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FEDERAL TRADE COMMISSION
RULEMAKING WORKSHOP

SESSION 3
FRIDAY, JUNE 7, 2002
9:00 a.m. to 5:00 p.m.

MARRIOTT WARDMAN PARK HOTEL
WASHINGTON, D.C.

Reported by: Sally Jo Bowling

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1 PROCEEDINGS

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3 MS. HARRINGTON: Well, let's start. We're on
4 our third and final day. Many of you have asked if we
5 could please extend this through the weekend.

6 (Laughter.)

7 MS. HARRINGTON: But, you know, we have -- some
8 of us have other plans, you know, root canal, other
9 things that we need to deal with over the weekend.

10 I need to borrow an agenda from someone, I know
11 we're talking about express verifiable authorization
12 this morning. We're joined this morning by Carole
13 Reynolds, who is actually one of the most respected
14 authorities on Truth in Lending and consumer credit and
15 billing issues, and many others anywhere. So, it's a
16 colleague from our Division of Financial Practices, and
17 she'll be introducing herself in a moment, I'm sure, but
18 I just want to thank her for taking the time to come and
19 help us.

20 Since our team from the Division of Marketing
21 Practices is rapidly approaching kind of the pudding
22 head stage here after days of this. We have a new
23 stenographer, I see this morning, so she's going to have
24 to learn who we all are, and we're going to need to do a
25 good job of introducing ourselves, identifying ourselves

1 for the first part of the morning until she has a good
2 grip on our identities. So, why don't we begin by doing
3 that.

4 And I'll start today, we're going to talk about
5 express verifiable authorization and novel billing
6 payment, so let's do the introduce ourselves and give
7 one sentence, no more, about our -- about a principal
8 concern that we have with this issue.

9 I'm Eileen Harrington from the FTC's Division of
10 Marketing Practices, and I'm concerned that we get this
11 right.

12 MS. HARRINGTON-McBRIDE: I'm Katie
13 Harrington-McBride with the Division of Marketing
14 Practices.

15 MS. REYNOLDS: I'm Carole Reynolds with the
16 Division of Financial Practices.

17 MS. DANIELSON: Carole Danielson, Division of
18 Marketing Practices.

19 MR. ANDERSON: Keith Anderson with the
20 Commission's Bureau of Economics.

21 MR. GOODMAN: Michael Goodman with the FTC.

22 MR. PROCHNOW: Tyler Prochnow with the American
23 Teleservices Association. We're here today to make sure
24 that the FTC continues in the same direction as the rest
25 of the Federal Government in supporting new innovative

1 ways of payment and supporting their use in the consumer
2 marketplace.

3 MR. PRIDGEON: Stratis Pridgeon with the
4 American Resort Development Association. We're here
5 really kind of hoping to achieve a reasonable balance
6 between consumer and commercial issues, and I think
7 we're pretty good on the way there.

8 MR. MURRAY: I'm John Murray with the Newspaper
9 Association of America, and I'm here to -- because
10 newspapers are concerned that currently they have found
11 a new service that they're offering their subscribers
12 for payment of their newspaper bills and it's literally
13 a service, and it's also encouraged by organizations
14 such as the Federal Reserve to cut down on the number of
15 checks, and we see some conflicts in the direction we're
16 going with the concern over express verifiable
17 authorization and we want to make sure that we continue
18 to offer the services that our customers are
19 appreciating.

20 MS. GRANT: Good morning, Susan Grant from the
21 National Consumers League. We think there should be
22 express verifiable authorization for any payments for
23 which consumers will be billed, regardless of whether
24 those accounts -- those types of accounts are considered
25 novel or not.

1 MR. DUNCAN: I'm Mallory Duncan from National
2 Retail Federation. Our primary concern is to reduce
3 complexity and increase reliability and reduce costs for
4 both consumers and businesses.

5 MR. THOMAS: George Thomas from the Consumer
6 Choice Coalition. Our principal concern is with regard
7 to the proposed elimination of one of the only three
8 safe harbors for express verifiable consent.

9 MR. CERASALE: I'm Jerry Cerasale with The
10 Directing Marketing Association, and we want to --
11 our concern is that we keep payment options open
12 for the consumer to have choice so that we will not
13 have regulations that will in effect stop marketers
14 from accepting any type of payment onto their credit
15 card.

16 MS. PAGAR: Thank you. Char Pagar on behalf of
17 the Promotion Marketing Association. Our concern is
18 that the express verifiable authorization requirement
19 not be extended to novel payment methodologies that do
20 contain adequate dispute resolution methodologies that
21 are similar or comparable to those provided under TIL
22 and FCBA. We are also concerned that the written
23 confirmation method for express verifiable consent not
24 be eliminated.

25 MR. CONWAY: Art Conway, Dial America Marketing.

1 We have a concern about novel payment systems in that
2 our experience with those is that some of them do create
3 confusion on the consumers' part, and we think it's
4 important that the consumer understand these novel
5 payment systems and what they really -- the real
6 implications of these.

7 MR. KRAMER: Jeff Kramer with AARP, and we are
8 concerned I guess from the consumer point of view that
9 consumers understand that they are entering into a
10 transaction when they do so and as long as that's made
11 clear to them, I think we're okay. Thank you.

12 MR. BURG: Good morning, Elliot Burg from the
13 Vermont Attorney General's Office, I'm here on behalf of
14 the National Association of Attorneys General, and
15 assuming that the pre-acquired account information
16 regime that we discussed yesterday is in place, we
17 support the proposed revisions on EVA.

18 MS. SCHNEIDER: Anne Schneider on behalf of the
19 National Association of Attorneys General, and our
20 objective in supporting the Commission's proposal is to
21 ensure that consumers do receive meaningful disclosures
22 as to the nature of these transactions through these
23 novel and less familiar payment methods.

24 MS. COHEN: Rita Cohen, Magazine Publishers of
25 America. Our interest is in retaining the three options

1 that have been available for express verifiable
2 authorization, and also in the use of this technique as
3 a companion to the pre-acquired account information to
4 allow express verifiable authorization for transfers of
5 information.

6 MS. GOLDSTEIN: Linda Goldstein representing the
7 Electronic Retailing Association. Our concern is also
8 maintaining the current rule's 3 options for obtaining
9 express verifiable authorization, including the written
10 confirmation, and also ensuring that there not be an
11 additional burden imposed on consumers or businesses
12 when consumers choose to use debit cards rather than
13 credit cards.

14 MS. HARRINGTON: Okay, before we start our
15 discussion, Jerry wanted to say something.

16 MR. CERASALE: Thank you very much, Eileen.

17 I've been appointed -- asked to make this
18 statement by a group probably because I keep my head
19 cool so well at these things. We have -- you know, we
20 appreciate the opportunity to have the workshop. One of
21 the things that we would like to put on the record,
22 however, is that we know that you have to close the
23 book, time comes and you have to move on to another
24 issue, and we would like the record to reflect that I
25 think it applies to everyone, not just business, that

1 sometimes you move on to another subject, and people
2 have other things they would want to respond.

3 And so that you know that the fact that no
4 response was given was not because there wasn't one
5 ready, it's just that the time factor, and we're going
6 to -- we appreciate the fact that the record is open
7 until the 28th of June and we will send it by email, not
8 by paper. We will submit comments on that, and to
9 respond further to things that happened when the time
10 ended.

11 The second thing was in yesterday's discussions,
12 a lot of things depended upon definitions, and I know
13 that, you know, somebody asked for a definition and so
14 forth, but our comments when we're based on -- were
15 based on the definitions that we were saying. So, if
16 you change the definition, our comment response might be
17 very different about what is billing information, if
18 your determination of billing information is different
19 from what we were saying, and what being able to charge
20 the credit card independently immediately right there.

21 So, those are the two comments we would like to
22 put on the record, and thanks for giving me the time.

23 MS. HARRINGTON: Sure thing. Let me say that
24 the problem with time is always a problem. And some of
25 you have been concise, and others of you aren't, and one

1 of -- and we chew up a lot of time if people aren't
2 concise and if they feel like they need to make speeches
3 for the record rather than responding to issues that are
4 actually framed for discussion.

5 So, we will do a lot better if people can
6 monitor themselves and not speak at length. The other
7 thing is that I'm going to moderate all day today, and
8 when people are not concise, I'm just not going to call
9 on them very often, because we really need to get
10 through a lot. So, if your tent is up and you're not
11 being called on, there's a message there.

