WHY ARE YOU CALLING ME?: THE IMPORTANCE OF THE DO-NOT-CALL REGISTRY IN PROTECTING THE ELDERLY FROM FINANCIAL ABUSE

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INTRODUCTION

Financial abuse affects many groups of people, especially the elderly, and the problem grows as the elderly population increases. The elderly are more vulnerable to financial abuse because they are more likely to be at home, and therefore more accessible to telephone solicitations.[1] The problem is worsened by the mental afflictions which are suffered primarily by the elderly, such as dementia and Alzheimer's.[2] Because the elderly are living longer, it is becoming more likely that they will develop dementia.[3]

The national Do-Not-Call Registry protects the elderly to some extent by preventing commercial telemarketers from contacting them. However, requiring the elderly to opt-into the Do-Not-Call Registry is not enough to protect them from financial abuse. The elderly may not realize the dangers of financial abuse and need extra protection. One possible protection would be to "shift[] the [current] default rule from a 'call list' to a do-not-call list."[4] Under this new default rule, persons aged sixty-five and older would automatically be placed on the Do-Not-Call Registry, and would therefore need to opt-out of the registry to receive solicitations, rather than having to opt-in to prevent commercial calls.[5] However, changing the default rule may not be possible, so an alternative would be education. People should be educated about the financial dangers they could face as an elderly person, how the danger is increased if they suffer from dementia, and how to prevent financial abuse.

This article discusses how the elderly population is growing in the United States. As the elderly population continues to increase, there will be a greater number of people who are vulnerable to financial abuse. The second section examines the most common diseases that affect the mental capacity of the elderly. These diseases place an already vulnerable group in an

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[1] Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 508 (2004).

[2] *See* Evelyn M. Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675, 678 (2009).

[3] *Id.* at 677.

[4] Nathalie Martin, *Consumer Scams and the Elderly: Preserving Independence Through Shifting Default Rules*, 17 ELDER L.J. 1, 27 (2009).

[5] *Id.*

even more vulnerable position when it comes to financial abuse. The third section examines why the elderly are so often targets of financial abuse. This includes not only dementia, but also the aspects of an elderly person's lifestyle that make him or her particularly susceptible. The fourth section examines the use of telemarketing and how it facilitates the financial abuse of the elderly. Telemarketers also take advantage of the elderly lifestyle, increasing the likelihood of abuse. The fifth section examines the Do-Not-Call Registry and its importance in preventing financial abuse of the elderly. The sixth section concludes with possible solutions to protect the elderly from financial abuse.

I. THE GROWING ELDERLY POPULATION

The percentage of elderly people in the United States is increasing at a rapid rate.[6] With continuing advances in science, technology, and medicine, people in the United States are living longer,[7] and can lead healthier and more productive lives.[8] In 2003, 12% of the country's total population, or 35.9 million people, were age sixty-five or older.[9] Of these 35.9 million people, 18.3 million were between the ages of sixty-five and seventy-four, 12.9 million were between the ages of seventy-five and eighty-four, and 4.7 million were age eighty-five and older.[10] In 2005, there were over one million people in the United States over one hundred years old.[11] In 2009, it was estimated that the sixty-five-or-older population in the United States consisted of thirty-nine million people.[12] Between the years 1980 and 1990, the fastest growing age group was eighty-five to ninety years old, and

[6] Johnny Parker, *Company Liability for a Life Insurance Agent's Financial Abuse of an Elderly Client*, 2007 MICH. ST. L. REV. 683, 689 (2007).

[7] *Id.* at 687; *see also* David Brown, *Life Expectancy Teetering in Large Sections of U.S.*, WASH. POST, June 15, 2011, at A07 (while overall longevity is increasing in the United States, there are large areas of the country where life expectancy is stagnate or decreasing).

[8] RONALD J. SCHWARTZ, LAW AND AGING: ESSENTIALS OF ELDER LAW 1 (Elizabeth Sugg et al. eds., 2d ed. 2005).

[9] Parker, *supra* note 6, at 684.

[10] *Id.*

[11] SCHWARTZ, *supra* note 8, at 1.

[12] Press Release, U.S. Census Bureau, Census Bureau Reports World's Older Population Projected to Triple by 2050 (June 23, 2009), *available at* http://www.census.gov/newsroom/releases/archives/international_population/cb09-97.html [hereinafter U.S. Census Bureau].

between the years 1990 and 2000, the fastest growing age group was ninety to ninety-five.[13]

It is predicted that, by the year 2030, the number of elderly will reach seventy-two million, or 20% of the population of the United States.[14] Another estimate for the same year is that the number of elderly will reach eighty-nine million, or 25% of the United States population.[15] Of the eighty-five million, nine million will be over the age of eighty-five.[16] By 2050, the population of people sixty-five and older may increase to eighty-nine million,[17] and the population over eighty-five may increase to 10% of the total population in the United States.[18]

As the population of the United States grows older, the elderly will begin to control a significant portion of the nation's wealth. In 2007, "people over [fifty] control[led] 70[%] of the nation's wealth"[19] and 91% of the nation's net worth was in the hands of families whose heads of household were over forty.[20] It is estimated that over the next twenty years, seventy-five million people in the United States will turn sixty, which averages to "more than 10,000 people retiring every day."[21] The majority of the nation's net worth will eventually be controlled by newly-retired baby boomers.[22] Since the elderly hold such wealth and are considered a vulnerable group, they have become targets for people who try to take that wealth. This situation is worsened by diseases that make the elderly vulnerable to potential financial abuse.

II. THE DISEASES OF THE ELDERLY: DEMENTIA AND ALZHEIMER'S

A. Dementia

As people live longer, the number of patients with dementia

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13 Parker, *supra* note 6, at 684.
14 *Id.*
15 Moore & Schaefer, *supra* note 1, at 516.
16 *Id.*
17 U.S. Census Bureau, *supra* note 12.
18 Parker, *supra* note 6, at 684.
19 *Id.*
20 *Id.* at 689.
21 *Id.*
22 *Id.*; *see also Retirement Planner: Full Retirement Age,* U.S. SOC. SEC. ADMIN., http://www.ssa.gov/retire2/retirechart.htm (last updated June 19, 2012) (explaining that a person can receive retirement benefits as early as age sixty-two).

continues to rise.[23] Dementia refers to many diseases of the brain where there is a "slow progressive deterioration of cognitive ability and personality traits and severe behavior changes."[24] More and more people are developing dementia, and live with the condition for a long time because of increased life expectancy and the slow progression of the disease.[25]

"[T]he number of individuals with dementia is increasing rapidly, and individuals diagnosed with dementia can expect to live for many years with gradually decreasing cognitive functioning including diminishing ability to respond to their environment."[26] Dementia can cause the elderly to have impaired memories and judgment and difficulty communicating.[27] The ability of the elderly to make decisions that are well informed and rational is significantly limited.[28]

B. Alzheimer's

Of the more than sixty causes of dementia, Alzheimer's disease is the most common.[29] "Alzheimer's accounts for 60[−]80% of dementia cases,"[30] and mainly affects people over seventy.[31] Alzheimer's disease "results in an irreversible, progressive mental decline due to nerve cell degeneration in the brain,"[32] leading to "loss of cognitive functions as well as behavioral disturbances."[33] Those with Alzheimer's experience memory impairment, but the disease will also eventually destroy the person's ability to reason, make sound judgments, and communicate.[34] These individuals degenerate over the course of

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[23] Tenenbaum, *supra* note 2, at 677.

