BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

In the Matter of:
Telemarketing Review - Comment FTC File No. R411001

COMMENTS AND RECOMMENDATIONS
NATIONAL ASSOCIATION OF STATE CHARITY OFFICIALS

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Telemarketing Sales Rule - Charitable Solicitations

The following comments to the proposed Telemarketing Sales Rule are submitted by the National Association of State Charity Officials (NASCO). NASCO consists of representatives from most of the 38 states that have statutes regulating charitable entities and\or the solicitation of contributions. NASCO members include representatives of Attorneys General, Secretaries of State and other State officials charged with the oversight of charities and those who raise funds on their behalf. The National Association of Attorneys General is a sister organization and partner with NASCO in its effort to provide support to state offices charged with oversight of charitable organizations in the United States. Although NASCO does not represent any particular state, it represents the collective interests of state charity regulators.

In light of the events of September 11, 2001, oversight of charities has taken on new significance. Since September 11, Americans have made unprecedented contributions to charity. They have also made clear that they expect and demand that their contributions be used to benefit the people and the programs served by the charities. The public's concern is based not only on the tragedy and the publicity it received, but on the growing body of information available and the public's increased interest in receiving such information.

Supreme Court decisions have limited the states' ability to limit fundraising costs and\or compel disclosure of such costs. In response to those decisions, some states have published reports that document the amount that charities receive from telemarketing campaigns conducted by fundraising professionals. California's Attorney General reported that of $193.3 million raised in such campaigns in 1999, only $93.1, or 48.2 percent, was received by charity. A similar report issued by the Attorney General in New York reported that charities retained an average of 31.5 % of the funds raised in 2000 by telemarketers registered to solicit contributions in New York. Some of the charities received much less than that and some received nothing at all. The response to those reports has been an increasing demand for information by members of the public who are often unaware that a fundraising professional is involved in solicitation of their contributions.

Based on the experiences of NASCO members, we urge that any Telemarketing Sales Rule adopted address the concerns described below.

A. Introduction

Legal oversight of charitable solicitations is well established as a function of the States. As early as 1954, New York enacted a comprehensive law to regulate charitable solicitations. Thirty-six states now have laws governing charitable solicitation by the many various forms these solicitations take—mail, telephone, print, electronic media and door-to-door. Twenty states require registration with their Attorney General; sixteen states require registration with another governmental agency such as the

Secretary of State. NASCO welcomes the Commission's proposed inclusion of charitable solicitations in the proposed amendment to the Telemarketing Sales Rule. The following comments are based the extensive experience of NASCO members in regulating charitable solicitations and the recent collaborations between the states and the Federal Trade Commission.

A review of recent federal/state cooperation highlights the importance of the partnership between NASCO and the Commission in combating deceptive charitable solicitations. In April 1997, NASCO members joined with the FTC in "Operation False Alarm." This joint law enforcement and public education campaign targeted the deceptive fundraising activities of certain for-profit fundraisers who misrepresented ties with police departments, firefighters and other public safety organizations. Together, federal and state officials initiated 57 law enforcement or regulatory actions against companies engaged in deceptive fund-raising practices. Another federal/state campaign, "Operation Missed Giving," took place in November 1998, was directed at deceptive fundraising activities alleged to be on behalf of police departments, firefighters, veterans groups, children's health organizations and other community organizations. Together, federal and state officials initiated 39 law enforcement or regulatory actions in that campaign.

As reflected in §310.7(b), the clear intent of the proposed amendments to the Rule is not to preempt the States from enforcing their own state charitable solicitations laws. Effective Rule provisions on deceptive fundraising will complement ongoing state law enforcement efforts. In this regard, NASCO offers the following recommendations on how to strengthen the Rule to further appropriate legislative, law enforcement and public policy goals.