12 Let's go and ask the first general question
13 about the proposed requirement that telemarketers obtain
14 express verifiable authorization when accepting payment
15 via novel methods, would that proposal adequately
16 protect consumers?

17 Jerry?

18 MR. CERASALE: One of the things, Jerry
19 Cerasale, Direct Marketing Association, I'm sorry I
20 didn't do that with the last statement.

21 The issue that is foremost on this is the debit
22 cards for marketers. This is a remote sale, and many
23 consumers do not know whether it's a debit card, believe
24 it or not, don't know whether it's a debit card or a
25 credit card because it has a Visa logo or something on

1 it. It's also that it is impossible for a marketer to
2 know whether it's a debit card or a credit card, in the
3 best instance, until after the entire number has been
4 given. In some instances you don't even know it when
5 the number is given, which would force marketers to have
6 express verifiable authorization for everything, which
7 would be highly expensive, and the only other option for
8 a marketer saying we don't accept debit cards.

9 Now, one of the good things is that Visa has
10 told us, and it's in our comments, and I think they have
11 about 80 percent of the debit card business, does
12 provide something similar to credit card protections,
13 but we're not certain that all debit cards have them, so
14 that there is a problem, a potential problem with debit
15 cards here that creates a problem for marketers, and we
16 would just hope that the solution of not accepting the
17 debit card, because of the express verifiable consent
18 and the expense needed by them to do that, taking
19 everything, does not stop people who can't get a credit
20 card using a debit card from direct marketing.

21 MS. HARRINGTON: Okay. And I appreciate those
22 remarks. Let's try as much as we can right now to focus
23 on the consumer protection issue, which you certainly
24 have addressed.

25 Elliot?

1 MR. BURG: I just wanted to underscore what I
2 said in the introduction, which is that it's important
3 to look at EVA in the context of the rule generally, and
4 in particular, in the context of the pre-acquired
5 accounting information provision, so that if the
6 question is does EVA as proposed adequately protect
7 consumers, the states' answer would be yes, assuming
8 that the pre-acquired account information regime is in
9 place. If you eliminate that and substitute something
10 else like disclosure, then EVA suddenly becomes much
11 less valuable to consumers. The key here is that
12 consumers understand what's going on, and pre-acquired
13 account information requirements are an integral part of
14 that.

15 MS. HARRINGTON: Okay, well let's move to cost
16 to business for complying with the proposal.

17 George?

18 MR. THOMAS: Generally --

19 MS. HARRINGTON: Would you identify yourself.

20 MR. THOMAS: Oh, sorry, George Thomas with
21 Consumer Choice Coalition.

22 The principal area for this area would be
23 inbound calling, which is not necessarily taped today,
24 and not required to be taped. So that there could be --
25 where express verifiable consent is limited to, as under

1 the proposed rule, two areas, which is basically the
2 signature and audiotape, that is a problem for business,
3 so they have to on the inbound side acquire the
4 technology or rent it from third parties essentially to
5 effect that. So, that's a cost there which is
6 substantial. And that's in Chairman Muris' comments.

7 MS. HARRINGTON: On inbound, inbound centers,
8 and businesses that take inbound calls, are they not
9 accepting phone check payment now?

10 MR. THOMAS: I don't know. I don't have any
11 information on that.

12 MS. HARRINGTON: Because if they were, they
13 would need express verifiable authorization there, and a
14 question that I have is whether when you say that
15 inbound --

16 MR. ANDERSON: No, inbound calls are exempt.

17 MS. HARRINGTON: Oh, that's right, certainly
18 inbound calls are exempt, but some aren't.

19 MR. ANDERSON: Most are.

20 MS. HARRINGTON: It depends, it depends, but
21 let's say that we're talking about inbound calls that
22 aren't exempt. I'm just curious about whether someone
23 can tell me in those instances whether those merchants
24 are not accepting phone check payment.

25 Linda?

1 MS. GOLDSTEIN: What I was going to respond is
2 you really, I think, have to look at it more from the
3 standpoint of the merchant than the call center. Many
4 of the call centers will have the capability, but
5 depending on how large they are and the sophistication,
6 a cost of adding the taping can be quite prohibitive,
7 and I know many -- there are many, many clients that
8 have declined to accept check debits because they don't
9 want to as part of the telemarketing campaign build in
10 the cost of taping, and so they have made a decision not
11 to accept check debits at all. But it occurs at the
12 marketer level, not really at the call center level.

13 MS. HARRINGTON: Susan?

14 MS. GRANT: In our comments, we reported on our
15 telemarketing fraud statistics for last year where 22
16 percent of the payments were by demand draft, but in
17 calculating the statistics for the first quarter of this
18 year, that has jumped to 33 percent, which shows a clear
19 trend towards using consumers' bank accounts for
20 payment, and it's high-end categories where outbound
21 telemarketing is used such as offers of credit cards and
22 other categories. So, I think that it is a great
23 concern, especially because consumers' rights of
24 recourse are so different than credit cards.

25 MR. CERASALE: If I could ask one question on

1 that?

2 MS. HARRINGTON: Go ahead, Jerry, speak.

3 MR. CERASALE: Jerry Cerasale.

4 Does the demand draft include debit in your

5 question, did that include debit cards as well?

6 MS. GRANT: No, that did not.

7 MS. HARRINGTON: Tyler?

8 MR. PROCHNOW: Tyler Prochnow from the American

9 Teleservices Association.

10 One of the reasons, and I don't have data to
11 back that up, but I know from anecdotal evidence from
12 some of our members who offer online check processing,
13 telephone check processing, most of them through the
14 ACH, not necessarily the Demand Draft Program, but one
15 of the reasons you may see in that, what they have found
16 is that there is a significant increase in Americans
17 right now who do not have a valid credit card, whether
18 it is -- they don't have a credit card or whether that
19 credit card is maxed out and is unavailable for use in a
20 transaction.

21 So, when they wanted to make a purchase over
22 the telephone, or over the Internet, they've been forced
23 to resort to their checking accounts, and so I think
24 you've seen a significant increase in the amount of
25 telephone checks, and that would probably provide some

1 statistical evidence as to why there was a jump in the
2 complaints.

3 MS. GRANT: Could I just clarify that because
4 consumers don't know the difference between telephone
5 checks and ACH and everything, we just categorize all
6 the withdrawals from their accounts that aren't debit
7 cards in one category. So, when I say demand draft, I'm
8 covering all of that.

9 MR. PROCHNOW: Sure. Sure. Yeah.

10 MS. HARRINGTON: Okay. Anne?

11 MS. SCHNEIDER: Anne Schneider on behalf of
12 National Association of Attorneys General, and we also
13 have observed, as Tyler mentioned, an increase in the
14 use of the generic term "demand drafts." In fact, we
15 have found some telemarketing operators who have
16 required only that method of payment in inbound calls
17 and were general media exemptions in response to radio
18 advertisements. So, they fall within an exemption, but
19 utilize this method of payment, and it's very organized.

20 MS. HARRINGTON: Well, are there alternatives to
21 what we have proposed that would give consumers a level
22 of protection and opportunity to dispute and be held
23 harmless while the dispute is being investigated? Are
24 there alternatives, or other alternatives that would
25 protect consumers from the harm that this proposal seeks

1 to mitigate?

2 I mean, what's the answer, especially, you know,
3 business folks, what's the answer here? I understand
4 that you have a principal concern with debit cards and,
5 you know, it seems to me that part of the problem here
6 is that the people who develop the products and benefit
7 from their use haven't done a very good job of making
8 those distinctions for consumers. So, what do we do
9 about that?

10 Jerry?

11 MR. CERASALE: Jerry Cerasale.

12 I think on the debit card issue, since the
13 marketplace is responding with what Visa has done, I do
14 know that the Comptroller of the Currency at least is
15 still looking at this, at what type of regulations might
16 be necessary on debit cards, and I think from one --
17 from the instance of debit cards are a little bit
18 different than others because the marketer doesn't -- in
19 many instances doesn't know whether it's a credit card
20 or a debit card. So, that raises a different kind of
21 question from other forms.