[24] SCHWARTZ, *supra* note 8, at 9; *see also* Tenenbaum, *supra* note 2, at 678 (describing the general symptoms of patients with dementia).

[25] Tenenbaum, *supra* note 2, at 675, 677, 679 (Alzheimer's eventually kills those afflicted).

[26] *Id.* at 679.

[27] *Id.* at 678.

[28] *Id.*

[29] *Id.* at 677; ALZHEIMER'S ASS'N , BASICS OF ALZHEIMER'S DISEASE: WHAT IT IS AND WHAT YOU CAN DO 9 (2012).

[30] ALZHEIMER'S ASS'N, *supra* note 29, at 9.

[31] SCHWARTZ, *supra* note 8, at 9; ALZHEIMER'S ASS'N, *supra* note 29, at 13 (explaining that increasing age is the "greatest known risk factor for Alzheimer's").

[32] Tenenbaum, *supra* note 2, at 678.

[33] SCHWARTZ, *supra* note 8, at 9.

[34] Tenenbaum, *supra* note 2, at 678; *see generally* ALZHEIMER'S ASS'N, *supra* note 29, at 19–22 (describing the stages of Alzheimer's disease).

months or years.[35] While the disease decreases life expectancy significantly, a person with Alzheimer's can live, on average, for "five to eight years after diagnosis, and the length of survival varies from about three to twenty years."[36] In the United States there are about four million people who suffer from Alzheimer's,[37] and "due to the aging of the baby boomers and increased life expectancy in general, this number is projected to increase to fourteen million by 2050."[38]

There is a period of time prior to diagnosis where the elderly, and the people around them, may not be aware that they are suffering from the disease. At this point in time, when the family may not know for certain that their elderly family member needs help, the elderly person is especially vulnerable to financial abuse.

III. WHY THE ELDERLY ARE TARGETS FOR FINANCIAL ABUSE

The financial exploitation of the elderly includes "[t]heft, fraud . . . and use of undue influence as a lever to gain control over an older person's money or property."[39] It has been estimated by the National Center on Elder Abuse "that there are five million cases of financial elder exploitation annually."[40] With their growing population and increased life expectancy, the elderly have become appealing targets for scam artists and con men.[41] The elderly also tend to be easily accessible.[42] They are

[35] Tenenbaum, *supra* note 2, at 679.

[36] *Id.*

[37] *Id.* at 677.

[38] *Id.*; ALZHEIMER'S ASS'N, *supra* note 29, at 9 (estimating that over 5 million people in the United States suffer from Alzheimer's, including 13% of persons over age 65, and 50% aged 85 or older, and that by 2050, "the number of individuals with the disease may reach 16 million."); Alice Park, *New Research on Understanding Alzheimer's*, TIME, Oct. 31, 2010, http://www.time.com/time/magazine/article/0,9171,202557 2,00.html ("More than 5 million Americans currently suffer from Alzheimer's disease, a number that will grow to 13.4 million by 2050. Health experts estimate that a 65-year-old has a 10% risk of developing Alzheimer's and that baby boomers [are] currently approaching [the] peak age for the disease . . . ."); Richard Stengel, *Attacking Alzheimer's*, TIME, Oct. 14, 2010, http://www.time.com/time /magazine/article/0,9171,2025573,00.h tml ("More than half of all Americans now know someone with Alzheimer's; for almost 30% of Americans, that person is a family member.").

[39] NAT'L CTR. ON ELDER ABUSE, WHY SHOULD *I* CARE ABOUT ELDER ABUSE? 1 (2010).

[40] Parker, *supra* note 6, at 685.

[41] *Id.* at 684–85; *see also* Jeffrey L. Bratkiewicz, *"Here's a Quarter, Call Someone Who Cares"; Who is Answering the Elderly's Call for Protection from*

easy to reach by phone or mail since they are often home for most of the day.[43] Some elderly are homebound because of a disability, creating a "captive audience" for telemarketers.[44] They also have more time to listen and welcome visitors.[45]

The isolation of the elderly also contributes to the risk of elder abuse, including financial abuse.[46] The elderly tend to be lonelier, which can make them more willing to talk with strangers and even appreciate their company.[47] The elderly are also generally more courteous and will not hang up on telemarketers.[48] There is also the perception that the elderly are more trusting.[49] "Because the elderly are members of a more trusting generation . . . they are more likely to rely on the representations made by the telemarketer, making it difficult for seniors to recognize when they are being swindled."[50] Additionally, "many older people do not see the danger in giving out personal information, such as social security numbers, credit card numbers, and even bank account numbers, over the phone."[51]

Dementia contributes to the perception that the elderly are "less aware of their surroundings[] and easier to handle."[52] This perception has some merit. The gradual decrease in cognitive functioning caused by dementia limits the elderly person's ability to make informed and rational decisions.[53] Elderly persons with dementia tend to be even more susceptible to financial abuse during the early stages of dementia, prior to diagnosis,[54] when

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Telemarketing Fraud?, 45 S.D. L. REV. 586, 586 (2000) ("Unfortunately, accompanying the growth of the senior population has been a rise in the incidence of consumer fraud perpetrated upon the elderly.").

[42] *See* Parker, *supra* note 6, at 690–91.

[43] Bratkiewicz, *supra* note 41, at 589 ("[S]enior citizens are more likely than those in other age groups to be home in the afternoon, the time that telemarketers typically call."); Moore & Schaefer, *supra* note 1, at 508.

[44] Bratkiewicz, *supra* note 41, at 589.

[45] Parker, *supra* note 6, at 691.

[46] NAT'L CTR. ON ELDER ABUSE, *supra* note 39, at 1.

[47] Bratkiewicz, *supra* note 41, at 589 (fraudulent telemarketers prey on feelings of isolation, befriend the elderly victim, and then take their money) ; Martin, *supra* note 4, at 5.

[48] Patrick E. Michela, *"You May Have Already Won . . .": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 PEPP. L. REV. 553, 558 (1993).

[49] Parker, *supra* note 6, at 685.

[50] Bratkiewicz, *supra* note 41, at 590.

[51] Martin, *supra* note 4, at 6.

[52] Parker, *supra* note 6, at 685.

[53] Tenenbaum, *supra* note 2, at 678.

