Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE DMA NONPROFIT FEDERATION

TELEMARKETING RULEMAKING—COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

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I. Background/Introduction

A. The DMA Nonprofit Federation

With more than 500 members, the DMA Nonprofit Federation ("the Federation") represents both the largest segment of members in the Direct Marketing Association ("The DMA") and the largest organization representing nonprofit entities that use mail, telephone, e-mail, and the Internet to communicate with donors, members, and the public at large. The Federation includes most nationally renowned charities, such as the American Heart Association, American Cancer Society, Red Cross, Salvation Army, American Diabetes Association, Cystic Fibrosis Foundation, Chesapeake Bay Foundation, Humane Society International, Volunteers of America, World Wildlife Fund, and UNICEF. The membership of the Federation also includes more than two dozen fundraising consultants and agencies, most of which recommend telephone fundraising strategies for their clients. The total client list of these organizations is in the thousands. Operating as an unincorporated subsidiary of The DMA, the Federation's programs include professional education, advocacy at the state and federal levels, and communication about the numerous issues facing nonprofit organizations in the 21st Century.

B. Charitable Solicitation Through Telemarketing Is Integral to Charities' Missions

Application of the Federal Trade Commission's proposed amendments to the Telemarketing Sales Rule (the "Rule")[1] to charities—most notably the do-not-call list—undoubtedly would have a significant impact on the ability of legitimate charities to raise needed funds by telephone solicitation. The vast majority of contributions raised by charities are collected from individuals, through solicitation. See Dr. Michael A. Turner and Lawrence G. Buc, The Impact of Data Restrictions on Fundraising for Charitable & Nonprofit Institutions (January 23, 2002) at 7, attached hereto as Exhibit A ("Turner and Buc"). Approximately one

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[1] Telemarketing Sales Rule; Proposed Rule, 67 FED. REG. 4492 (proposed January 30, 2002) (to be codified at 16 C.F.R. pt. 310) ("NPRM" or "proposed Rule").

quarter of all charitable contributions raised in 2001 came from telephone solicitation. Id. at 8. Approximately 60 to 70 percent of that solicitation is conducted by professional fundraisers on behalf of charities. Jeff Jones, *Do Not Call: Proposed FTC Rules Could Hurt*, Nonprofit Times (March 2002). According to one study, an opt-in form of data restriction would increase costs to charities by $5.9 billion. Turner and Buc at 4.

C. Requested Action/Summary of Argument

Section 1011 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the "USA PATRIOT Act")[2] amended the Telemarketing Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act")[3] by limiting the applicability of the Rule to charitable contributions *only* to disclosures. Specifically, Congress directed to Commission to require that charities using professional fundraisers and for-profit firms soliciting charitable contributions disclose their organization and the purpose of the call and other disclosures specified by the Commission. The legislative history to the USA PATRIOT Act illustrates that Congress was concerned about preventing fraud by illegitimate charities. Neither the text nor legislative history makes mention of a do-not-call list or the other requirements of the proposed Rule, such as time of day restrictions, or otherwise gives any indication that Congress intended to subject charities or their agents to the entire Rule. In addition, the do-not-call list is not sufficiently narrowly tailored to withstand the exacting constitutional scrutiny with which the Supreme Court has analyzed restrictions on the ability of charities to solicit contributions through professional fundraisers. Further, the do-not-call list and the other aspects of the proposed Rule that the Commission proposes to apply to charities using professional fundraisers would have a negative effect on charities' ability to solicit funds to carry out their philanthropic activities and would impose undue burdens on charities.

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[2] Crimes Against Charitable Americans Act of 2001, Pub. L. No. 107-56 (Oct. 25, 2001), 115 Stat. 272, 396 (2001).

[3] 15 U.S.C. §§ 6101 et seq.

II. In the USA PATRIOT Act, Congress Gave the Commission Authority to Require Disclosures by Certain Charities But Did Not Apply the Other Aspects of the Rule.