22 Now, I think that as you go down to the next
23 question, as to whether or not the confirmation letter
24 transaction, I think that others will have some
25 discussions about that, that that may be -- we think

1 that that still is probably a viable response, but I
2 think as you look at the rules specifically, the
3 consumer determines -- so many consumers think a debit
4 card is just like a credit card, it's the consumer
5 making that choice, and the marketer is at a
6 disadvantage to know that there's a difference on that,
7 in most instances, for most sellers, it's just they
8 don't know. It's very different from some of the
9 equipment that credit -- that grocery stores have, so
10 it's where they don't have that type, and so they're at
11 a disadvantage with the debit cards and aren't covered
12 by the Visa dispute resolution.

13 So, I think that that's an issue where we would
14 like not to have to do the express verifiable consent
15 there, because the only response is, if you're not going
16 to report everything, is to not accept it.

17 MS. HARRINGTON: Mallory and then Art.

18 MR. DUNCAN: Mallory Duncan, National Retail
19 Federation.

20 This is an extremely difficult issue. Debit
21 cards do not provide quite the same level of protection
22 for consumers as do credit cards. But as Jerry pointed
23 out, remote sellers cannot distinguish a debit card from
24 the credit card with any great degree of reliability
25 pre-purchase. This is a problem that is not of the

1 retail industry's making. In fact, as I'm sure you may
2 be aware, the retail industry is suing the banking
3 industry, and this difficulty is part of that suit.

4 So, it is problematic to ask the retail industry
5 to try to resolve the problem that was not of their
6 creation. I mean, we hear both consumers and retailers
7 are operating, and the FTC is operating within the
8 confines of a very imperfect system. The only realistic
9 responses, either involve radical changes to retail
10 operations, and much higher costs, or a greater degree
11 of consumer education and market changes. And that is
12 going to have to come from a combination of all the
13 parties, the banking industry, the government, and to
14 some extent retailers in making that available, but
15 there is -- this is an imperfect situation we've been
16 given. There is no easy answer to it.

17 MS. HARRINGTON: Could I ask a couple of really
18 basic questions, and I'm sure you all know the answers,
19 and are surprised that I don't, but are the merchant
20 agreements that the merchants enter into with their
21 merchant bank that permit them to accept a branded card,
22 like MasterCard or Visa, require them to accept debit
23 and credit?

24 MR. DUNCAN: The card issuers have what's called
25 an Honor-All-Cards rule.

1 MS. HARRINGTON: Right.

2 MR. DUNCAN: And anything that they put a Visa
3 or MasterCard label on.

4 MS. HARRINGTON: Right.

5 MR. DUNCAN: We are required to accept. If we
6 want to also accept the credit cards.

7 MS. HARRINGTON: And is that an issue that has
8 been the subject of any discussion or negotiation? Kind
9 of on an industry-wide basis, with, you know, that is
10 between the merchant industry and the banking industry?

11 MR. DUNCAN: That issue is at the heart of our
12 antitrust lawsuit against the card-issuing associations.
13 It is not a matter that they have in any way agreed to
14 negotiate with the merchants.

15 MS. HARRINGTON: It's my understanding that
16 generally the discount rate or the fee that's charged
17 for handling a transaction that's paid by a credit card
18 is different than the fee or the discount rate or
19 whatever it is that's charged for the debit card
20 transaction. Is that true?

21 MR. DUNCAN: It is different, but you have to
22 distinguish between types of debit cards. There are
23 online and offline debit cards. Online debit cards are
24 those that require that you enter your PIN. Those
25 typically have a much, much, much lower fee to the

1 merchant. Offline cards are treated just like a credit
2 card, the fee is different but indistinguishably
3 different in most instances, and it is a practical
4 matter from those credit cards between offline and the
5 credit cards.

6 MS. HARRINGTON: Thank you.

7 George?

8 MR. THOMAS: George Thomas, Consumer Choice
9 Coalition.

10 On the issue of consumer protection, I want
11 just to pick up where Jerry left off in terms of the
12 voluntary protection, since debit cards have been
13 issued, the voluntary trend has been towards a majority
14 if not all debit card issuers to voluntarily effect a
15 chargeback situation, so they're allowed just like
16 credit cards have been. However, it is not statutorily
17 required, as you all know.

18 The other voluntary protections that have been
19 in existence for other nonrepayment rewards, including
20 checking is of course the bank relationship, and also
21 the vendor or marketer relationship in terms of liberal
22 refund policies, et cetera, for any disputes with
23 respect to authorization, all of which can be addressed
24 through the existing novel verification system
25 requirement, express verifiable authorization. And

1 all of these nonpayment methods should be treated the
2 same way and can be fairly treated the same way to
3 ensure that the consumers understand and there is
4 verification.

5 MS. HARRINGTON: Okay, Art?

6 MR. CONWAY: Art Conway, Dial America.

7 We've had experience with charging people's bank
8 accounts and we've also had experience with LEC billing,
9 where the charge goes on a telephone bill, and they have
10 not been good experiences. We -- our answer to this is
11 we won't do it -- we won't do a program where -- and
12 particularly and Elliot, this is your point of
13 pre-required account information, well that requires a
14 bank account. We turn that down, because we feel that
15 creates too much confusion with the consumer, and I
16 don't -- EVA or whatever you want to do, I think there's
17 a real problem there. And we found the same problem
18 with LEC billing, the consumer just doesn't understand
19 these novel payment systems.

20 So, we're very leery of novel payment systems
21 and tend to try and stay away from those. We make a big
22 distinction between credit card, debit card, and other
23 forms of payment.

24 MS. HARRINGTON: Okay, thank you.

25 Char?

1 MS. PAGAR: Char Pagar from the PMA.

2 I just wanted to follow up on that and say, you
3 know, I don't think that it's necessarily fair at this
4 point to make blanket statements that these sorts of
5 novel payment methodologies are not used by legitimate
6 or responsible telemarketers. Art certainly can run his
7 business and seems to have made that decision, but it
8 seems to me that there are also responsible marketers
9 who do accept such payment methodologies and do so
10 responsibly.

11 And just to follow up, on the consumer confusion
12 issue, there is evidence that something like that could
13 be addressed by appropriate disclosures. We know this
14 is an area that has been evolving and it's certainly
15 true that perhaps several years ago the disclosures that
16 were made to consumers, you know, it takes a while to
17 develop an understanding, even on the part of marketers
18 on how to communicate with consumers in a particular
19 way, and that knowledge has been evolving and developing
20 over the course of the last few years since these new
21 payment methodologies have been coming online.

22 MS. HARRINGTON: Okay. Linda?

23 MS. GOLDSTEIN: I just wanted to make two
24 points. One is just specifically on the issue of debit
25 cards, I think we can take some comfort, I'm going to

1 say two things that may appear inconsistent, but
2 hopefully they can be reconciled.

3 We can also look at this from the vantage point
4 of the consumer, and when the consumer -- when the
5 consumer pulls out their card and reads the number from
6 a debit card, as we indicated, most of the time they
7 don't even know if it's a credit card or a debit card,
8 but they certainly understand what's going to happen as
9 far as payment.

10 It doesn't have from the consumer understanding
11 standpoint some of the issues that something like LEC
12 billing in the early days presented where people didn't
13 exactly understand how that charge was going to be
14 passed through. I don't think there's any consumer you
15 could survey who when they call to purchase a product
16 and they read a number off a card, doesn't understand
17 that they're going to be charged the amount off the card
18 that they just read. So --

19 MS. HARRINGTON: I don't know that that's the
20 issue as much as it is that they do not understand that
21 they don't have the same chargeback rights, and I think
22 that's -- that there is vast ignorance on that point.

23 MS. GOLDSTEIN: But my understanding is that the
24 purpose of the express verifiable authorization was to
25 make sure or at least hearing from the consumer groups

1 that the consumer understand that they're making a
2 payment -- that they're authorizing a transaction and
3 that they're making the payment and that they're going
4 to be charged.

5 MS. HARRINGTON: But the reason that we don't
6 require express verifiable authorization for credit card
7 payment is that if there is an unauthorized debit or
8 charge, the consumer has recourse. So, so you're right,
9 but there is more to it.

10 MS. GOLDSTEIN: Well, that then may fit well
11 into the second point that I was going to make, which is
12 that however we fashion this, I think we need to be
13 flexible enough to think not of just about what we know
14 today, but any payment methods that do provide ADR or
15 chargeback protections, you know, should really be
16 treated similarly, and however it is that we draft the
17 rule, if those payment methods do provide the consumers
18 with those protections then they should be excluded from
19 these additional requirements.