B. Scope of Regulations

The Commission has proposed to expand the scope of the Rule to include telemarketing calls involving charitable solicitations, based on §1011(b)(1) of the USA PATRIOT Act, Pub. L. 107-56 (Oct. 25, 2001). However, the Commission has also taken the position that only *for-profit* entities that solicit charitable contributions will be subject to the Rule, and that the Telemarketing Sales Rule will not apply to charitable organizations themselves. The basis for this distinction, according to the Commission, is the text and legislative history of the USA PATRIOT Act, which is said not to affect the preexisting limitation on the FTC's jurisdiction to for-profit entities and their members.[1]

However, NASCO members believe that neither the text nor the legislative history of the USA PATRIOT Act supports this nonprofit/for-profit dichotomy. The Act itself is devoid of any language suggesting such a distinction. This is true, first, with respect to the Act's amendment to the definition of "telemarketing" in the Telemarketing Act, 15 U.S.C. § 6106(4), where the underscored language -- neutral as to the profit motive of the solicitor -- was inserted:

[1] *See* 15 U.S.C. §44.

> The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services or a charitable contribution, donation, or gift of money or any other thing of value . . .

Nor does any nonprofit/for-profit distinction appear in §1011(b)(1), which simply states that the Rule's definition of deceptive telemarketing acts or practices "shall include fraudulent charitable solicitations." Similarly, the nonprofit/for-profit dichotomy is absent from §1011(b)(2), which adds "a requirement that *any person* engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall [make certain disclosures on the call]." (Emphasis added.) Significantly, the word "person" is defined broadly by the Rule as including "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity," with no reference to for-profit or nonprofit status.

The intent of Congress to apply the Telemarketing Sales Rule to *all* telephonic charitable solicitations, regardless of the for-profit/nonprofit status of the solicitor, is also reflected in the draft legislation that became §1011, and in the real-world context in which this provision came into being. Section 1011 was originally part of S. 1484, "Crimes Against Charitable Americans Act of 2001," introduced by Senator McConnell of Kentucky in October 2001. In remarks on the floor of the Senate, Senator McConnell explained that the reason for the bill was the surge in fraudulent charitable solicitations in the wake of September 11:

> Almost daily we hear of American citizens receiving solicitations from phony charities. News reports from more than a dozen States, from New York to Florida to California, reveal that Americans are being asked to contribute to what turn out to be bogus victim funds, phony firefighter funds and questionable charitable organizations. The fraudulent solicitation of charitable contributions is a problem all across our Nation. [147 Cong. Rec. S10065 (Oct. 2, 2001)]

Undoubtedly, some of the fraud described by Senator McConnell was perpetrated by for-profit organizations or people associated with them. By the same token, some of these "questionable charitable organizations" were nonprofit groups whose fault was using contributions in a manner inconsistent with representations that they themselves had made to prospective donors. The best-known post-September 11 instance of this misdirection involved the American Red Cross. The Red Cross faced widespread criticism and an investigation by a state Attorney General for its proposal to keep tens of millions of dollars specifically donated for 9-11 relief in reserve for future disasters, rather than distribute the money to victims of the terrorist attack as originally announced to donors.[2]

Deception by a for-profit entity was not the issue in the Red Cross case; however, it was that controversy that symbolized the abuses that Senator McConnell's bill, and §1011, were designed to

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[2] *See, e.g.*, Susan Saulny, *Red Cross Announces Plans for Rest of Disaster Fund*, N.Y. TIMES, Feb. 1, 2002, <http://www.nytimes.com/2002/02/01/ nyregion/01CROS.html> (Feb. 8, 2002).

address. Thus, the available evidence suggests that §1011 was intended to apply to *all* fraudulent fund-raising calls, not just to those made by for-profit entities. It would be inconsistent with that intent for telemarketing by charities themselves to be excluded from the scope of the Rule, as the Commission has proposed.

Lastly, including charities among potentially liable parties under the Telemarketing Sales Rule is the right thing to do. It is consistent with the underlying purpose of the Rule, which is to "offer consumers necessary protection from telemarketing deception and abuse." 15 U.S.C. §6101(5). Most charities do not engage in deceptive conduct. However, some do. To deny relief to consumers under the Rule for acts by the one, but not the other, affords consumers incomplete protection from the full range of charities fraud to which the USA PATRIOT Act was directed.