[54] *See* Bratkiewicz, *supra* note 41, at 589 ("These feelings of loneliness,

they and the people around them may not be aware of the disease.

There are several other reasons why scam artists choose the elderly as targets.[55] Businesses are very aware of the increase in the elderly population and the desire of the elderly to grow their retirement investments and will "frequently participate in the financial fleecing of the elderly."[56] The elderly "are [more] likely to have a 'nest egg,' own their homes, and/or have excellent credit."[57] They are less likely to report the fraud because they "fear losing control of their money if they appear unable to care for themselves,"[58] "do not know to whom to report it, are too ashamed at having been defrauded, or do not know they have been defrauded."[59] Most of these cases are unreported due to embarrassment by the elderly or their inability to recognize that the theft has happened or is happening.[60] When the fraud is reported, the elderly "often make poor witnesses, due to the effect of age on memory."[61]

While some states have "specifically criminalize[d] financial abuse of the elderly . . . [or] rely on criminal statutes of general application to proscribe" the abuse,[62] "the perpetrators are seldom prosecuted[] due to problems of proof and court delays," or there are few incentives for prosecutors to pursue financial abuse cases.[63] Additionally, "only a small number of civil cases are brought in connection with financial abuse."[64] The problem with bringing civil cases is that the victims themselves must bring the

coupled with a possible deterioration in physical and mental capabilities, make the elderly attractive victims to telemarketers.").

55 *See id.* at 588 ("Telemarketers are thought to prey upon the elderly because of (1) their availability, (2) their frailty, and (3) their financial resources.").

56 Parker, *supra* note 6, at 686; *see also* Michela, *supra* note 48, at 554 ("[T]hey must have taken advantage of my loneliness by constantly calling me on the telephone and talking to me and my need for financial security which they promised they could achieve for me by these 'hot investments.'").

57 Parker, *supra* note 6, at 685.

58 Moore & Schaefer, *supra* note 1, at 519–20; *see also* Martin, *supra* note 4, at 1 (financial abuse is a less obvious threat to the independence of the elderly).

59 Parker, *supra* note 6, at 685; *see also* Michela, *supra* note 48, at 574 (discussing how and why boiler room operators focus their efforts on the elderly knowing their desire to increase their income).

60 Parker, *supra* note 6, at 685.

61 *Id.*

62 Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?*, 38 AKRON L. REV. 707, 708 (2005).

63 Moore & Schaefer, *supra* note 1, at 513.

64 *Id.*

suit.[65] However, often victims do not receive the necessary guidance to bring the suit, are overwhelmed or embarrassed, lack financial resources, or cannot face a long court battle.[66]

The current environment is particularly dangerous due to technological advances and deregulation of consumer protection.[67] For example, "[c]omputers, high-tech databases, and other information systems make personal data much more easily accessible to legitimate as well as illegitimate businesses."[68]

For the same reasons that the elderly are targets for scam artists, they also tend to be attractive targets for abuse by institutions that are considered reputable and the professionals they employ.[69] Institutions may try to take advantage of the elderly because of the perception that they are more trusting, easier to handle, and have assets.[70] When financial elder abuse is done by an organized business, it is known as "commercial elder abuse."[71] In those situations, the commercial abuser gains access to assets by acting as a business, not by outright theft.[72]

Most scams on the elderly by commercial abusers are actually legal.[73] "They are just poor financial deals."[74] An example of a poor financial deal is a credit card offer.[75] Many who take these offers see the credit card as easy money.[76] However, credit cards also have high interest rates and fees that prevent the elderly from getting out of debt.[77] Credit card companies, conduct studies to determine how best '"to exploit their customers' cognitive biases and errors.'"[78] They design their products so that consumers will take on credit that exceeds their ability to pay it back.[79]

[65] *Id.* at 524.
[66] *Id.*
[67] Martin, *supra* note 4, at 1.
[68] *Id*. at 2 (the rapidly changing world of "marketing, advertising, and financial product design" makes it particularly difficult for the elderly to cope).
[69] Parker, *supra* note 6, at 686.
[70] *Id.* at 685.
[71] *Id.* at 686.
[72] *Id.* (citing Kurt Eggert, *Lashed to the Mast and Crying for Help: Self-Limitations of Autonomy Can Protect Elders from Predatory Lending*, 36 Loy. L.A. L. Rev. 693, 698 (2003)).
[73] Martin, *supra* note 4, at 2.
[74] *Id.*
[75] *See id.* at 8.
[76] *Id.* at 8–9.
[77] *Id.* at 9.
[78] *Id.* at 12.
[79] *Id.*

The elderly tend to suffer more than other groups from these poor financial deals since "many have no capacity to rebound from financial setbacks" because they are frequently retired, and may find it difficult to find a job in order to recoup what they lost, or cannot work for reasons such as a disability.[80] Elderly victims then face a future "without any savings to rely upon."[81] This often pushes the victims who have lost their "savings to rely on public programs for [their] housing and health care" needs.[82] "Many elderly victims have had to cut back their monthly expenditures as a result of fraud, and some have had to take low-paying jobs to survive."[83]

Not only are the elderly hurt financially, but their dignity may be negatively impacted should their family begin to take away freedoms.[84] Little can be done to protect the elderly from financial harm, except to educate them or remove some freedoms.[85] Family members may be reluctant to protect the elderly from financial abuse because of the need to limit their elderly family member's independence to stop or prevent exploitation.[86] It is important to find a way to protect the elderly from these financial deals while preserving their dignity.

IV. TELEMARKETING

Poor financial deals are frequently made over the telephone between the elderly and telemarketers.[87] Telemarketing is conducted to exchange payment for goods or services by telephone, and "involves more than one telephone call by a

[80] *Id.* at 16; Bratkiewicz, *supra* note 41, at 589 (stating the elderly also suffer because, by draining their victim's bank accounts, telemarketers "ultimately rob the senior of her dignity and ability to trust others"); Moore & Schaefer, *supra* note 1, at 513 ("By virtue of age limitations and other disabilities, they are often vulnerable to abuse, whether physical, mental, or financial, and may not be capable of seeking help . . . .").

[81] Michela, *supra* note 48, at 575.

[82] *Justice for All: Ending Elder Abuse, Neglect and Financial Exploitation: Hearing Before the S. Special Comm. on Aging*, 112th Cong. 8 (2011) (testimony of Marie-Therese Connolly, Senior Scholar, Woodrow Wilson Int'l Ctr. for Scholars Dir., Life Long Justice (an elder justice initiative of Appleseed)).

[83] Michela, *supra* note 48, at 575.

[84] Martin, *supra* note 4, at 2.