Congress intended that charities using professional fundraisers or other for-profit organizations soliciting charitable contributions make certain disclosures to potential donors and sought to combat fraud by bogus charities. To accomplish this goal, Congress made the following three amendments to the Telemarketing Act in the USA PATRIOT Act: (a) included fraudulent charitable solicitations within the deceptive telemarketing acts or practices subject to the Commission's rules; (b) required that the Commission's rules over abusive telemarketing practices include a rule mandating disclosure of the purpose of a charitable solicitation call; and (c) included within the definition of "telemarketing" a "plan, program or campaign" to induce a charitable contribution. 15 U.S.C. §§ 6101, et seq., as amended by Pub. L. No. 107-56. The USA PATRIOT Act left unchanged the provision of the Telemarketing Act limiting the Commission's authority to activities within the jurisdiction of the Federal Trade Commission Act. 15 U.S.C. §§ 41 et seq. (the "FTC Act"). As the Commission correctly interpreted, the FTC Act does not reach nonprofit organizations, 67 FED. REG. 4516 n.234, and thus the USA PATRIOT Act amendments to the Telemarketing Act do not apply to nonprofit entities whose solicitation campaigns are conducted directly by their own employees or volunteers.

The logical reading of the text of Section 1011 of the USA PATRIOT Act is that all charities using professional fundraisers (or other for-profit firms to solicit charitable contributions) must disclose that the purpose of the call is to solicit charitable contributions and make other disclosures as the Commission deems necessary. One need only read the statutory text to conclude that other parts of the Rule, including efforts the Commission asserts are within its jurisdiction to regulate deceptive and abusive practices pursuant to the Rule (such as the proposed do-not-call list) do not apply. Had Congress intended to apply to charities *all* the strictures of the Rule, it would simply have stated in the USA PATRIOT Act that the Commission's rules promulgated pursuant to the Telemarketing Act apply to all organizations soliciting contributions, donations, gifts of money or any other thing of value. Subsection

(b)(2)(D) of Section 1011 of the USA PATRIOT Act (requiring disclosures) would be superfluous[4] because the existing Rule *already* mandates a host of disclosures, including identity of the organization and purpose of the call.[5] The Federation therefore takes issue with the Commission's assertion that "nothing in the text or legislative history of the [USA PATRIOT] Act indicates an intention to exclude telemarketers soliciting charitable contributions from Rule provisions that . . . are designed to protect consumers' privacy rights." 67 FED. REG. 4516. One need do no more than read the USA PATRIOT Act's amendments to the Telemarketing Act according to basic principles of statutory interpretation to disagree with the Commission's interpretation of the scope of the Rule's applicability. Id.

Indeed, the existing Rule supports the reading that Congress meant only to apply disclosures—and not the other aspects of the Rule—to professional fundraisers for charities and to for-profit entities soliciting charitable contributions for their own philanthropic purposes. Section 310.4(d) specifically states that it shall be an abusive telemarketing practice to fail to disclose, *inter alia*, the identity of the caller and that the purpose of the call is to sell goods and services. See also Section 310.3 of the Rule (making it a deceptive telemarketing act to fail to make certain disclosures). Thus, subsection (b)(2)(D) of Section 1011 of the USA PATRIOT Act acts as an express *limitation* on the scope of the Commission's authority over charitable solicitation. In other words, the USA PATRIOT Act brings certain charities soliciting contributions within the Rule for purposes of disclosures, but not for the other components of the Rule.

The interpretation that Congress intended only to apply disclosures to charities using professional fundraisers or for-profit firms soliciting contributions is borne out by the legislative intent of Section 1011 of the USA PATRIOT Act, which was intended to address fraudulent organizations seeking to profit illegitimately from the outpouring of support for the nation's charities after September 11. It was *not* intended to curtail charitable solicitations on behalf of

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[4] Section 310.4(d) of the Telemarketing Sales Rule.

