights. *See* 67 Fed. Reg. 4492, 4495 (Jan. 30, 2002).

¹¹⁴ 68 Fed. Reg. 4580, 4630 (Jan. 29, 2003). Although the record showed that such registries did reduce unwanted telemarketing calls, the record also showed that a national registry would be more effective. *Id.*

¹¹⁵ *Id.* at 4629-30 n.591. This figure represented the number of answered calls and did not include calls that were abandoned.

¹¹⁶ *Id.* at 4629-30.

¹¹⁷ *Id.* at 4638-39. *See also* note _____ *infra*, and accompanying text, regarding telemarketers not covered by the Registry provisions.

requires telemarketers or sellers to access the list and “scrub” their sales lists to ensure they call only consumers who wish to receive telemarketing sales calls.¹¹⁸

The final Rule does not eliminate the company-specific approach. It remains available to individuals who do not want to sign up for the Registry but want to stop calls from individual telemarketers, and for those who want to stop calls from certain telemarketers exempt from the rule’s Registry provisions, *e.g.*, for-profit telemarketers for charitable organizations and companies with whom the consumer has “an established business relationship.”¹¹⁹ Other entities outside the FTC’s jurisdiction, *e.g.*, common carriers and banks, are subject to the National DNC Registry,¹²⁰ pursuant to rules promulgated in 2003 by the Federal Communications Commission (FCC).¹²¹

B. Subsequent Actions

The Congressional response to the FTC’s final Rule, unlike its response to the Cigarette Rule and the Children’s Advertising Rulemaking, was entirely supportive. Shortly after the final Rule’s promulgation, Congress enacted the Do-Not-Call Implementation Act, authorizing the FTC to collect fees to cover the cost operating the Registry.¹²² Further, in direct response to a federal district court ruling that the

¹¹⁸ *Id.* at 4640. Telemarketers must pay a fee to access the list. 16 C.F.R. § 310.8 (2004).

¹¹⁹ 16 C.F.R. 310.4(b)(1)(iii)(B)(ii).

¹²⁰ 47 C.F.R. § 64.1200(c)(2)

¹²¹ Under the Telemarketing Consumer Protection Act, 47 U.S.C. § 227(c)(1)(A)-(E), the FCC has authority to issue rules to protect telephone subscribers from receiving unwanted telemarketing calls, including the creation of a national do not call database, but had established only a company-specific rule. In July 2003, pursuant to the Do Not Call Implementation Act, Pub. L. No. 108-10, §§ 2-3 (2003) (directing the FCC to coordinate its efforts with the FTC), the FCC revised its rule to establish a national DNC Registry.

¹²² Pub. L. No. 108-10, §§ 2, 3 (2003).

Commission lacked authority to establish the DNC Registry,¹²³ Congress enacted a law that expressly ratified the Commission's action.¹²⁴

Unlike the other rules discussed in this article, there were challenges to this rule in a number of courts on a number of grounds.¹²⁵ To date, the Commission has been successful in defending the rule.¹²⁶

C. Another Bold Initiative

The idea of giving consumers the right to stop unsolicited telephone calls to their homes was not new, nor was the idea of a do not call registry. By the time the final Rule was issued, 27 states had passed legislation creating registries for residents of their states, and numerous other states were considering similar bills.¹²⁷ But it was a novelty to provide consumers with a simple, “one-stop” opt-out mechanism to reduce significantly the number of unwelcome telemarketing calls nationwide. It was an innovative use of technology that shifted power from telemarketers to consumers, with a profound impact on the marketplace. Within 72 hours of beginning to accept telephone numbers for the National DNC Registry, more than 10 million numbers had been registered;¹²⁸ at the one-year anniversary of the Registry, the number had grown to 62 million.¹²⁹

D. Legal Analysis

Unlike the other two rulemakings, where the FTC had launched far-reaching initiatives under its broad Section 5 authority, it was proceeding here under a specific

¹²³ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 283 F. Supp.2d 1151 (D. Colo. 2003).

¹²⁴ An Act to Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82, 117 (2003).

¹²⁵ *See e.g.*, *Mainstream Mktg. Servs. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1250 (10th Cir. 2004); *U.S. Security v. Fed. Trade Comm'n*, 282 F. Supp.2d 1285 (W.D. Okla. 2003).