[85] *Id.*

[86] *Id.*

[87] *See id.* at 3 (commenting on the "sophisticated methodologies" commonly utilized by telemarketers).

telemarketer."[88] While telemarketing may have its benefits, it has been reported that over 90% of adults in the United States have received fraudulent offers from telemarketers.[89] Telemarketing is a very large industry with a significant number of businesses engaging in the practice.[90] An average household receives more than nineteen calls annually.[91]

The telemarketing business has grown significantly over the years. Between 1994 and 1999, the telemarketing industry grew from a $400 billion a year industry to over $540 billion a year.[92] During those same years, employment in the telemarketing industry grew by approximately 2 million people, from 3.5 million to nearly 5.5 million people.[93] Between 1991 and 2002, the number of calls increased from 18 million calls per day to 104 million per day.[94] By 2002, the telemarketing industry generated approximately $668 billion, and created 6 million jobs.[95] "[S]tudies [in 2004 showed] that on any given day there [were] more than 300,000 solicitors working on behalf of telemarketing companies to contact over 18 million people."[96]

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[88] N.Y. GEN. BUS. LAW § 399-z(1)(h)(i) (McKinney Supp. 2012).

[89] Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPECTUS 61, 62 (2004).

[90] *See* Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin' On!*, 3 WYO. L. REV. 167, 171 (2003).

[91] *Id.*; Meacham, *supra* note 89, at 62 ("Telemarketing has become a legitimate form of business in this country because the telephone is one of the most convenient and cost-effective ways for organizations to make contact with potential customers.").

[92] Pattison & McGann, *supra* note 90, at 171; Steven R. Probst, *Telemarketing, Commercial Speech, and Central Hudson: Potential First Amendment Problems for Indiana Code Section 24–4.7 and Other "Do-Not-Call" Legislation*, 37 VAL. U. L. REV. 347, 347–48 (2002).

[93] Pattison & McGann, *supra* note 90, at 171; Probst, *supra* note 92, at 347–48 (stating that in 2000 it was estimated "that the ten largest telemarketing firms in the country are able to make five hundred and sixty calls per second"); Fred Kaplan, *Demands for Privacy Curb Telemarketers*, BOSTON GLOBE, Dec. 26, 2000, at A1.

> [T]he top 10 telemarketing firms [had], together, the capacity to make 560 phone calls per second. That translates to 33,600 calls per minute; 2,016,000 calls per hour; 16,128,000 per eight-hour day; 80,640,000 per five-day week; 322,560,000 – enough to call every phone number in the United States, some several times over – each and every month.

Id.

[94] Jared Strauss, *The Do-Not-Call List's Big Hang-up*, 10 RICH. J.L. & TECH. 27, ¶ 4 (2004).

[95] Pattison & McGann, *supra* note 90, at 171.

[96] Meacham, *supra* note 89, at 61.

A. Telemarketing Fraud

The cost of telemarketing fraud to consumers in the United States is "between $15 and $40 billion annually."[97] This impacts all groups of people, making it a "national problem."[98] The IRS also loses millions of dollars every year in unreported illegal income.[99] Additionally, the economy suffers because there is less investment capital to "finance legitimate business opportunities."[100]

B. Telemarketer Practices

It has been estimated by the American Association of Retired Persons (AARP) that about "ten percent of all telemarketing firms use fraudulent or deceptive sales tactics."[101] Telemarketers prey on the weaknesses of people, including the elderly, by winning their confidence.[102] "A sophisticated telemarketer can use his powers of persuasion to paint a 'word picture' in the mind of his client[,]" thereby increasing the "salesperson's ability to convince a purchaser to spend money on the fraudulent scam."[103] A word picture is used to lead the consumer into making an assumption about a product that is not true.[104] These tactics "play upon the client's fears and emotions in ways that would be difficult or impossible in a face-to-face meeting."[105] Over the phone, the person being called can only rely on the telemarketer's voice, tone, and what he or she is saying.[106] At a face-to-face meeting a person can look to facial expression and body language.[107]

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[97] Michela, *supra* note 48, at 573–74.
[98] *Id.* at 574.
[99] *Id.*
[100] *Id.*
[101] Bratkiewicz, *supra* note 41, at 587.
[102] Michela, *supra* note 48, at 555.
[103] *Id.* at 563–64 ("[Telemarketers] can tailor their sales presentations to appeal to the consumers, using different techniques for different types of people.").
[104] *Id.* at 563 n.68.
[105] *Id.* at 564.
[106] *See id.*
[107] *See id.*

C. Telemarketer Practices on the Elderly

Telemarketers are particularly dangerous for the elderly, and their tactics can have devastating effects.[108] This is not only the case "for those seeking to commit fraud and identity theft," but also "for sellers of goods and services and solicitors of charitable contributions."[109] It has been reported by the AARP that more than half of victims of telemarketing fraud are fifty years old or older.[110] "While Americans over fifty account for more than one half of telemarketing fraud victims, they only comprise twenty-two percent of the total population."[111] This group of consumers loses an estimated $14.8 billion yearly to telemarketers.[112]

V. THE DO-NOT-CALL REGISTRY

One way both state and federal governments have fought telemarketing fraud and financial abuse is by creating Do-Not-Call registries. Before the implementation of the national Do-Not-Call Registry, fourteen states had set up their own do-not-call lists, and "at least ten more states [were] considering establishing state lists."[113] While the state registries are similar to the federal registry, each state is different. "The do-not-call protection typically establishes a list of consumer names telemarketers must obtain before doing business in a state."[114] The telemarketers cannot call the people who have placed themselves on the list.[115] Some states required consumers to pay a fee to register and telemarketers to pay larger fee to obtain the list, which is maintained and updated by a state agency.[116] A significant number of state residents took advantage of the "state no-call lists" to avoid the hassle of adding themselves to individual telemarketer no-call lists.[117] Under the company-

[108] *Id.* at 575.
[109] Martin, *supra* note 4, at 4–5.
[110] Bratkiewicz, *supra* note 41, at 587; *see also* Edwin L. Klett & Rochelle L. Brightwell, *Telemarketing: Exercise in Free Speech or Just a Pain in the Neck?*, PA. LAW., Nov.–Dec. 2002, at 38, 39 ("In one case, the FBI found that fraudulent telemarketers were targeting nearly 80[%]of their calls to older consumers.").
[111] Bratkiewicz, *supra* note 41, at 587.
[112] *Id.*
[113] Pattison & McGann, *supra* note 90, at 188.
[114] *Id.*
[115] *See id.* at 189.
[116] *Id.* at 188−89.
[117] *Id.* at 189.

specific do-not-call list system, consumers could request that they be removed from that company's telemarketing list after the initial call.[118]

The national Do-Not-Call Registry was a culmination of "efforts to alleviate consumer frustration with unwanted sales calls."[119] Frustration was shown by the significant increase in complaints over telemarketing calls between 1998 and 2002.[120]