[5] See Singer, STATUTORY CONSTRUCTION (6th Ed. 2000), at §53:01.

legitimate, nonprofit charities or establish extensive procedures to protect consumers from receiving any solicitations from legitimate charities. In a floor statement, Senator Mitch McConnell, who introduced the legislation that became Section 1011 of the USA PATRIOT Act, explained that the legislation's purpose was to prevent "bogus victim funds, phony firefighter funds and questionable charitable organizations." 147 CONG. REC. S10059, S10065 (daily ed., Oct. 2, 2001). Senator McConnell recounted that charitable Americans' largesse had proved to be an "irresistible target to criminals who prey upon the generous and good-hearted nature of Americans," and that "false charities" had sprung up after September 11. Id. Senator McConnell's bill "direct[ed] the [Commission] . . . to include charitable solicitations within its definition of telemarketing and to promulgate rules designed to end such fraudulent practices." Id. Among the pernicious effects of fraudulent charitable solicitation of concern to Congress was the effect on "trust of the American people in legitimate charitable organizations." Senator McConnell saw his bill as a way to "preserve the integrity of our charities and their ability to help others." Nowhere in the text or legislative history of the USA PATRIOT Act (or the Telemarketing Act, for that matter) is there any reference to a do-not-call list. Nor had the Commission proposed a national do-not-call list at the time the USA PATRIOT Act was passed, permitting no implication that Congress was aware of the Commission's proposal and tacitly endorsed it by passing Section 1011 of the USA PATRIOT Act. Rather, the legislative history suggests that Congress envisioned measures to counter fraudulent "charities," but did not anticipate that the Commission would subject the entire range of Rule obligations to legitimate charities or their agents.

If the Commission were to adopt its contrary statutory interpretation that Congress intended to subject all nonprofits using professional fundraisers to the panoply of requirements in the Rule, it may not selectively apply such requirements where it thinks the burdens of such regulations are excessive. Specifically, the Commission has no authority to single out agents of religious organizations for exemption from its reading of the statute's reach, as it proposes to do. The Commission explains that, "as a matter of policy," and based on a risk to the "societal value" of religious discourse, it will not apply the Rule's requirements to professional fundraisers for tax-exempt religious organizations. 67 FED. REG. 4499. However, there is no language in

the statute that allows the Commission to make this distinction for agents of religious organizations. Further, the Commission offers no evidence as to why fundraising on behalf of religious organizations is any less likely to be fraudulent than that conducted by firms soliciting money for other nonprofit charities. Indeed, as explained elsewhere in these comments, the Federation believes that the tax-exempt status of *all* nonprofit charities is a sufficient mechanism to address Congress' concerns in the USA PATRIOT Act that consumers might be defrauded by "bogus" charities. The Commission appears to accept, at least implicitly, this position that tax exemption provides sufficient protection to deter fraud, but only insofar as it pertains to religious organizations. This selective exemption is neither permitted by the statute, supported by cited empirical evidence, nor permitted by the U.S. Constitution.[6]

III. The Do-Not-Call List Violates the First Amendment Rights of Charities.

In the NPRM, the Commission initially adheres to the letter and intent of the USA PATRIOT Act by recognizing that nonprofits that solicit contributions themselves (and not through professional fundraisers) are outside the scope of its proposed amendments to the Rule. The Commission notes in the NPRM that the USA PATRIOT Act amendments retain the exclusion from coverage of nonprofit organizations. 67 FED. REG. 4516 n.234. Nevertheless, apart from the statutory limitation to disclosures of the Rule's applicability to charities, discussed supra, the Commission may not apply the Rule's restrictions[7] to the for-profit agents of such charities without violating the First Amendment to the U.S. Constitution. These constitutional deficiencies are most evident in the context of the national do-not-call list.