¹²⁶ *See notes ___infra* and accompanying text discussing the legal challenges and courts' rulings.

¹²⁷ 68 Fed. Reg. 4580, 4630 n.592 (Jan. 29, 2003).

¹²⁸ *See* FTC Press Release, June 30, 2003, located at <http://www.ftc.gov/opa/2003/06/dncregistration.htm>.

¹²⁹ *See* FTC Press Release, June 24, 2004, located at <http://www.ftc.gov/opa/2004/06/dncanny.htm>.

statute giving it authority to issue rules regulating “deceptive“ and “other abusive” telemarketing practices. With respect to the creation of the DNC Registry, the principal legal issues were whether the FTC had statutory authority to establish the Registry and whether it placed restrictions on commercial speech in violation of the First Amendment.

Authority to establish the DNC Registry

There were colorable claims that the FTC lacked statutory authority to establish the Registry. The Telemarketing Act was silent on the subject, but Congress had explicitly given the FCC the authority to establish a national do not call database.¹³⁰ The FTC was on solid ground, however, in arguing, as it did in its Statement of Basis and Purpose, that the Telemarketing Act should not be read narrowly to place limits on the Commission that were not specifically spelled out in the statute.¹³¹ To do so would undermine the aim of the statute by denying the Commission the authority to devise the most effective means for carrying out one of its principal mandates, *i.e.*, to prohibit unsolicited telephone calls that abuse consumer privacy. Perhaps the stronger argument, however, made in briefs to the courts, was that the post-rule enactments by Congress had ratified and confirmed the Commission’s authority.¹³²

In *Mainstream Marketing Services v. FTC*, an appeal in which four cases challenging the DNC Registry had been consolidated,¹³³ the Tenth Circuit Court of Appeals gave short shrift to the claim that the Commission lacked authority to create the

¹³⁰ See note _____ *supra* and accompanying text.

¹³¹ 68 Fed. Reg. 4580, 4638 (Jan. 29, 2003) (arguing that where a statute is broadly written and does not limit the way in which an agency may carry out its mandate, it leaves the method of implementation to the agency’s discretion, citing leading administrative law scholars, Kenneth Culp Davis and Richard Pierce).

¹³² See *e.g.*, Consolidated Opening Brief of the FTC, FCC & Intervenor U.S.A. at 57-59, *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228 (10th Cir. 2004). See notes ___ *supra* and accompanying text describing the two post-rule enactments

¹³³ 358 F.3d 1228 (10th Cir. 2004). In one of the cases, the district court had concluded that the FTC lacked statutory authority to create the registry. *U.S. Security v. Fed. Trade Comm’n*, 282 F. Supp.2d 1285 (W.D. Okla. 2003).

Registry. It summarily concluded that the Commission’s interpretation of the Telemarketing Act was entitled to deference under the “familiar test” outlined in *Chevron U.S.A., Inc. v Natural Resources Defense Council*,¹³⁴ and that the Commission had arrived at a “permissible construction” of the Act.¹³⁵ In addition, the court pointed to the post-rule congressional enactments, finding that they made the Commission’s authority “unmistakably” clear.¹³⁶

First Amendment

The Commission anticipated that the DNC Registry would be challenged on First Amendment grounds. The Registry restricts commercial speech, including non-misleading speech, which clearly comes within the protection of the First Amendment under the Supreme Court’s *Central Hudson* ruling.¹³⁷ To meet constitutional standards, the Commission’s rule needed to meet the three-part test of *Central Hudson*: it must (1) address a “substantial” government interest, (2) “directly advance” that interest, and (3) be no “more extensive than necessary” to serve that interest.¹³⁸

The Commission had developed a strong record and carefully crafted the Registry provision so that it would pass constitutional muster. First, it was clear that the privacy interests at stake were “substantial” government interests. Numerous federal statutes, including the Telemarketing Act, as well as Supreme Court rulings, indicate the importance of privacy interests generally, and especially the privacy of one’s home

¹³⁴ 456 U.S. 837 (1984). Under *Chevron*, the court first asks whether Congress has spoken directly to the precise question; if so, Congress’ intent controls. If the statute is silent or ambiguous, the court defers to the agency’s interpretation, deciding only whether it has offered a “permissible” construction of the statute.

¹³⁵ 358 F.3d 1228, 1250 (10th Cir. 2004).