Other reasons for creating the Do-Not-Call Registry included protecting consumer privacy, and reducing "'abusive and deceptive telemarketing practices.'"[121] Congress "spoke of protecting the peace and quiet of the home and preventing family dinners from being interrupted by unwanted calls."[122] It was also believed that the original company-specific do-not-call lists "placed too heavy a burden on consumers, who [were] forced to repeat their request to be removed from a calling list to each individual caller."[123] Telemarketers would also ignore "consumer requests, and consumers had no way of verifying their removal from the list."[124] It was believed that "a national registry would provide a more convenient one-stop method for reducing unwanted calls. . . ."[125]

In January 2003, the Federal Trade Commission (FTC) "promulgated its final, amended Telemarketing Sales Rule [that] established[ed] the nationwide do-not-call registry and prohibit[ed] telemarketers from calling phone numbers consumers listed on the registry."[126] The original Telemarketing

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[118] Strauss, *supra* note 94, ¶ 3 (explaining that at that time telemarketing was regulated under the Telemarketing and Consumer Fraud Protection Act (TCFAP) which had instructed the Federal Trade Commission (FTC) "to create rules to combat 'abusive telemarketing acts or practices'" and they did so by creating company-specific regulations).

[119] *Id.* ¶ 1.

[120] *Id.* ¶ 4 (stating that complaints had increased by 1000%).

[121] *See id.* ¶¶ 4, 7.

[122] *Id.* ¶ 7.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Edward J. Schoen & Joseph S. Falchek, *The Do-Not-Call Registry Trumps Commercial Speech*, 2005 MICH. ST. L. REV. 483, 484 (2005); *see also* Christopher T. Pickens, *Don't Call Us, We'll Call You: Why Telemarketers Are Tortfeasors*, 17 ALB. L.J. SCI. & TECH. 615, 617 (2007); James Sweet, *Opting-Out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 926, 928–29 (2003)

> On March 11, 2003, President George W. Bush signed the Do-Not-Call Implementation Act into law. On June 26, 2003, the FTC began accepting names for the national do-not-call registry, and within two

Sales Rule (TSR) was adopted August 16, 1995 and was created to help combat fraudulent telemarketing practices.[127] The original rule required telemarketers to tell consumers "(1) the identity of the seller; (2) the fact that the purpose of the call [was] to sell goods or services; (3) the nature of the goods or services being offered; and (4) in the case of prize promotions, that no purchase or payment [was] necessary to win."[128] In 2002, several revisions to the TSR were proposed, including the creation of the national Do-Not-Call Registry,[129] which later become one of the amendments to the TSR.[130]

The Do-Not-Call Registry was likely the most significant amendment to the TSR.[131] Consumers could add their phone numbers via telephone or the internet.[132] The registry became very popular very quickly with more than fifty million telephone numbers placed on the registry within the first three months.[133] Once a phone number is placed on the registry, telemarketers are required to remove it from their phone lists.[134] For the elderly

> days 735,000 people signed up, and within two weeks that number was up to twenty-three million people . . . . Enforcement was scheduled to commence October 1, 2003, subjecting telemarketers to $11,000 for each number on the list that they called.

Id.

[127] Telemarketing Sales Rule, 68 Fed. Reg. 4580–01, 4581 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

[128] *Id.*

[129] *Id.* at 4582.

[130] Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B) (2012).

[131] Sweet, *supra* note 126, at 924.

[132] Schoen & Falchek, *supra* note 126, at 484.

[133] Pickens, *supra* note 126, at 617; *see also* Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n, 358 F.3d 1228, 1234 (10th Cir. 2004) (By 2004, "consumers [had] registered more than 50 million phone numbers on the national do-not-call registry"); Sweet, *supra* note 126, at 929 ("At the height of registration on the first day, 158 people signed up every second.").

[134] Schoen & Falchek, *supra* note 126, at 484 ("They do so by periodically accessing the registry through a secure website to ascertain what numbers, sorted and available by area code, have been listed, and then removing those numbers from their calling list."); *see also* Nat'l Fed'n of the Blind v. Fed. Trade Comm'n, 420 F.3d 331, 334 (2005).

> Specifically, Congress directed the FTC to forbid 'unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,' to restrict 'the hours of the day and night when unsolicited telephone calls can be made,' and to require that callers disclose information about the nature and purpose of the call.

Id.; *Mainstream*, 358 F.3d at 1234 ("Commercial telemarketers are generally prohibited from calling phone numbers that have been placed on the do-not-call registry, and they must pay an annual fee to access the numbers on the registry specifically, the Do-Not-Call Registry serves the purpose of protecting registered elderly persons from telemarketers who are exploitative or promoting fraudulent schemes.[135] Since the only information that telemarketers receive is the telephone numbers of the people registered[136] the elderly cannot be specifically targeted. Additionally, the TSR gives the FTC the authority to "identify and prohibit . . . abusive telemarketing practices . . . that implicate privacy concerns."[137] Such practices would include threats, intimidation, or the intent to harass or oppress the called party.[138]

While the Do-Not-Call Registry does prevent a significant number of telemarketing calls, which helps limit abuse, it does have some shortcomings. For example, charities seeking donations are exempt from the protections of the Do-Not-Call Registry.[139]

The Do-Not-Call Registry was originally intended to regulate charitable solicitations; however, it was decided that charitable solicitations would be regulated using the company-specific approach.[140] Under the company-specific approach, consumers must make a "'do-not-call' request with every telemarketer that calls."[141] There were a couple of reasons for this exemption for charities. First, it was feared that the Do-Not-Call Registry would hinder "the ability of charities to continue their philanthropic missions."[142] Second, it was assumed that charities did not need regulation to the same extent as commercial callers.[143]

While it is important not to hinder a charity's ability to raise money, there should be some changes in how the Do-Not-Call Registry is implemented, so the elderly can be better protected. The company-specific approach is burdensome to the average

so that they can delete those numbers from their telephone solicitations lists."); Meacham, *supra* note 89, at 70–71 ("Telemarketing companies are required to 'scrub' their list of potential callers periodically to remove any names that have been added to the database since the company last updated their list.").

135 Sweet, *supra* note 126, at 926; Telemarketing Sales Rule, 68 Fed. Reg. 4580-01, 4614 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

136 Telemarketing Sales Rule, 68 Fed. Reg. at 4641.

137 *Id.* at 4614.

138 *Id.*

139 Martin, *supra* note 4, at 5.

140 Strauss, *supra* note 94, ¶ 8.

141 Telemarketing Sales Rule, 68 Fed. Reg. at 4629.

142 Strauss, *supra* note 94, ¶ 9.

143 *Id.* ¶ 10.

consumer, since there is no way to verify that his name has been placed on the list, and his requests to be placed on the list could simply be ignored.[144] Additionally, the consumer must keep track of which charities contacted him and when they called.[145] This would be extremely burdensome for the average consumer, but for an elderly person, and especially one suffering from dementia, requesting each individual charity not to contact him, and keeping track of who contacted him and when, would be nearly impossible.