20 MS. HARRINGTON: You know, and that leads us,
21 Linda, nicely to a question that we want some discussion
22 on, and that is whether if by contract the payment
23 mechanism provides comparable protections that should
24 suffice for purposes of taking the transaction out from
25 under the express verifiable authorization requirement.

1 So, if, for example, we have Visa providing on
2 debit card payment comparable chargeback and other
3 protections to consumers, is that sufficient to take it
4 out from the EVA requirement.

5 Stratis?

6 MR. PRIDGEON: Stratis Pridgeon with ARDA.

7 I'm not going to speak from industry experience,
8 but from a personal experience, I had one of those cards
9 that was a Visa and a debit card that had an
10 unauthorized charge on it, and what occurred was that I
11 contacted my bank and the bank basically went after the
12 merchant, and we were able to get -- I mean, we got our
13 funds back from the bank, and we disputed it like we
14 would a charge that is on our statement that we have a
15 dispute with, and we went back to the bank and they
16 credited us for the amount, and went after the merchant.

17 So, I think there are some protections there
18 that are somewhat different from the charge limits on a
19 credit card, but they are available.

20 MS. HARRINGTON: Tyler?

21 MR. PROCHNOW: Tyler Prochnow, American
22 Teleservices Association.

23 In response to one of your questions about
24 consumers not understanding that they don't have the
25 same protections, it's my understanding that the issuing

1 bank or whoever is issuing the debit card to them is
2 providing -- is required to provide them a statement of
3 how their dispute resolution process works and how they
4 can, what liability they will be faced with, prior to
5 the first transaction they use on that card.

6 MS. HARRINGTON: Um-hmm.

7 MR. PROCHNOW: So, there will be at least a
8 statement given to the consumer so they understand.

9 MS. HARRINGTON: Okay. Mallory?

10 MR. DUNCAN: I guess we have to -- Mallory
11 Duncan, National Retail Federation.

12 We have to move back from the perfect to the
13 practical. Given that we have an imperfect system,
14 given that there are some efforts to try to educate
15 consumers, as was alluded to, and that the
16 alternative -- the cost alternatives of requiring every
17 credit card transaction to be subject to EVA or an even
18 more imperfect system by asking consumers to determine
19 what kind of card they're using in every instance
20 actively before making the purchase, and some consumers
21 undoubtedly misstating the kind of card they have,
22 perhaps intentionally or perhaps just they want to make
23 the purchase or for other reasons, and finally, given
24 the fact that no one around this table can resolve this
25 problem, we're going to have to use something -- make

1 the best use of the imperfect system we have, and so
2 allowing contractual factors to obviate the need for EVA
3 is probably the best solution that we all could come to,
4 but it's going to mean that in each instance, the
5 Commission is going to have to come up with some set of
6 standards as to what is essentially comparable before we
7 can go further.

8 MS. HARRINGTON: Jeff?

9 MR. KRAMER: Jeff Kramer, AARP.

10 In response to your question, I think some kind
11 of uniform chargeback requirement would be helpful to
12 consumers, because they make get thorough disclosures,
13 but it's taken a while, but it's gotten to the point
14 where consumers do understand that they, for the most
15 part, have some kind of protection when they make a
16 charge, they don't understand it, they don't for debits,
17 I guess not just older Americans, but generally
18 consumers have that same concern.

19 So if there was some kind of assurance that if
20 they use a debit card or a Visa card with a chargeback
21 protection, I think that would be sufficient.

22 MS. HARRINGTON: Susan?

23 MS. GRANT: Susan Grant, National Consumers
24 League.

25 I wouldn't call a credit or debit card agreement

1 that a consumer receives from a financial institution an
2 educational piece in any way, shape or form, but we've
3 been doing a lot of education on this subject for the
4 past few years, and that comes back to bite us
5 sometimes. We have stressed that some payment systems
6 offer greater protections than the law does, for
7 instance Visa, and now I have a letter on my desk from
8 somebody with a Visa debit card dispute where the letter
9 from Visa refers him back to his bank and tells him that
10 he is subject to whatever his bank's policy is. I've
11 asked Visa for an explanation, I haven't received it
12 yet, so I don't know exactly what the story is here, but
13 it's very, very confusing for consumers, and I don't
14 think that we can rely on voluntary policies that are
15 mysterious, inconsistent, and can change.

16 MS. HARRINGTON: George?

17 MR. THOMAS: One consumer issue regarding this
18 is debit cards are often issued to persons who would not
19 ordinarily qualify for credit cards. So, you have a
20 class of people who rely upon debit cards for making
21 purchases. When you put into place rules that prevent
22 them or in the case of Art Conway's company, for
23 whatever reason make them uncomfortable doing business,
24 with debit cards, you're hurting consumer choice, their
25 ability to make purchases.

1 So, you've got to work out a way to allow them
2 to effect purchases, give them adequate notice if the --
3 if the issues they don't understand, perhaps consumers
4 education can be conducted by the FTC on its website, as
5 it does in many other ways. Also, there are some states
6 that prohibit marketers or businesses from
7 discriminating between debit and credit card, so they
8 are not permitted to decline debit cards. So, you're
9 caught in kind of a catch-22 as a marketer, not being
10 able to tell it's a debit card, and the consumer is also
11 caught in the problem.

12 MS. HARRINGTON: Anne?

13 MS. SCHNEIDER: Thank you.

14 I think we all wish that debit cards were like
15 credit cards and that they had the same protections and
16 we wouldn't be stuck with this thorny issue, but we have
17 to recognize and cannot underscore enough the importance
18 of that dispute resolution process, the chargeback
19 process, because goods are being bought unseen, services
20 are being purchased, undelivered, and consumers have got
21 to have the right to contest it when they don't arrive,
22 when they've been, you know, either misrepresented or
23 simply not understood by the consumer. And the debit
24 card rules do not provide that ability. You know,
25 unlike the credit cards. And we cannot -- we cannot

1 rely on, you know, the voluntary efforts by some
2 responsible issuers to address this. We have to require
3 this be available to all consumers.

4 MS. HARRINGTON: Anne, do you equate voluntary
5 with contractual?

6 MS. SCHNEIDER: I suppose so. I mean, I think
7 it's problematic to base a rule on private contractual
8 relationships, because those can always change, and
9 typically neither the consumer nor the merchant knows
10 what those -- or the seller or the telemarketer know
11 what the specific contractual relationship is.

12 MS. HARRINGTON: Katie, you had some questions?

13 MS. HARRINGTON-McBRIDE: Yes.

14 Actually, George, it was in the consumer choice
15 comment that I think a race to the bottom was mentioned,
16 so far when we've talked about comparable protections,
17 we've been focusing mainly on the contractually provided
18 protections that Visa and MasterCard offer. The term
19 comparability being used in a rule, I think you suggest,
20 could lead to problems with organization offering
21 illusory protections, which would end up penalizing good
22 actors and giving the bad ones a "bye."

23 Can anyone speak to that issue?

24 MS. HARRINGTON: George?

25 MR. THOMAS: Thank you.

1 I think that's accurate as reflected in our --
2 in the chairman's comments. That is very true. I think
3 that's true of a lot of regulation, of course, is that
4 the good actors will be penalized and the bad actors
5 will continue to be bad actors. Of course the
6 difficulty for you all is that you can't write a rule to
7 clean up 100 percent of the bad actors, because you're
8 going to be burdening legitimate business.

9 MS. HARRINGTON: Any other comments on Katie's
10 question?

11 (No response.)

12 MS. HARRINGTON: Let me ask a question about
13 novel payment systems other than debit cards. There was
14 a mention of LEC billing, and other -- there's billing
15 and other methods, payment and other methods. Let's
16 take debit cards off the table for a moment. What about
17 the express verifiable authorization requirement for
18 non-debit card novel payment systems? What burdens or
19 costs, what's the cost of compliance there?

20 John?

21 MR. MURRAY: Currently these papers rely heavily
22 on the written confirmation method as satisfactory check
23 and balance. Newspapers, of course, maybe they're
24 unique because we're still making the transition from
25 the kid at the door collecting, that's still a pretty

1 good transition for some consumers.

2 With the proposed change, newspapers would not
3 be able to offer payment options such as what's becoming
4 particularly popular is check by mail or check by phone,
5 excuse me, check by phone, where you can in effect
6 deliver a check over the phone by providing the
7 newspaper with your checking account information. And
8 this is not some -- is rarely used in the sale of
9 newspapers as it is servicing our current customers; in
10 other words, your subscription is about to expire,
11 service is about to be suspended, and you can use a
12 debit card, credit card, or whatever, when the person
13 calls you to continue the service.