C. Definition of "Charitable Contribution"

The proposed definition of "charitable contribution" in §310.2(f) is apparently -- and appropriately -- intended to be expansive, encompassing "*any* donation or gift of money or any other thing of value." (Emphasis added.) Because the only exceptions to the definition are contributions to political and religious organizations,[3] any donation to any other group should logically constitute a "charitable contribution."

However, it would be helpful for the Commission to clarify, in a comment, two aspects of this definition. The first would be to state that the word "charitable" does not limit the character of the recipient of the contribution. In many states, public safety organizations -- such as departments, unions and other associations of police, firefighters, sheriffs and similar personnel -- are considered "charitable" for regulatory purposes.[4] In addition, where a *for-profit* entity holds itself out as a charity, contributions solicited on behalf of the entity should fall within the Rule. In sum, the Commission should make it clear that public safety organizations are "charitable" within the meaning of the Rule, and, more generally, that the use of the term "charitable" is not meant to limit recipients of contributions to any particular subset of organizations.

The second requested clarification concerns "percent of purchase" situations, where contributions are sought in the form of the purchase of goods or services, where a portion of the price will, according to the solicitor, be dedicated to a charitable cause. These dual-purpose scenarios should clearly be covered by the Rule -- either as sales of goods or services, or as charitable contributions, or

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[3] *See* §310.2(f)(1) and (2).

[4] *See, e.g.,* N.Y. EXECUTIVE LAW §171-a(1) & (11) (McKinney 1993) ("charitable organization" includes any "organization, association, union or conference of . . . law enforcement officers, including, without limitation, peace officers and police officers . . ., sheriffs, deputy sheriffs, detectives, investigators or constables"); TENN. CODE ANN. §48-101-501(1) (1995) ("charitable organization" includes any group which is or holds itself out to be "for the benefit of law enforcement personnel, firefighters, or other persons who protect the public safety").

as both -- but this point should be expressly stated, so that such hybrid transactions do not fall between any regulatory cracks.

D. Definition of "Constituted Religious Organizations"

The proposed TSR exempts "Constituted Religious Organizations" from its coverage. However, the TSR contains no definition of "Constituted Religious Organizations". It is the experience of NASCO members that many organizations erroneously claim to be religious and, therefore, exempt from registration with the states. NASCO recommends that the TSR include a definition of "Constituted Religious Organizations" in order to clarify and limit the body of organizations exempt from the TSR.

E. Mandated Disclosures

Section 310.4(e) requires two oral disclosures in charitable solicitations: the identity of the charitable organization on whose behalf the request is being made, and the fact that the purpose of the call is to solicit a charitable contribution. NASCO also recommends that if the telemarketer is being *paid* to solicit, three additional disclosures be required: (1) the name of the caller; (2) the name of the telemarketing company; and (3) the fact that the caller is being paid to solicit.

Currently, at least 20 states have statutes requiring a professional telemarketer to disclose the fundraiser's identity and the fact that the telemarketer is being paid to solicit.[5] These disclosures help avoid deception in charitable fund-raising calls. Prospective donors need to know who is soliciting their contribution, to ensure that they are not misled as to the identity of the caller. A common problem that the states have seen involves paid fundraisers who misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling. Likewise, only if prospective donors are informed that the fundraiser is being paid to solicit are they likely to seek out -- by asking the caller or contacting a state agency -- key information on how much of their contribution will go to the fundraiser and how much to the charity.

In a number of states, fundraisers are also required to disclose where donors can obtain information about the respective percentages of the donor's contribution that will go to the fundraiser and to the charity, or to disclose such information to prospective donors on request.[6] The Commission should clarify in a comment that the disclosures required by the Rule represent the federal "floor" only, and that telemarketers are not relieved from legal obligations to provide additional disclosures that are

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[5] *See, e.g.*, N.Y. EXECUTIVE LAW §174-b(2-a) (McKinney 1993); MASS. GEN LAWS ANN. ch. 68, §23(a) (2001); CAL. BUS. & PROF. CODE §17510.85 (West 2002); TENN. CODE ANN. §48-101-513(j)(1) 1995).