VI. A POSSIBLE SOLUTION: OPTING-OUT RATHER THAN OPTING-IN

Currently, the default rule is that telemarketers can call people as long as consumers have not placed their number on the Do-Not-Call Registry.[146] It has been suggested that the Do-Not-Call Registry would better protect the elderly if "the default rule [was shifted] from a 'call list' to a do-not-call list for people over the age of sixty-five."[147] Under this rule, once a person turns sixty-five, he cannot be solicited by phone or mail unless he opts-in to be solicited.[148] This "ban would switch the [current] presumption that people want to be called unless they [have] asked to be placed on a do-not-call list."[149]

The default rule matters a great deal when determining what a person's choices will be.[150] In an online study on default rules and organ donation, it was found that when the subjects had to opt-out, they were significantly more likely to be donors.[151] When a

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

[145] *Id.*

[146] Martin, *supra* note 4, at 26.

[147] *Id.* at 27; *see also* Pattison & McGann, *supra* note 90, at 197 ("Under the proposal the presumption would be that people do not want to be called unless they request it.").

[148] Martin, *supra* note 4, at 27; *see also* Pattison & McGann, *supra* note 90, at 197 (asserting that there be "a ban on all telemarketing calls made without prior knowledge of consent").

[149] Pattison & McGann, *supra* note 90, at 197.

[150] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 178 (2008).

[151] *Id.*

> [W]e know something about how much the choice of the default matters in this domain. Using an online survey, the researchers asked people, in different ways, whether they would be willing to be donors. In the explicit consent condition, participants were told that they had just moved to a new state where the default was not to be an organ donor, and they were given the option of confirming or changing that status. In the presumed consent version, the wording was identical

person has to opt into a program, he or she is less likely join the program.[152] Thus, if the default is that the person is already in the program and has to opt-out, the person is much more likely to remain in the program.[153] Additionally, in the case of elderly with dementia, it is very unlikely that they will opt-out of the Do-Not-Call Registry. Since dementia impairs the memories of those who suffer from the disease,[154] it is unlikely that a person suffering from dementia would remember that he has been placed on the Do-Not-Call Registry and therefore would not think to remove himself from it.

There are likely significantly fewer elderly people registered with the Do-Not-Call Registry because of its opt-in nature.[155] If the default was that persons aged sixty-five and older were automatically placed on the list, more elderly would be registered.[156] Other countries have also developed their own versions of the Do-Not-Call Registry. However, in those countries, unlike the United States, a person has to register to be placed on the list, making them opt-in programs rather than opt-out programs.[157] Were any of these lists opt-out lists there would likely be a decrease in financial abuse, especially if charitable solicitations were included.

A. Presumed Consent: Shifting Presumption

There have already been laws developed where a person has to opt-out of a program rather than opt-in, such as presumed

> but the default was to be a donor. In the third, neutral, condition, there was no mention of a default—they just had to choose. Under all three conditions, the response was entered literally with one click. As you will now expect, the default mattered—a lot. When participants had to opt in to being an organ donor, only 42% did so. But when they had to opt out, 82% agreed to be donors. Surprisingly, almost as many people (79%) agreed to be donors in the neutral condition.

Id.

152 *Id.*

153 *Id.*

154 Tenenbaum, *supra* note 2, at 678.

155 *See* THALER & SUNSTEIN, *supra* note 150, at 178.

156 *See generally id.*

157 *See Welcome to the Do Not Call Register,* AUSTL. COMM. & MEDIA AUTHORITY, https://www.donotcall.gov.au (last visited Nov. 25, 2012); *see also Welcome: What are the Telephone Preference Service*, TELEPHONE PREFERENCE SERV., http://www.mpsonline.org.uk/tps (last visited Nov. 25, 2012) (in the UK there is no exception for charities); *What is the National Do Not Call List?*, CAN. RADIO-TELEVISION & TELECOMM. COMM'N, https://www.lnnte-dncl.gc.ca/index-eng (last visited Nov. 25, 2012).

consent laws with regard to organ donation.[158] In this type of law, known as a "shifting presumption law,"[159] instead of presuming no consent to organ donation, there would be a presumption of consent.[160]

Under the 2006 Uniform Anatomical Gift Act, coroners or medical examiners have the authority to make anatomical gifts, usually of corneal tissues and pituitary glands, when the deceased individual or authorized person did not make a gift and there is no known objection by the family.[161] This presumption that the gift is acceptable can be rebutted by the donor prior to death, or by the family of the donor after death.[162] Family members can rebut by simply objecting to the donation.[163] These laws reduce the likelihood that a potential donor will be a "passive bystander," as is the case when individuals need to opt-in.[164] By making consent to organ donation the presumption, the belief is that there will be an increase in organ donations.[165]

It is possible that a presumed consent law for the Do-Not-Call Registry may have less impact than other opt-out laws because there may be religious and other concerns regarding one's

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158 Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1219, 1236 (2009).

159 Alexander Powhida, Comment, *Forced Organ Donation: The Presumed Consent to Organ Donation Laws of the Various States and the United States Constitution*, 9 ALB. L.J. SCI. & TECH. 349, 359 (1999).

160 *Id.* at 360.

161 *See* Sheldon F. Kurtz et al., *The 2006 Revised Uniform Anatomical Gift Act—A Law to Save Lives*, HEALTH L. ANALYSIS, Feb. 2007, at 44, 48; *see also* NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, REVISED UNIFORM ANATOMICAL GIFT ACT (2006), *at* 34 (Aug. 26, 2009), http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf; Erik S. Jaffe, Note, *"She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 535 (1990) (other requirements for the removal of corneal tissues and pituitary glands include "(1) a request for such tissue for the purposes of transplant or therapy is made by an authorized recipient; (2) the removal would not interfere with the course of an autopsy or other investigation; [and] (3) the removal would not alter the deceased's facial appearance"); *Legislative Fact Sheet—Anatomical Gift Act (2006),* UNIFORM L. COMMISSION, http://www.uniformlaws.org/ Legis lativeFactSheet.aspx?title=Anatomical%20Gift%20Act%20 (2006) (last visited Nov. 26, 2012) (showing that forty-five states, the District of Columbia, and the U.S. Virgin Islands have enacted the Uniform Anatomical Gift Act [2006] and one state has introduced the Act).

162 Powhida, *supra* note 159, at 358 (arguing that these types of presumed consent statutes are ineffective, because the donor and the family can refuse consent, and need to be informed of their right to refuse consent).

163 Jaffe, *supra* note 161, at 535–36.

164 Goodwin, *supra* note 158, at 1236.

165 *Id.*

remains, and donors and family members have an opportunity to refuse to donate.[166] The opportunity to refuse to donate would be similar to giving the elderly placed on the Do-Not-Call Registry at sixty-five the ability to opt-out.