14 Now, we don't sell any additional goods or
15 services at that point in time, we're using it as a
16 service for our existing customers, but it would
17 certainly fall underneath the umbrella of the
18 regulations. In almost all these cases, these are
19 newspapers who are dealing with -- well, newspapers are
20 a low cost item, and it is no more or less than a
21 service to the consumer to continue the subscription.

22 The relatively small cost of a newspaper
23 subscription really removes any potential threat of
24 consumer harm with the current -- with the confirmation
25 method. In fact, the newspapers are generally willing

1 to absorb the cost of the subscription if the customer
2 contends that they did not authorize the sale.

3 I talked to a newspaper the other day, and just
4 coincidentally, he was checking -- he was chasing down
5 information where a subscriber had written a letter to
6 the editor about the conversation that he had with the
7 representative of the newspaper as not being quite as
8 consumer friendly as it should be, or wasn't polite or
9 whatever, and that's going to run in the newspaper. In
10 other words, there is a check or balance there that if
11 we don't conduct ourselves appropriately, I don't guess
12 anybody else would have this problem, but we actually
13 write a letter to the editor saying we didn't do a very
14 good job.

15 So, very simply, our customers appreciate the
16 service that we're giving them now, it's -- it crosses
17 the whole line as far as consumers, it's really hard to
18 get busy people, consumers who forget to pay their
19 newspaper bill, and I don't think that was the intent of
20 what we're dealing with here, but it would certainly
21 fall into and be relevant, and I see the check by phone
22 expression is internal, I don't know the name of the
23 exact product or the members, I don't have it with me,
24 but it is very popular, and I used it myself as a
25 consumer the other day for a credit card bill that I

1 forgot to pay, we just provided our checking account
2 information, and it was a major retailer, and then when
3 the next bill came, it was noted that I had paid my bill
4 and I avoided the late charge, the penalty charge and
5 interest that I would have had to pay. And so for me
6 that was a great service, but I don't think that I would
7 be able to do that under these regulations.

8 MS. HARRINGTON-McBRIDE: John, let me see if I
9 can clarify so that I understand your particular
10 scenario as it relates to newspapers. To the extent
11 that newspaper sales are even covered by the rule,
12 because they are non-intrastate and your members would
13 be covered, what I heard you say was that you're using
14 check by phone, which is allowed under the rule, the
15 only requirement being that you do have to obtain
16 express verifiable authorization so that the consumer is
17 fully aware of the specifics of the transaction and that
18 the money will be debited from their checking account.

19 I know that some of us have had the experience
20 of paying our credit -- paying by credit card for our
21 newspaper subscription, so I imagine some of your larger
22 members may use that method as well, and then you
23 mentioned something that I think we're going to be
24 getting into, which is the written authorization method.
25 All of those, I'm thinking, would be allowed, they would

1 simply be regulated under the rule and require EVA. Is
2 there -- am I missing something in what you're saying?

3 MR. MURRAY: I think we're saying the same
4 thing, but a couple -- let me just give you a -- you
5 made a couple of generalizations that wouldn't be
6 accurate. The newspaper I talked to happened to be on
7 Columbus, Georgia, which is on the Chattahoochee River
8 between Georgia and Alabama.

9 MS. HARRINGTON-McBRIDE: Someone cleverly
10 pointed out that there are 48 contiguous states. So,
11 yes, we know that all of these situations will result in
12 some interstate, but just, you know, to the extent that
13 you were covered, I wanted to clarify that intra, not
14 inter.

15 MR. MURRAY: So, I have to assume that there's
16 enough of those, there's enough on the rivers, I was
17 dealing with Grand Forks the other day, who has to deal
18 with the Minnesota rules, the Grand Forks rules and all
19 the other rules. So, that was one answer to your
20 question.

21 It will fall under, then, express verifiable
22 authorization, and the point is that I'm doing this as a
23 service for you, as a consumer, because I'm a good
24 business person, I want to keep your business, and if
25 you have to send me something in writing, on your own,

1 being a consummate procrastinator that you are, people
2 like me who let the thing creep up on them, the idea of
3 them sitting down and writing you something is to me
4 pretty unlikely.

5 MS. HARRINGTON-McBRIDE: Well, and the method
6 that allows for taping of the express authorization
7 would be the alternative to that.

8 MR. MURRAY: Right, and what you're looking at
9 there is, as I said the other day, like 85 percent of
10 our newspapers are less than 50,000 circulation, so if
11 you're dealing with -- and I don't think this is unique
12 to newspapers, I think our representative from small
13 business here would say the same thing, that this is not
14 the heart of the business, but it's an important part,
15 and they're not set up for doing that type of thing.
16 They're really not.

17 MS. HARRINGTON: John, I have a concern that
18 they may already be required to do this, and simply
19 aren't complying. So, I think you're digging your guys
20 in a little bit here, we probably want to move on.

21 Now, the question is concerning other novel
22 payment systems, LEC billing, as being covered in the
23 Commission's call for rulemaking, but there are other
24 novel payment systems that we've seen billing on
25 mortgage statements, electricity statements, and so

1 forth. The question is taking debit cards out of the
2 equation, taking demand drafts out of the equation,
3 because they already require express verifiable
4 authorization, unless it's not a telemarketing
5 transaction, are there costs -- does anyone on the
6 business side want to say anything about costs or
7 burdens?

8 George?

9 MR. THOMAS: The costs outside of debit card
10 would be essentially the same as identified by Chairman
11 Miller's report, which is to the extent you have to do
12 audiotape verification and you don't have it, you have
13 to get it. I think that novel payment methodologies
14 will continue to increase, particularly given the
15 Internet, even those transactions who aren't on the --
16 may be effectuated on the Internet that doesn't apply to
17 FTC rules, but that there's going to be increasingly
18 novel payment methods, and probably when credit cards
19 came out, they were a novel payment method at the time.

20 So, I think they can all be treated the same.
21 They are going to have the same degree of cost depending
22 upon the verification methodology employed or imposed.
23 And that's what's important here is to decide what those
24 should be.

25 MS. HARRINGTON: Well, if they all -- if the

1 cost of express verifiable authorization is similar, is
2 there a difference in benefit? In efficiency? Are some
3 of these novel payment systems either lower cost or
4 likely to generate greater sales revenues because they
5 expand payment options to people who might not be able
6 to pay by more established means, and should consumers
7 then benefit -- share in the benefits by getting some
8 protection?

9 MR. THOMAS: I think they should. I think
10 consumers should have the choice to pay for goods and
11 services as they wish, and as methodologies become
12 available that are convenient or cheaper, cheaper to the
13 consumer in terms of interest, cheaper to -- more
14 efficient to the consumer, faster, safer, more
15 verifiable, they should have the advantage of that.
16 They should also have the advantage of adequate
17 protection, which can be achieved through express
18 verification, regardless of the type of methodology of
19 the transaction.

20 MS. HARRINGTON: Elliot?

21 MR. BURG: I just want to -- Elliot Burg for
22 NAAG.

23 I just want to note the potential coercion
24 factor for some of these novel billing factors, if
25 you're talking about getting billed on your phone bill

1 or electric bill or your mortgage, there is a concern
2 that's been recognized in a number of corridors over
3 consumers believing that there will be consequences to
4 nonpayment that go far beyond not paying or simply
5 having a ding on their credit report, such as having
6 their phone service cut off.

7 A couple of years ago the Vermont legislature
8 enacted a law that requires written authorization for
9 any LEC billing that's not telecom in nature, to follow
10 up on that concern.

11 MS. HARRINGTON: Linda?

12 MS. GOLDSTEIN: Yeah, I just wanted to comment
13 that I know this is -- we're moving on to this next, but
14 the cost factor, I think, also has to be looked at in
15 tandem with the written confirmation, that if you
16 maintain the written confirmation as an option, I think
17 that will help balance the additional costs. When you
18 start to move out into some of the more esoteric novel
19 payment methods, often marketers will structure
20 different campaigns, sometimes those might even be done
21 in the context of some affinity programs.

22 So, it may be easier to separate out and budget
23 separately for the additional costs associated there.
24 When you're dealing with a debit card, the problem is
25 that the marketer will never know in advance which card

1 the consumer is going to take out, but ultimately you
2 could allow written confirmation as an option so that if
3 the consumer elects to choose one of those methods
4 because they don't have a credit or debit card, but the
5 marketer has -- they can't go back now and turn around a
6 tape recording that they didn't have, but if they have
7 the option of doing the written confirmation, that would
8 really help mitigate the costs associated with that.