As an initial matter, Section 1011 of the USA PATRIOT Act is constitutionally suspect because it compels speech by mandating that agents of charities make certain disclosures. As the U.S. Supreme Court explained, "the First Amendment guarantees 'freedom of speech,' a term

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[6] See pages 13-14, infra.

[7] For purposes of brevity, the Federation focuses its comments on the do-not-call list, and hereby incorporates by reference the objections to the other requirements of the Rule that are discussed in the comments of The DMA in this proceeding.

necessarily comprising the decision of both what to say and what *not* to say." Riley v. National Federation of the Blind, 487 U.S. 781, 796-797 (1988) (emphasis in original), discussing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In Riley, as discussed more fully below, the U.S. Supreme Court applied its test "for fully protected expression" in invalidating a state law requiring professional fundraisers (on behalf of charities) to make certain disclosures. 487 U.S. at 796. Therefore, even before assessing the Commission's sweeping proposals promulgated pursuant to the USA PATRIOT Act, we note that the text of Section 1011 of the USA PATRIOT Act itself raises substantial questions about its constitutionality.

The proposed do-not-call list, of course, goes *much* further than disclosures. The Commission's proposed do-not-call list is not sufficiently narrowly tailored to withstand the exacting scrutiny with which the Supreme Court has analyzed restrictions on the protected speech of charitable organizations conducted on their behalf by for-profit firms. The do-not-call list unnecessarily sweeps in a large amount of protected activity, rendering the proposed registry constitutionally overbroad. Further, the do-not-call list is a prior restraint on speech, which is presumptively unconstitutional. Yet in spite of the constitutional infirmity of its proposal, the Commission makes no attempt to demonstrate how the do-not-call list could survive the most demanding level of scrutiny under which it would be analyzed.

The effect of the national do-not-call list would be to prevent all solicitations—fraudulent or not—conducted by charities that contract with professional fundraisers, to individuals in a national registry (unless the customer opted in to receiving solicitations on behalf of a certain charity), while nonprofits that use their own employees or volunteers would face no such restrictions on their solicitations. First, we note the policy anomaly of such a position, in light of the congressional intent of the USA PATRIOT Act discussed above; the determination of whether a call on behalf of a nonprofit organization is permitted would depend not on whether a particular telephone solicitation is likely to be fraudulent or intrusive of privacy (and therefore impinge on the purported government interests) but merely on the wholly unrelated question of whether the charity employs professional fundraising or conducts such solicitation in-house. In any event, the proposal is unconstitutional as applied to professional fundraisers for charities.

The Commission concedes that its regime raises First Amendment questions,[8] but concludes that a national do-not-call list affecting those firms soliciting on behalf of charitable organizations is a sufficiently narrowly tailored mechanism under Supreme Court precedent to serve the government interests of preventing fraud and protecting privacy. 67 FED. REG. 497 n.51. This assertion is both unsupported and untenable.

A trio of Supreme Court cases involved state restrictions on for-profit organizations that solicit contributions on behalf of charities, and sets forth the analysis by which restrictions on such solicitations will be evaluated. With respect to the level of First Amendment protection due, the Court rejected arguments that charitable solicitation is due the protections accorded to commercial speech, holding that the commercial elements of such a solicitation are "inextricably intertwined with otherwise fully protected speech." Riley, 487 U.S. at 796; Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease."); Secretary of State of Maryland v. Munson, 467 U.S. 947, 959 n.8 (1984). The Court has found it irrelevant whether the right asserted is the right of the professional fundraiser or the underlying charity. Riley, 487 U.S. at 794 ("whether one views this as a restriction of the charities' ability to speak, or a restriction of the professional fundraisers' ability to speak, the restriction is undoubtedly one on speech") (internal citations omitted); see also Munson, 467 U.S. at 956 n.6. Accordingly, the Court has deemed restrictions on charitable solicitations by for-profit entities to constitute "content-based