Shifting the presumption of consent with regard to a person's placement on the Do-Not-Call Registry after the age of sixty-five is not likely to bring out the same emotional response as presumed consent for organ donation. Therefore, people are less likely to protest being placed on the Do-Not-Call Registry automatically after age sixty-five.

B. Concerns Regarding Shifting Presumption and the Do-Not-Call Registry

There may be *First Amendment* concerns to the automatic placement of a person over the age of sixty-five on the Do-Not-Call Registry. In *Mainstream Marketing Services, Inc. v. Federal Trade Commission,*[167] the court found that one of the reasons the Do-Not-Call Registry did not violate the First Amendment was that it was "an opt-in program that put[] the choice of whether or not to restrict commercial calls entirely in the hands of consumers."[168] "The primary issue in [the] case [was] whether the First Amendment prevent[ed] the government from establishing an opt-in telemarketing regulation that provide[d] a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls."[169] The court held that the opt-in provision made the law narrowly tailored by "not inhibit[ing] any speech directed at the home of a willing listener."[170] It is possible that if the default rule was shifted to an opt-out rule, even for a limited group of people, the court may find that it violates the First Amendment. However, because it is important to protect vulnerable groups

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[166] Powhida, *supra* note 159, at 360–61.

[167] 358 F.3d 1228 (10th Cir. 2004). This case was a consolidation of four cases that challenged the national Do-Not-Call registry. *Id.* at 1232. However it did not address "whether the do-not-call registry would be constitutional if it applied to political and charitable callers." *Id.* at 1233 n.2.

[168] *Id.* at 1233.

[169] *Id.* at 1232.

[170] *Id.* at 1238 (The court in this case held that the Do-Not-Call Registry advanced the government's interest because it helped to block a significant number of problem calls. Additionally it was "narrowly tailored because [of] its opt-in character"; therefore it would not inhibit speech made to a willing listener).

like the elderly, who are particularly susceptible to financial abuse, the court should not find that an opt-out program limited to a particular group violates the First Amendment.

The court in *Mainstream* used the three-part *Central Hudson* test for First Amendment challenges to commercial speech.[171] First, a substantial interest must be asserted by the government, which the proposed regulation is intended to achieve.[172] Second, "the regulation must directly advance the government's interest."[173] Third, the regulation must be narrowly tailored to restrict as little speech as necessary.[174]

An opt-out program for persons sixty-five and older would achieve the government interest of protecting the elderly from financial abuse. This would directly advance the interest, because it would be created expressly for elderly persons. The regulation would be narrowly tailored in that it would focus on a specific group of people, and anyone in that group could choose to opt-out. For these reasons, opt-out programs should be found to pass the test for commercial speech and not violate the First Amendment.[175]

C. Other Solutions

Since the Court did place a great deal of value on the opt-in nature of the Do-Not-Call Registry, other solutions must be considered. The current methods being used to protect the elderly from financial abuse only come into effect after the abuse has taken place, and rely on the abuse being reported by the elderly person, family members, or friends. Signs family members or friends should be instructed to look for include: suspicious changes in finances and accounts, bank withdrawals that are unusual, or loss of property.[176] The suspected financial abuse can be reported to an adult protective services agency or law enforcement by family members, friends, or elderly people

[171] *Id.* at 1237.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] It may be argued that most people aged sixty-five and over are competent to deal with these types of calls and that an opt-out program is not narrowly tailored. However this is the best way to prevent financial abuse because there is not a more narrowly tailored option.
[176] NAT'L CTR. ON ELDER ABUSE, *supra* note 39, at 2.

themselves.[177]

Another way to prevent or stop financial abuse is for family and friends to keep in contact with the elderly person.[178] By maintaining communication, there is a decreased likelihood that there will be mistreatment and the elderly person has a chance to express any problems he may be experiencing.[179] Additionally, family and friends should be aware of the possibility of financial abuse, and they should "take note of what may be happening with [their] older neighbors and acquaintances."[180]

The AARP suggests that if an elderly person or a family member believes that he or his elderly family member is a victim of financial abuse, he should contact the Eldercare Locator.[181] The Eldercare Locator helps victims to identify "local programs and sources of support" in their community.[182] It was created with the goal of "provid[ing] users with the information and resources that will help older persons live independently and safely in their homes and communities for as long as possible."[183] This organization achieves this goal by helping older adults, families, and caregivers navigate the "maze of services" and identify the trustworthy resources in the older person's geographic area.[184] Such programs provide a defense against abuse by "maintain[ing] health, well-being, and independence."[185]

New York State helps the elderly maintain as much of their independence as possible through Article 81 of the Mental Hygiene Law (MHL).[186] Under the MHL, it is recognized that the "needs of persons with incapacities are as diverse and complex as

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[177] *Id.* ("Although a situation may have already been investigated, if you believe circumstances are getting worse, continue to speak out.").

[178] *Id.*

[179] *Id.*

[180] *Id.* ("Do they seem lately to be withdrawn, nervous, fearful, sad, or anxious, especially around certain people, when they have not seemed so in the past?").

[181] *See* Lynnette Khalfani-Cox, *Are You a Victim of Financial Abuse?*, AARP (Mar. 7, 2011), http://www.aarp.org/money/scams-fraud/info-03-2011/are-you-being-financially-abused-by-a-family-member.html.

[182] NAT'L CTR. ON ELDER ABUSE, *supra* note 39; *see also* Khalfani-Cox, *supra* note 181.

[183] *Eldercare Locator*, DEP'T OF HEALTH & HUMAN SERV., http://www.eldercare.gov/ELDERCARE.NET/Public/About/Services.aspx (last modified Sept. 16, 2010).

[184] *Id.*

[185] NAT'L CTR. ON ELDER ABUSE, *supra* note 39.

[186] N.Y. MENTAL HYG. LAW § 81.01 (Consol. 2012).

they are unique to the individual."[187] This law allows for the "least restrictive form of intervention which assists [elderly persons] in meeting their needs but . . . permits them to exercise the independence and self-determination of which they are capable."[188] This allows for the protection of the individual while preserving his or her rights.[189] Personal or property management is tailored to the needs of each individual.[190] "By limiting the determination of incompetency to the area where the individual cannot function—[e.g.,] financial transactions—the court maximizes the patient's autonomy by allowing him to maintain control over other aspects of his life . . . ."[191] The intended result is a "least restrictive form of intervention consistent with the person's functional level,"[192] providing the guardian with only the powers necessary to protect the incapacitated person in the area of his life in which he needs protecting.[193] With help, the financial well-being of the elderly can be protected while also protecting their dignity.