9 MS. HARRINGTON: Well, that's a very nice
10 transition to that question. And that is the burdens to
11 business of eliminating the written authorization safe
12 harbor. Don't all talk at once.

13 George?

14 MR. THOMAS: Once more into the breach. I think
15 this is, as Linda pointed out, extremely important. As
16 express verifiable consent is applied to more and more
17 novel billing methods, the -- certainly what is most
18 likely the cheapest way to effectuate that, under the
19 existing rule, has been written, verification after a
20 sale confirming the sale. You've heard from the
21 newspaper folks and what they do, other areas of
22 businesses that do that include insurance and almost
23 every other kind of business that takes advantage of it,
24 where they don't have the capacity to tape, and it is
25 important to maintain it, since it is the cheapest way

1 of effectuating a transaction and to provide
2 confirmation.

3 MS. HARRINGTON: Char?

4 MS. PAGAR: Char Pagar from the PMA.

5 I just wanted to say that the only piece of info
6 that I recall reading from the NPRM as to the reason for
7 the elimination is that businesses had not been using
8 this methodology, and I think if you're going to go
9 ahead and expand the requirements for EVA, then I think
10 perhaps past use doesn't provide that much evidence of
11 what might happen in the future, especially given that
12 this is more likely to be less expensive than the other
13 methodologies. So, it seems to me that it would be
14 reasonable to continue it and, you know, maybe in your
15 next review see if it's continuing to be used or not.

16 MS. HARRINGTON: Anne?

17 MS. SCHNEIDER: I haven't seen one of these post
18 transaction mailings for a couple of years. I mean,
19 these were prevalent several years ago, like five years
20 ago, and we haven't seen much, much use of them. So,
21 I -- we've tended to concur with the Commission's
22 observation.

23 But I think that the problem this presents is,
24 you know, greatly magnified when you combine it with an
25 negative option free trial offer or the use of

1 pre-required account telemarketing, where in any
2 situation where there might be some question as to
3 whether the consumer understood the transaction, or
4 agreed to the transaction, because they're not looking
5 for that mailing. They don't recognize the name when it
6 comes in the door. It's just another piece of junk
7 mail.

8 And I don't think we have -- we are entitled to
9 hold the consumer responsible for carefully reading
10 every piece of, you know, what looks like junk mail that
11 comes in the door.

12 MS. HARRINGTON: So, you favor the elimination
13 of the written verification?

14 MS. SCHNEIDER: Absolutely.

15 MS. HARRINGTON: Rita?

16 MS. COHEN: We spent a lot of time thinking
17 about this, because as you know, we proposed that you do
18 written authorization with a transfer of information as
19 an alternative to a ban on that. And so we thought
20 about a lot what would be the right way to communicate
21 to consumers, assuming we had, again, made our
22 disclosures, and gotten consent. We felt that it was
23 important to retain the third method.

24 Certainly we do send out written confirmations
25 in many cases when we have a magazine sale. We

1 recommend it for advance consent agreements, for free
2 trial offers, and it's very re-assuring to consumers, I
3 believe, they do understand the name of our brand, and
4 this is something they can keep that explains the
5 material terms, it gives them the number to call to
6 cancel, so it is a tremendously useful communication to
7 the consumer.

8 We've also looked at the possibility of taping,
9 as I explained yesterday, that could be quite
10 prohibitive, particularly for smaller call centers. So,
11 we thought that it was important to retain this. And
12 one of the things that we mentioned in our comments was
13 that if there was a concern that the written
14 confirmation did not have the same protection as the
15 other two methods, that perhaps a liberal refund policy
16 or requirement that you allow a refund if there was a
17 claim that there was an unauthorized charge protecting
18 us.

19 MS. HARRINGTON: Keith, do you have a question?

20 MR. ANDERSON: I'm not sure that I do. I sort
21 of wanted to say what Anne was saying, I mean, my
22 concern here is the consumer doesn't see the receipt --
23 the confirmation when it comes in the door, and
24 therefore if there has been a problematic transaction,
25 he or she is just not protected. And I -- I guess I

1 would like to see people address how we deal with that
2 problem.

3 MS. HARRINGTON: Jerry?

4 MR. CERASALE: Jerry Cerasale, DMA.

5 I guess in part response to Keith and in
6 response to Anne, a confirmation coming later, which has
7 your charge for this and here's how much you were
8 charged is required by Postal regulations, federal law,
9 to go out first class mail. So, it is not the
10 advertising mail that you normally receive. It comes as
11 first class mail. So, it's different. You know, I
12 think you just can't push it in with all the standard
13 mail that comes.

14 MR. ANDERSON: Yeah, but enough of your
15 marketers, Jerry, figured out that there's a better
16 chance that I'll open it if it's first class that I
17 start discarding first class that doesn't look like it's
18 legitimate.

19 MS. HARRINGTON: Let me just check around the
20 table.

21 George, did you want to speak?

22 MR. THOMAS: I did.

23 MS. HARRINGTON: Okay, I'm not calling on you,
24 I'm just checking.

25 Susan?

1 MS. GRANT: The Federal Communications
2 Commission eliminated the welcome packet as one means of
3 verifying that a consumer had agreed to switch their
4 phone service precisely because of that concern. So, I
5 share the concern about the written confirmation.

6 MS. HARRINGTON: Do you mean -- can I ask you
7 for clarification, a letter of agreement is no longer --

8 MS. GRANT: No, no, no, not the letter of
9 agreement, but a written confirmation, not that you
10 sign.

11 MS. HARRINGTON: Okay.

12 MS. GRANT: That a written confirmation of your
13 telephonic agreement to switch.

14 So, if a written confirmation is going to be
15 allowed still as a verification method here, I think it
16 would be really important for the Commission to be even
17 more specific about what it should contain, what it
18 shouldn't contain, you know, that it should not contain
19 information that would make it look like a sales
20 solicitation, that it can't be used for upselling, maybe
21 it should have something in particular on the envelope
22 that would signal what it is, and I don't know if there
23 is a way of doing this, but I do have a concern about
24 the written confirmation.

25 MS. HARRINGTON: Okay, George?

1 MR. THOMAS: On that precise point, the written
2 notification is certainly viable, what the issue would
3 be is the clearness, the conspicuousness of the notice,
4 our own company, we send out not only in the context of
5 outbound telemarketing, do we have an audiotape, but we
6 also follow up with written verification on the outside
7 of the envelope, conspicuously noting that the purpose
8 is to tell them that they're about to be charged or
9 renewed, et cetera.

10 On top of that, many companies, including our
11 own, have a no-questions-asked refund policy for anyone
12 that says that they didn't understand a disclosure or
13 that they were going to be enrolled, and in combination
14 with all those, certainly written verification is often
15 used as a redundant safeguard, so that under the
16 three -- limited three ways under the current rule of
17 getting express verification, in the event that the tape
18 fails, you have a second methodology as a back-up. Many
19 companies use that either exclusively or as a back-up,
20 and it's important.

21 MS. HARRINGTON: Okay, Linda?

22 MS. GOLDSTEIN: Yeah, I just wanted to respond
23 particularly to Anne's comment, and this issue has come
24 up a number of times, and that is the interplay of the
25 free trial. And, you know, we recognize that that is an

1 issue that's -- that has emerged, but the novel payment
2 issue is an issue that's much broader and potentially
3 has far greater implications, and we're talking about
4 novel payment methods that may be utilized in very
5 traditional sales without a free trial. I mean, if the
6 free trial raises additional issues as we indicated in
7 our comments, it may be appropriate to require certain
8 additional disclosures that would attach to that, but I
9 don't think we should force marketers who do not utilize
10 free trial undergo unnecessary burdens that would not
11 otherwise be necessary just because in some instances a
12 free trial offer might also be required.

13 MS. HARRINGTON: Elliot?

14 MR. BURG: Elliot Burg from NAAG.

15 It seems to me that a fundamental issue here is
16 the possibility or with some telemarketing companies the
17 likelihood that there's going to be a material
18 inconsistency between what's said on the phone and
19 what's in that piece of paper that comes in later as a
20 post-call confirmation. And consumers are not lawyers,
21 they're not going to take the writing that comes in
22 through the mail and they may not even keep it, in many
23 cases they will throw it away, but if they do keep it,
24 they are not going to scrutinize it to see if what they
25 were told on the phone or what impression they

1 reasonably took from the phone call is consistent with
2 the small print in the confirmation.