[8] We note that even in proposing a national do-not-call list, for which no authority exists in the statute or legislative history, the Commission has violated a fundamental canon of statutory interpretation that agencies should avoid statutory interpretation in a way that raises constitutional questions. See Singer, STATUTORY CONSTRUCTION (6th Ed. 2000), at § 56.04.

regulation" subject to "exacting First Amendment scrutiny." Riley, 487 U.S. at 798.[9] Under the Court's strict scrutiny analysis, a government regulation on protected speech is permissible only if the government "chooses the least restrictive means to further the articulated interest." See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

Applying its requirement of narrow tailoring for restrictions on "fully protected expression," Riley, 487 U.S. at 796, the Court in Riley, Munson and Schaumburg struck down laws limiting the fees that may be charged by professional fundraisers on behalf of their nonprofit clients.[10] While acknowledging the constitutional shadow cast by its proposal in light of Riley, 67 FED. REG. at 4497 n.51, the Commission offers legal conclusion, but no argument, as to how the national do-not-call list could be considered sufficiently narrowly tailored to withstand strict scrutiny. This is certainly puzzling in light of a factual comparison of the do-not-call list with the statutes struck down in the three Supreme Court cases, which prohibited (either outright or by adding a presumption of illegality) *categories* of professional fundraisers

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[9] Indeed, the Commission acknowledges as much. 67 FED REG. 4524 n.286 (citing the "strong First Amendment protection of charitable fundraising" under Riley). However, to the extent that the Commission's citation of Watchtower Bible and Tract Society of New York, Inc. v, Village of Stratton, Ohio, 240 F.3d 553 (6th Cir. 2001), stands for the proposition that some lesser level of scrutiny applies to restrictions on telemarketing campaigns by professional fundraisers on behalf of charities, it is erroneous. In Watchtower, the Sixth Circuit applied *intermediate* scrutiny to an ordinance that prevented door-to-door solicitation of homes that had filed a "No Solicitation" form after determining that the Supreme Court had not clarified what level of scrutiny to apply to the type of ordinance at issue. 240 F.3d at 560. However, no such doubt exists as to the level of constitutional scrutiny the Court applies to laws restricting professional fundraising activities on behalf of charities; Riley, Munson and Schaumburg plainly demonstrate that such laws will be evaluated under strict scrutiny. The Commission's citation to Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), 67 FED. REG. 4497, n.51, equally merits clarification. Telco held that informing the public and preventing fraud constituted substantial state interests, 885 F.2d at 1231, but the "brief, bland and non-pejorative" disclosure requirements upheld in Telco as narrowly tailored are quite different in scope from the national do-not-call list proposed by the Commission, which prevents any solicitation to those on the list who have not specifically opted in to receiving solicitation. At best, these lower court cases confirm that prevention of fraud and protection of privacy may, under certain conditions, constitute substantial state interests. They do not provide any support for the glaring omission from the NPRM as to how a national do-not-call list that, by definition, sweeps in non-fraudulent, non-abusive solicitations could meet the Supreme Court's most demanding tailoring requirement.

[10] Riley invalidated a state law establishing *prima facie* "reasonableness" fee for contributions according to a three-tiered schedule. Munson struck down a state law prohibiting contracts allowing fundraisers more than 25% of money collected after expenses. Schaumburg struck down an ordinance which prohibited door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes."