¹³⁶ *Id.*

¹³⁷ *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (commercial speech that concerns lawful activity and is not misleading comes within First Amendment protection).

¹³⁸ *Id.*

involved here.¹³⁹ Second, the Commission was able to show that the Registry would “directly advance” those privacy interest by reducing significantly the number of unwanted telemarketing calls.¹⁴⁰ Finally, the Commission was able demonstrate that the rule was not overly restrictive. Importantly, the registry had been designed to affect only “core commercial speech,” *i.e.*, commercial sales calls.¹⁴¹ Further, it operates in a manner that does not involve direct restrictions on commercial speech by the government; instead, it gives private individuals a tool to restrict unwelcome speech directed to them, if they choose to use it.¹⁴² In addition, the rule provides individuals with an array of options, including signing up for the Registry, using the company-specific option,¹⁴³ or taking no action at all. Finally, the rulemaking record convincingly demonstrated that the less restrictive, company-specific do not call option was not an effective alternative to address the privacy interests protected by the statute.¹⁴⁴

In *Mainstream Marketing*, the U.S. Court of Appeals ruled that the DNC Registry does not violate the First Amendment.¹⁴⁵ In applying the *Central Hudson* criteria, the court agreed with the Commission’s analysis, finding that the Registry addressed a substantial governmental interest, would directly advance those interest by barring a

¹³⁹ See *e.g.*, *Rowan v. United States Post Office Dep’t.*, 397 U.S. 728, 737 (1970).

¹⁴⁰ *E.g.*, the record supported an estimate that 40-60% of telemarketing calls would be halted. See Consolidated Opening Brief of the FTC, FCC & Intervenor U.S.A. at 35 n.9, *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228 (10th Cir. 2004).

¹⁴¹ The Commission had exempted from the Registry charitable solicitation telemarketing, an exemption that was warranted by the record but that the Commission also recognized removed the grounds for a more serious First Amendment challenge to the rule. 68 Fed. Reg. 4580, 4636-7 (Jan. 29, 2003). See also *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1233 (10th Cir. 2004) (expressing “no opinion as to whether the do-not-call registry would be constitutional if it applied to political or charitable callers”).

¹⁴² “The Supreme Court has repeatedly held that speech restrictions based on private choice (*i.e.*, an opt-in feature) are less restrictive than laws that prohibit speech directly.” *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1242 (10th Cir. 2004).

¹⁴³ 16 C.F.R. § 310.4(b)(1)(iii)(A). Another option allows consumers to sign up for the Registry and then give written permission for some businesses to call them. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i).

¹⁴⁴ 68 Fed. Reg. 4580, 4630-31 (Jan. 29, 2003).

¹⁴⁵ 358 F.3d 1228 (10th Cir. 2004).

“substantial amount of unwanted telemarketing calls,” and was “narrowly tailored because its opt-in feature does not restrict any speech directed at a willing listener.”¹⁴⁶

The importance of the *Mainstream Marketing* ruling may go well beyond its immediate impact on the DNC Registry. The court’s opinion strongly affirms the importance of privacy interests, which the FTC increasingly seeks to protect.¹⁴⁷ The ruling also is a solid endorsement of the FTC’s careful approach to regulating commercial speech, which can be helpful precedent for the Commission in this delicate area of law. Finally, the court’s ruling on the FTC’s authority to create the Registry, discussed above, affirms the Commission’s broad authority to construe its statutes. In short, the ruling, which the U.S. Supreme Court declined to review¹⁴⁸, is one of the most important and lasting legacies of the rule.

V. Conclusion

All three rulemaking initiatives were significant legal milestones for the FTC, contributing to the development of legal principles that continue to guide its consumer protection mission today. Its recent success with the DNC Registry is a sign not only of its legal acumen, but of its policy and political savvy as well. The next articles will focus on these political and policy aspects of the three initiatives.

¹⁴⁶ *Id.* at 1246.

¹⁴⁷ Since 1995, the FTC has made consumer privacy one of its highest priorities. *See* Dialogue of Chairmen Pitofsky and Muris, Symposium on the 90th Anniversary of the Federal Trade Commission (Sept. 22, 2004).

¹⁴⁸ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 73 U.S.L.W. 3206 (U.S. Oct. 4, 2004).