The FTC has also been combating telemarketing fraud through its telemarketing sweeps. Operation Tele-PHONEY[194] was the "largest telemarketing fraud sweep . . . by the [FTC]."[195] Under this operation, the FTC coordinated with more than thirty law enforcement agencies at the international, federal, state, and local levels to stop consumers from being defrauded by unscrupulous telemarketers.[196] Additionally, under Operation False Charity, the FTC worked with forty-nine states and the District of Columbia to bring actions against organizations and people who participated in charitable solicitation fraud.[197]

The FTC has also developed an education campaign called

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[187] *Id.; see also* EDWIN KASSOFF, ELDER LAW AND GUARDIANSHIP IN NEW YORK § 11:6 (2012).

[188] N.Y. MENTAL HYG. § 81.01.

[189] *See* KASSOFF, *supra* note 187, at § 11:6.

[190] N.Y. MENTAL HYG. § 81.01.

[191] Tenenbaum, *supra* note 2, at 711–12.

[192] N.Y. MENTAL HYG. § 81.09(c)(5)(xii) (Consol. 2012).

[193] KASSOFF, *supra* note 187, at § 11:10.

[194] Press Release, Fed. Trade Comm'n., FTC Announces 'Operation Tele-PHONEY,' Agency's Largest Telemarketing Sweep (May 20, 2008), *available at* http://www.ftc.gov/opa/2008/05/telephoney.shtm.

[195] *Id.*

[196] *Id.*

[197] Press Release, Fed. Trade Comm'n., FTC Announces "Operation False Charity" Law Enforcement Sweep (May 20, 2009), *available at* http://www.ftc.gov/opa/2009/05/charityfraud.shtm.

"Who's Calling?"[198] This campaign educates consumers on how to recognize phone fraud and report it, and encourages consumers to place their phone numbers on the Do-Not-Call Registry.[199] The FTC disseminates the "Who's Calling?" information through the internet, and provides people and organizations with brochures to distribute.[200]

D. An Alternative Solution to Shifting Presumption

The educational information is not always received by the elderly. Making sure that the elderly receive the information is very important to preventing financial elder abuse. In 1999, a bill was proposed in the Senate called the "Telemarketing Fraud and Seniors Protection Act."[201] The purpose of this bill was to protect senior citizens from telemarketing fraud through the use of education.[202] The education program included informing senior citizens of how often their demographic was the target of telemarketing fraud, how telemarketing fraud works, how to identify and report it, and how seniors can protect themselves.[203] The information could be disseminated through public service announcements, a manual or pamphlet, the internet, and telephone.[204] While this program would be a step in the right direction, this form of dissemination is easy for people to ignore, or they may never receive the information.

One way to be sure that seniors receive the information and read it is to send it with a statement important to financial planning. From October 1999, every year after workers and former workers turned twenty-five, the Social Security Administration (SSA) used to send out a Social Security statement in an automatic mailing.[205] One of the reasons the SSA

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[198] FED. TRADE COMM'N., WHO'S CALLING?: RECOGNIZE & REPORT PHONE FRAUD, http://www.ftc.gov/bcp/edu/pubs/consumer/telemarketing/tel19.pdf.

[199] *Id.*

[200] *Partner Resources,* WHO'S CALLING?: RECOGNIZE & REPORT PHONE FRAUD, http://www.ftc.gov/bcp/edu/microsites/phonefraud/partner.shtml (last visited Nov. 27, 2012).

[201] 145 Cong. Rec. S5590 (daily ed. Mar. 24, 1999).

[202] S. 699, 106th Cong. (1999).

[203] S. 699, § 104(b).

[204] *Id.*

[205] Emily Brandon, *Social Security Suspends Annual Statements*, U.S. NEWS MONEY, Apr. 4, 2011, http://money.usnews.com/money/blogs/planning-to-retire/2011/04/04/social-security-halts-annual-statements-.

did this was to aid in financial planning.[206] However, due to budget cuts, the SSA discontinued this practice in 2011.[207] In early 2012, the SSA resumed sending statements to people age sixty and older.[208] Additionally, the SSA has developed a way for everyone aged eighteen and older to check their statements online.[209] Included in these statements is a person's earnings record, an estimate of how much he will receive after retiring, how much he would receive should he become disabled, and how much the person's family would receive should he die in the coming year.[210]

In order to educate people about the financial abuse they could face as elderly persons, the SSA should also provide information about the dangers of financial abuse and how much more susceptible people can become to such abuse in the years after retirement. This information would help people avoid becoming targets of financial abuse.

In addition to the information about the dangers elderly people face, a form should be provided giving people the option to be automatically placed on the Do-Not-Call Registry once they reach the age of sixty-five. This form should be provided with the automatic SSA mailing. For persons age fifty-nine and under, who will not be receiving the SSA mailing, the form should be included with the online statement the SSA provides for persons in this age group. By giving the option, the opt-in nature of the Do-Not-Call Registry would be maintained because people would still be choosing to be placed on the registry rather than placement being automatic at a certain age. People would also have the ability to plan and protect themselves, while they are young and in less danger of suffering from dementia, against the fraudulent and abusive solicitations they may receive when then they are older.[211] People should also be provided with the

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[206] *Id.*

[207] *Id.*; Ann Carrns, *Checking Your Social Security Benefits Online*, N.Y. TIMES, May 16, 2012, http://bucks.blogs.nytimes.com/2012/05/16/checking-your-social-security-benefits-online/?pagewanted=print (in February 2012 the SSA "resumed mailing paper statements to workers who are 60 and older and [are not] yet receiving benefits.").

[208] Carrns, *supra* note 207; Brandon, *supra* note 205 (statements were mailed only to people aged sixty and over between 1995–1999).

[209] Carrns, *supra* note 207.

[210] Brandon, *supra* note 205.

[211] *See* Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n, 358 F.3d 1228, 1237 (10th Cir. 2004) (protecting consumers "against the risk of fraudulent and abusive solicitation" was one of the justifications used by the government in the

additional option of including charities on the list of organizations that cannot call, so the person would not receive any telephone solicitations after the age of sixty-five.[212]

CONCLUSION

The elderly are living longer and are therefore more likely to develop some form of dementia, putting them at risk for financial abuse. Shifting the default rule from an opt-in to an opt-out for the elderly with regard to the Do-Not-Call Registry would help to decrease financial abuse. Financial abuse is especially harmful to the elderly. They are at risk of losing their life savings, and also their autonomy.

As an alternative, the population should be educated prior to age sixty-five about the Do-Not-Call Registry and the dangers the elderly face from telemarketers. If such education were to take place, people not already registered would be able to decide whether they want to be placed on the Do-Not-Call Registry at age sixty-five. People would be informed in advance that there are financial dangers they could face as elderly persons and the possibility that they could suffer from dementia and the greater danger that poses. People would then be able to plan for these possibilities choosing to be placed on the Do-Not-Call Registry at age sixty-five. This approach would maintain the opt-in aspect while allowing people to plan on how to best protect themselves from financial abuse.

Mainstream case).

[212] This would replace the charity-specific lists once a person reaches age sixty-five for those who choose to opt-in.