(those who retained more than a certain percentage of monies collected).[11] The proposed do-not-call list, of course, would prohibit *all* professional fundraisers working on behalf of charities from soliciting financial support from *any* individual on the do-not-call list (unless the individual opted in to the specific charity's solicitations). It necessarily follows that the do-not-call list is inherently *more restrictive* (and thus more constitutionally suspect) than the statutes struck down by the Court in Riley, Munson and Schaumberg.[12]

In fact, a do-not-call list was not sustained even under the *intermediate* scrutiny applicable to commercial speech in Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998). Pearson involved the constitutionality of a state law prohibition on certain solicitations by real estate agents (but which did not reach other forms of solicitations). The Seventh Circuit found that the challenged law did not meet the "reasonable fit" required by the Supreme Court for restrictions on commercial speech[13] because there was no evidence that the real estate solicitations were any more intrusive than other solicitations, and thus the ban failed to directly or materially advance the state's interests in protecting residential privacy. 153 F.3d at 405. As the Commission's do-not-call list leaves significant parts of the charitable sector (*i.e.*, those who do not use professional fundraisers) out of its reach, and there is no cited evidence that calls by professional fundraisers for charities are any more intrusive on privacy or any more likely to be fraudulent than calls by employees of nonprofits, the net effect of the Commission's proposal is the same as the law struck down in Pearson. The Commission can make no showing that a national do-not-call list for charities using professional fundraisers directly and materially advances its stated interests. Therefore, it is highly unlikely that it could be sustained against constitutional attack even applying the lower protections for commercial speech.

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[11] We also note the Commission's failure to address the identical effect of the national do-not-call list, as "impermissibly insensitive to the realities faced by small or unpopular charities" that must employ professional fundraisers, as the statutes struck down in Riley and Munson. See Riley, 487 U.S. at 793; Munson, 467 U.S. at 967.

[12] The existence of The DMA's Telephone Preference Service, which is a national do-not-call list, only underscores the Commission's failure to arrive at, or even consider, the least restrictive means to achieve its interests. For a description of the TPS, see Comments of The DMA in this proceeding.

[13] Central Hudson Gas & Elec. Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

Further, because the do-not-call list would include *all* charities using professional fundraisers—whether fraudulent or legitimate, and whether soliciting the same individual once a decade or once a week—within its parameters, it extends well beyond the deceptive and abusive practices that Congress included in the Commission's jurisdiction, to include non-fraudulent solicitations conducted so infrequently as to pose no reasonable threat to privacy. As such, the do-not-call list would not survive an overbreadth challenge to its constitutionality; although it reaches (unprotected) fraudulent or abusive solicitations made to consumers on behalf of charities, it curtails a substantial amount of speech by charities that does not fall into these categories.[14]

The Court has made clear that efficiency of a do-not-call list is an insufficient rationale to justify its use (and thereby save it from unconstitutional overbreadth); the Court's holding in Riley applies equally to the do-not-call list as to the presumptions of unreasonableness attached to certain professional fundraisers at issue in the case: "[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." Riley, 487 U.S. at 795. Although it unquestionably would face the burden of demonstrating how such a do-not-call list would meet the demanding test for narrow tailoring under strict scrutiny,[15] the Commission offers no explanation in the NPRM as to why it believes a national do-not-call list represents the "least restrictive means" to further the government interests in preventing fraud and protecting privacy.

The absence of analysis in the NPRM on the narrow tailoring requirement for restrictions on charitable solicitation is made all the more conspicuous by the Commission's proposed exclusion from the definition of "charitable contribution" any contributions to "religious

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[14] See Munson, at 967-968 ("Where . . . a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise . . . the statute is properly subject to facial attack.")

[15] Telco Communications v. Carbaugh, 885 F.2d 1225, 1230 (4th Cir. 1989) (citing Munson, 467 U.S. at 960-961, and Schaumberg, 444 U.S. at 637).

organizations or groups affiliated with and forming an integral part of the organization where no part of the net income inures to the direct benefit of any individual, and which has received a declaration of current tax exempt status." 67 FED. REG. 4499. The Commission's stated rationale is policy oriented,[16] but the special constitutional protections surrounding religious[17] association and speech surely are not lost on the Commission. Indeed, the Commission engages in a kind of tailoring analysis in deciding to exclude contributions to religious organizations, concluding that the risk of infringement of "free and unfettered religious discourse" outweighs the benefits of fraud prevention.[18] 67 FED REG. 4499. Setting aside the anomalies of such a position,[19] the discussion in the NPRM of the infringement of religious speech only highlights the absence of such analysis on the broader infringement on charitable speech, which the Supreme Court has indicated in no uncertain terms merits the same high levels of constitutional protection as religious speech.