[6] *See, e.g.*, VT. STAT. ANN. tit. 9, §2475(e) (2001); COLO. REV. STAT. §6-16-105.3(f) (2002); FLA. STAT. ANN. §496.412(d) (West 2002); TENN. CODE ANN. §48-101-513(n)(1995).

required by specific state laws and regulations. Such an approach is consistent with our federal system of law enforcement and with the cooperative working relationship between the FTC and NASCO members.

The proposed TSR permits a professional telemarketer that solicits charitable contributions to use the telephone number of its client charity as its "caller ID." NASCO members believe that the TSR should require telemarketers to use their companies' names, or, at the very least, their own phone number as their "caller ID." Such required disclosure would be more accurate, since it is not the charity that is making the call. Furthermore, such required disclosure would be consistent with the laws of the many states that require telemarketers to identify themselves when soliciting charitable contributions.

F. Misrepresentations

Section 310.3(d) lists categories of material information, misrepresentation of which is deemed to be fraudulent, deceptive and a violation of the Rule. The NASCO urges one modest but important addition to this section, and one clarifying comment.

First, NASCO proposes that a new subsection (8) be added, to read, "The address or location of the charitable organization, and where the organization conducts its activities." The purpose of this subsection is to ensure specifically that fundraisers do not misrepresent that the charities on whose behalf they are soliciting are "local," or that their activities are local. The local character of a charity or its programs is highly material to prospective donors, who can often be expected to prefer to support organizations that will benefit their own community. To take advantage of that sentiment, fundraisers will sometimes use a local commercial mail receiving agency or post office box as their return address, to make it seem as if the charity is based close to the donors -- a misrepresentation that is no less deceptive than others listed in §310.3(d).[7]

The Commission should also clarify that subsection (7) (prohibiting any misrepresentation of "[a] seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity"), covers misrepresentations of affiliations with a *charity*. Such misrepresentations are not uncommon, involving, for instance, telemarketers who falsely portray themselves as police officers soliciting for a police department, union or other public safety organization. Accordingly, it should be made clear that the reference to "any person" in subsection (7) encompasses "any charity."

G. Conclusion

[7] *See, e.g., State of Vermont v. Civic Development Group, L.L.C.*, No. 863-98CnC (Chittenden Super. Ct. Jan. 22, 2001) (Consent Decree and Stipulation) (prohibiting unqualified use of in-state street addresses by out-of-state charities); Vermont Consumer Fraud Rule 119.08(b) (prohibiting use of in-state address in any solicitation unless either charity maintains and staffs an office at that address, or there is a prominent disclosure of both charity's actual address and fact that local address is a mail drop); N.M. ADMIN. CODE tit.12, ch. 2, part 8 (proposed) (to similar effect).

NASCO views telemarketing fraud as a serious problem affecting numerous members of the public and the charitable organizations that they seek to support. We urge the Commission to adopt rules that will require callers on behalf of charities to identify themselves and the for-profit companies by which they are employed. In addition, unwanted telemarketing calls are a continuing intrusion into the privacy of those consumers who do not wish to receive such calls. We urge the Commission to view the public's desire for privacy in their homes as paramount as it pursues the establishment of a national No Call registry and works with our offices to ensure a legally sound and consumer-friendly database system.

We also encourage the Commission to proscribe the additional practices that it has identified as new hallmarks of fraudulent telemarketers and sellers. Assuring consumers of the protection of their own financial information in the hands of others, by restricting the sharing of billing information among sellers, is an extremely important measure. With fraudulent telemarketers still active domestically and internationally, vigilant enforcement continues to be as necessary as ever. Augmenting enforcement tools, proscribing the worst abuses, and safeguarding consumers' privacy, further our mutual consumer protection interests.