3 And so the consumer who receives a call about
4 credit repair and believes that he or she is just going
5 to get an information packet in the mail and is not
6 going to be charged, or the consumer that was called
7 about a discount club membership who believes based on
8 the call that there's going to be one charge for this
9 year, not an annual charge every year on the credit card
10 account, is not going to be looking at the mailing that
11 comes in to see if those things are not true.

12 So, that's the problem with these written
13 confirmations, the ones that are kept, and I don't know
14 how many are, are not going to be reviewed for
15 consistency with the call.

16 MS. HARRINGTON: Rita?

17 MS. COHEN: I wanted to respond to the concern
18 that consumers do not read their written confirmation.
19 We do send out quite a number of written confirmations,
20 particularly in cases where there is advance consent or
21 a free trial, and what we have found is that we'll give
22 a number that people can call for customer service or to
23 cancel if they so desire, and we get lots of calls to
24 those numbers. So, we do know that our consumers are
25 reading the written acknowledgments that we're sending

1 out.

2 MS. HARRINGTON: Char?

3 MS. PAGAR: I just wanted to make a quick point
4 that to the extent that there are serious material
5 inconsistencies between what's stated on the phone and
6 what is in a written piece that would at least be my
7 opinion be deceptive, and I don't know that we need to
8 regulate to the bottom, because there's going -- there
9 are always going to be folks who completely disregard
10 their rules, no matter what rules you issue.

11 MS. HARRINGTON: Stratis?

12 MR. PRIDGEON: It seems like several of the
13 novel payment methods that the Commission identified in
14 the notice link back to credit cards and bank accounts.
15 So, I don't know that they're necessarily novel, because
16 the base source for the funds for those credit card or
17 bank account would fall under the same requirements as
18 those two methods of payments.

19 I think originally we said that it is true, at
20 least in our industry, that the follow-up confirmation
21 is used less often in the terms of the telemarketing
22 call, because most of our -- most people in our industry
23 use the taping method, but when a confirmation is used
24 for the -- to inform the customer of what they're -- of
25 what they're getting, that often includes reservation

1 information, and other types of information. So, I
2 think it will be important not to limit the ability to
3 include -- if we're talking about novel payment methods,
4 limit the ability to include other information in those
5 types of mailings.

6 Also, question, Katie had said earlier about, I
7 think it was in response to John on some of the methods
8 he was describing, and I think, Katie, I think you said
9 that those are okay under the -- under the rule, but
10 other methods are not. Are we talking that these novel
11 payment methods are not available under the rule or not
12 allowed under the rule?

13 MS. HARRINGTON-McBRIDE: The rule as it stands
14 right now regulates demand drafts only, and the proposal
15 would expand it to novel payment methods that lack
16 certain protections.

17 MR. PRIDGEON: Okay.

18 MS. HARRINGTON: Katie has one more question,
19 and then I think we're going to do a schedule change
20 here, we're going to move the break up and we're going
21 to add the surplus time to lunch. So, that's what's at
22 stake here. Keep that in mind.

23 MS. HARRINGTON-McBRIDE: Nevermind. No. It's a
24 quick question, it's sort of a follow-up on what George
25 had said, if I understood you correctly, you were saying

1 that you often use more than one method of verification,
2 and that has been the Commission's experience as well,
3 that in many instances where written authorization after
4 the fact is obtained, there's also a tape verification.

5 Can anyone speak to the prevalence of taping in
6 addition to the use of the method that we have proposed
7 to eliminate?

8 MR. THOMAS: If I could just ask you a question.
9 Are you asking how much taping is used versus written
10 confirmation?

11 MS. HARRINGTON-McBRIDE: No. In the instances
12 where the proposed elimination would affect companies,
13 are they also taping, so is there some back-up method
14 that's already in place?

15 Rita?

16 MS. COHEN: I think that in some cases they are
17 doing that, but not in all cases.

18 MS. HARRINGTON: We have certainly seen it
19 actually in some of our enforcement work in the magazine
20 sales area that they are doing both.

21 MS. COHEN: Yes, sometimes.

22 MS. HARRINGTON: Anything else?

23 (No response.)

24 MS. HARRINGTON: All right, it is by my watch,
25 it's about 10:09, we are going to resume at 10:25 sharp,

1 and we will pick up on the USA PATRIOT Act amendment
2 discussion, and when we are finished with that
3 discussion, we will take a lunch break. We will resume
4 this afternoon after lunch at 1:30 as scheduled. So,
5 how we use our time between now and 1:30 is somewhat in
6 your control.

7 (Whereupon, there was a brief recess in the
8 proceedings.)

9 MS. HARRINGTON-McBRIDE: All right, we're going
10 to begin now on our session on the USA PATRIOT Act
11 amendments to the Telemarketing Act, and our proposed
12 amendments to the rule in light of these changes to the
13 act.

14 We will have some new folks at the table for
15 this session, primarily those who represent charities,
16 and so it would be useful if we could have each of those
17 people introduce themselves and state in one sentence
18 what their largest concern is with the proposed
19 modifications to the rule.

20 Looking around, I see that we have a
21 substitution from the Electronic Retailing Association.
22 Elissa, welcome back to the table, Elissa Meyers. We
23 have a substitution for Dial America, could you just
24 state who you are for the record, please?

25 MS. KAMINSKI: Sure, it's Noreen Kaminski, Dial

1 America.

2 MS. HARRINGTON-McBRIDE: Thank you.

3 We're joined by Michael Callan. Michael, if you
4 could introduce yourself.

5 MR. CALLAN: My name is Mike Callan, I'm
6 president of --

7 MR. HILE: Speak into the microphone, please.

8 MR. CALLAN: My name is Mike Callan, I'm
9 president of Community Safety, we're based in
10 Minneapolis and we provide professional fundraising
11 services to state-run and non-profit organizations.

12 MS. HARRINGTON-McBRIDE: And we're also joined
13 by Thomas Goodman.

14 MR. GOODMAN: My name is Thomas Goodman, I'm
15 with a firm called Siegel, Brill, Greupner, Duffy &
16 Foster and we have a client called Hudson Bay Company of
17 Illinois which owns a for-profit calling center in
18 Lincoln, Nebraska. They call for small, non-profit
19 advocacy groups like the ACLU of Ohio, Sierra Club,
20 Organic Consumers Organization, they also call for local
21 chapters of large organizations, Florida National
22 Organization for Women, and they call for U.S. Senator
23 Paul Wellstone, National Abortion Rights Action League
24 and grass roots advocacy groups like that. They do
25 membership drives, voter notification surveys, get out

1 to vote drives, membership renewals, fundraising,
2 alerting members to call legislators and stuff like
3 that.

4 Our position is that the rules must respect the
5 First Amendment regulations that already exist from the
6 Supreme Court.

7 MS. HARRINGTON-McBRIDE: All right, thank you.

8 Is there anyone else at the table who has not
9 already introduced him or herself to our court reporter?

10 (No response.)

11 MS. HARRINGTON-McBRIDE: All right, that
12 preliminary business being done, I will turn over the
13 microphone to Allen Hile, who will begin this session.

14 MR. HILE: Our first question deals with the
15 prohibited misrepresentations with respect to charitable
16 fundraising, and I thought it might be useful to start
17 by taking a look at what those actually are.

18 This is found in section 310(3)(d) of the
19 proposed rule, where it's proposed to prohibit
20 misrepresentations in charitable fundraising any of the
21 following material information: One, the nature,
22 purpose, or mission of any entity on behalf which a
23 charitable contribution is being requested; two, that
24 any charitable contribution is tax deductible in whole
25 or in part; three, the purpose for which any charitable

1 contribution will be used; four, the percentage or
2 amount of any charitable contribution that will go to a
3 charitable organization or to any particular charitable
4 program after any administrative or fundraising expenses
5 are deducted; five, any material aspect of a prize
6 promotion, including but not limited to the odds of
7 being able to receive a prize, the nature and value of
8 the prize, or that a charitable contribution is required
9 to win a prize or to participate in a prize promotion;
10 six, in connection with the sale of advertising,
11 instruct the purpose from which the proceeds of a sale
12 of advertising will be used, misrepresenting that a
13 purchase of the advertising has been authorized or
14 approved by any donor or that any donor's payment for
15 any advertising or the geographic area in which the
16 advertising will be distributed; and finally, seven,
17 misrepresenting a seller or telemarketer's affiliation
18 with or endorsement or sponsorship by any persons or
19 government entity.