Further, the restriction is a prior restraint because it "attempts to suppress speech prior to publication." Tribe, AMERICAN CONSTITUTIONAL LAW, § 12-34, 1040 (2nd Ed. 1988). Prior restraints "bear[] a heavy presumption against [their] constitutional validity," Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963)[20]—a burden that the Commission makes no attempt to address in the NPRM.

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[16] The Commission states that the risk of infringement on "unfettered free religious discourse" merits exclusion of contributions to political or religious organizations. 67 FED. REG. 4499.

[17] See, generally, Tribe, AMERICAN CONSTITUTIONAL LAW, Chapter 14 (2nd Ed. 1988).

[18] As noted, the Commission has no authority to exclude solicitations made on behalf of these religious organizations. See Section II, supra.

[19] Exclusion of solicitations on behalf of religious organizations means, for example, that while Catholic Charities could conduct a wide-ranging telephone solicitation campaign for contributions to clothe the homeless, a secular organization (using professional fundraisers) whose mission is to clothe the homeless could not call anyone on the do-not-call list.

[20] See also Near v. Minnesota, 283 U.S. 697, 716 (1931).

IV. Any Do-Not-Call List Affecting Charitable Contributions Should Be Limited to For-Profit Firms Soliciting Charitable Contributions For Their Own Causes.

Assuming *arguendo* that certain charities are subject to more than just the disclosures in the Rule, the Commission should limit the scope of any do-not-call list ultimately adopted to for-profit firms that solicit contributions for their own causes, because these efforts pose the risk of fraud that Congress intended to prevent.[21] As discussed above, the USA PATRIOT Act was intended to address fraudulent organizations seeking to profit illegitimately from the outpouring of support for the nation's charities after September 11. It was *not* intended to curtail charitable solicitations on behalf of legitimate, nonprofit charities or establish any procedures to protect consumers from receiving any solicitations from legitimate charities. See Floor Statement of Senator McConnell, 147 CONG. REC. S10065.

In the event the Commission disregards the statutory interpretation limiting the Rule's application to charities to disclosures, it should at least limit the Rule's broad application to for-profit firms soliciting charitable donations for their own legitimate philanthropic activities. This category of solicitations—and not solicitations on behalf of or by legitimate charities with nonprofit status—are the ones that present the risk of fraud that Congress sought to address by amending the Telemarketing Act. Nonprofit charitable organizations are already subject to myriad regulatory oversight and disclosure requirements (i.e., IRS regulations on tax-exempt status and extensive existing state regulations, including registration requirements and state anti-fraud laws) to ensure their legitimacy. Indeed, the Commission appears to recognize the utility of relying on such measures in its proposal to exempt religious organizations "which have received a declaration of tax exempt status" from the do-not-call list. 67 FED. REG. 4499. To the extent any do-not-call list is adopted, and to the extent it includes charitable solicitations, the Commission should focus on those "charities" soliciting contributions that are not subject to

[21] The effect of the Commission's proposal would be to create an unresolvable conundrum. It would become illegal (as well as anomalous) to telephone prior donors whose names are on a do-not-call list to request permission to request new donations by telephone. It would be impossibly expensive as well as fruitless to request such permission by mail.

existing checks on their legitimacy and not include within the definition of "charities" for-profit firms that solicit on behalf of nonprofits with current tax-exempt status.

V. Excluding Charities from the B-to-B Exemption Is Bad Policy.

Another troublesome effect of the Commission's proposed application of the Rule to charities is the effect on charitable business-to business solicitation. In the NPRM, the Commission proposes to make the exemption from the Rule's scope for business-to-business telemarketing (the "B-to-B exemption") unavailable for B-to-B charitable solicitations, citing its enforcement experience and the "plain language and legislative history" of the USA PATRIOT Act. 67 FED. REG. 4532. By citing its enforcement authority, the Commission recognizes that it already has separate statutory authority under which to pursue the large majority of offensive conduct in this area. Indeed, the cases cited in the NPRM were brought under sections of the FTC Act, not the Telemarketing Act. See 67 FED. REG. 4510 n.168.

With respect to the USA PATRIOT Act, the Commission offers no explanation as to why the "plain language" or legislative history supports excluding charities from the B-to-B exemption. In 1995, the Commission rejected proposals from consumer groups to exclude other kinds of organizations from the exemption. 60 FED. REG. 43861 (1995). There is nothing in either the text or legislative history alerting the Commission that B-to-B charitable solicitation presented a *particular* risk of fraud so as to cause the Commission to add charitable solicitations to the list of activities excluded from the exemption. Indeed, the legislative history supports the hypothesis that the primary legislative goal in amending the Telemarketing Act was to curb fraudulent solicitation of *individuals* by illegitimate charities. See Floor Statement of Senator McConnell, explaining that the bill's purpose is to prevent fraudulent solicitations of "well-meaning Americans." 147 CONG. REC. S10065.[22] Further, even if B-to-B charitable solicitations are not exempted from the Rule, it would be incongruous *also* to apply the recordkeeping

[22] Indeed, the most concrete example in the legislative history is solicitation of seniors. See Floor Statement of Senator McConnell.

requirements of Section 310.5 of the Rule to B-to-B charitable solicitation, as these requirements do not apply to sellers of nondurable office or cleaning supplies under the current rule. See Section 310.5(g) of the Rule. No rationale is proposed for imposing burdensome recordkeeping requirements on B-to-B charitable solicitors when other industries that the Commission believes pose particular risks of fraud are not subject to such recordkeeping.

VI. General Adverse Effect on Charities

More generally, and more importantly, the application of the Rule's many requirements to charitable solicitations through professional fundraisers and to charitable appeals by for-profit firms for their own causes would fundamentally and negatively alter the ability to raise funds to realize their philanthropic goals. Compliance costs and risks of running afoul of the Rule's many requirements would severely hinder charities' abilities to carry out telephone solicitation campaigns on which their very existences and their missions depend.

Further, the Commission's proposal would impose burdensome and lengthy (two-year) recordkeeping responsibilities on charities, decreasing funds available for beneficial purposes. 67 FED. REG. 4527-4528. It would be smaller charities, which are more likely to have to rely on professional fundraisers and thus would be in the scope of the Rule, that would be most adversely affected by the recordkeeping requirements.

In addition, unlike commercial organizations, which may increase prices charged for goods and services to cover cost increases, charities do not have that option. It is not possible to ask donors to increase their contributions by some percentage to cover the increased costs of regulation, of salaries, of printing, postage, etc. Increased costs inevitably reduce the funds available for the charities' mission-related programs.

Similarly, the requirement that nonprofit organizations scrub their lists regularly against the Commission's proposed do-not-call list would impose burdens on those organizations most adversely affected by such onerous and costly processes. Irrespective of the significant legislative and constitutional impediments discussed above, the negative real world effects on

charities and their missions represent a compelling rationale to reject the broad application of the Rule to charitable activities.

VII. Conclusion

WHEREFORE, for the reasons discussed above, the Federation respectfully requests that the Commission impose only the limited disclosure requirements on charitable solicitation by for-profit firms and not apply the Rule broadly to solicitations on behalf of charities.

THE DMA NONPROFIT FEDERATION

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EXHIBIT A

Dr. Michael A. Turner and Lawrence G. Buc

The Impact of Data Restrictions on Fundraising for Charitable & Nonprofit Institutions

(January 23, 2002)