20 The question that I want to pose is, are these
21 proposed prohibited misrepresentations adequate to
22 protect donors?

23 MS. HARRINGTON-McBRIDE: I'm sorry, but before
24 we get to that, we have actually been joined by two new
25 participants, if David could introduce himself, please.

1 MR. MULVIHILL: Certainly, I'm David Mulvihill,
2 vice president and general counsel with the Make-A-Wish
3 Foundation of America, we're a national non-profit with
4 79 chapters across the country that grant the wishes of
5 children with life-threatening illnesses. Our
6 organization does not engage in any telemarketing
7 activities whatsoever, we're here, our concern is with
8 an unknown but significant number of telemarketers who
9 misrepresent themselves as being affiliated with our
10 organization or otherwise mislead prospective donors to
11 believe that a solicitation is being made on our behalf,
12 when in fact it is not.

13 MS. HARRINGTON-McBRIDE: All right, thank you.
14 And we've also been joined at the opposite end of the
15 table. Would you please introduce yourself?

16 MR. BEATO: My name is Andrew Beato and I'm an
17 attorney with Stein, Mitchell & Mezines, and I'm here
18 today on behalf of the Not-for-Profit Charitable
19 Coalition. It's a coalition of 277 not-for-profit
20 charitable organizations that oppose the rule on
21 jurisdictional constitutional grounds. Glenn Mitchell
22 will be joining us in a minute, but until he does come
23 and give me the hook, you have me.

24 MS. HARRINGTON-McBRIDE: And we are delighted to
25 have you, I would only remind you and everyone else to

1 speak distinctly into the microphone so that our
2 reporter can pick us up. Thank you.

3 MR. HILE: All right, returning again to the
4 question that we want to deal with now, are the proposed
5 or prohibited misrepresentations that I just read
6 adequate to protect others.

7 I think we'll start with you, Elliot.

8 MR. BURG: Thank you, Elliot Burg from NAAG.

9 I would like to make three points on
10 misrepresentations.

11 MR. HILE: We're having a little feedback.

12 MR. BURG: The first one has to do with a
13 particular kind of misrepresentation that the states
14 feel should be added to the list, and that is the
15 location of the charity, a -- unfortunately, common
16 misrepresentation where misrepresentations occur is that
17 a particular charity is based in the community or the
18 State where the fundraising is done, that gives people
19 the impression that money is going to be used for local
20 purposes, which is important to many donors, even if the
21 purpose for which the money, the donations are to be
22 used is not explicitly stated, and so we think that it's
23 important to add location to the list.

24 Secondly, and this is a comment that spans the
25 issue of misrepresentations and disclosures and other

1 aspects of the TSR's potential application to charitable
2 solicitations, and that's a no preemption plea. The
3 states urge the Commission to clarify in its comments
4 that, for example, when it prohibits certain kinds of
5 misrepresentations, or when it requires specific
6 disclosures, that those prohibitions and requirements
7 are not intended to supplant state regimes that in many
8 cases have been in place for years and years pertaining
9 to charitable solicitations.

10 And my third point is that in the NAAG comments,
11 and in comments from the National Association of State
12 Charities Officials, the point was made that the
13 provisions on misrepresentations, disclosures and, in
14 fact just across the board, the proposed revisions to
15 the TSR and charities really were intended by Congress
16 to apply to telemarketing calls by charities themselves
17 and not just by paid fundraisers for charities, and I
18 won't go into detail on this, but let me just say that
19 looking at the language in the USA PATRIOT Act, it seems
20 clear that Congress had the option of acknowledging that
21 there was a distinction between paid fundraisers and
22 charities for the purposes of applying the TSR to one or
23 the other or both, and it did not do that.

24 And if one looks at the origin of the provisions
25 relating to charities in the U.S. PATRIOT Act, they came

1 from a bill that was introduced by Kentucky Senator
2 McConnell, and his floor comments, I think, make it
3 clear that the concern that he had at the time was with
4 many of the post-9/11 charity problems, and there were a
5 number of those, probably the best known was the
6 American Red Cross issue, which concerned solicitations
7 by charities and not just by fundraisers.

8 MR. HILE: Thank you. We are really trying to
9 focus on the misrepresentations and not the scope of
10 what we have done under PATRIOT Act, okay? Does anyone
11 have a reaction to Elliot's suggestion that we ought to
12 add a prohibition on misrepresenting the location of the
13 charity?

14 Do you have a reaction to this? To that
15 suggestion, Glenn?

16 MR. MITCHELL: No.

17 MR. HILE: Anybody have any reaction to that?

18 Jerry?

19 MR. CERASALE: Jerry Cerasale, Direct Marketing
20 Association.

21 Currently a charity is located in one area, many
22 of them do charitable work throughout the nation or
23 regionally, I'm not necessarily certain whether this is
24 a problem that needs to be added into specifically on
25 this rule.

1 MR. HILE: Are you saying it would be unworkable
2 to add that?

3 MR. CERASALE: No, I'm not saying it would be
4 unworkable, I just don't see the necessity for it.

5 MR. HILE: Jeff, do you have a comment on this
6 issue?

7 MR. KRAMER: Yeah, on this issue. Jeff Kramer,
8 AARP.

9 We support the addition of location, because
10 that's one thing our members look at when they make
11 contributions to charities. There's nothing wrong with
12 saying we're the American Red Cross representing the
13 nation, not necessarily saying it that way, and saying
14 we're the local chapter of your American Red Cross. So,
15 we would support the addition of location to that.

16 MR. HILE: Char, do you have something on this
17 particular question?

18 MS. PAGAR: I just have one particular
19 suggestion. I mean, if the concern is that folks are
20 perhaps misrepresenting the local nature and that's not
21 the case, maybe it could be a trigger prohibition to the
22 extent that if it makes the claim of being a local
23 charity, a disclosure about the location be added.

24 MR. HILE: Elissa?

25 MS. MYERS: Actually, I was just -- to follow up

1 on Jerry's comment, just seeking a clarification. Is it
2 the location of the domicile or the location of the
3 effect of the contributions?

4 MR. HILE: Speak into the microphone.

5 MR. BURG: I would say the mission
6 representation prohibition could go to any aspect of the
7 location of the charity, whether it's that it has a
8 local affiliate, or if it has an office in your
9 particular state, really there are many ways of cutting
10 this, if you're trying to mislead people about where --
11 ultimately where the donations are going to be used.

12 MS. HARRINGTON-McBRIDE: We've been joined by
13 another representative, I believe, by the American
14 Association of Fundraising Professionals. If you could
15 just introduce yourself, we're sharing microphones if
16 someone would be generous down at the end. Who you are
17 and what your interest is in this proceeding.

18 MS. MAEHARA: Good morning, my name is Paulette
19 Maehara, I am with the Association of fundraising
20 Professionals, and from our perspective, we have a
21 significant interest in these new regulations and
22 guidelines, and clearly they could have significant
23 impact on charitable solicitations, charitable
24 organizations. There are aspects of the guidelines that
25 we are very supportive of, because they are clearly in

1 line with our code of ethics, and the standards of
2 professional practice that we require our 26,000 members
3 to sign. So, I'm looking forward to the dialogue.

4 Thank you.

5 MS. HARRINGTON-McBRIDE: Thank you.

6 MR. HILE: Does anyone have anything else to add
7 on Elliot's suggestion about adding misrepresentations?

8 Susan Grant?

9 MS. GRANT: Susan Grant, National Consumers
10 League.

11 I just want to go on the record in supporting
12 the NAAG proposal.

13 MR. HILE: The next question regarding the
14 prohibited representations, are any of these
15 prohibitions likely to be overly burdensome to
16 charities?

17 Jerry?

18 MR. CERASALE: Yeah, Jerry Cerasale with DHA.

19 And of course my comments are strictly on this,
20 not whether or not we should even have this or afford
21 it.

22 MR. HILE: I'm assuming you'll reserve that
23 issue.

24 MR. CERASALE: On number four, the fourth
25 misrepresentation, and these are misrepresentations not

1 required disclosures, it appears to -- it appears to be
2 focused on the particular call, and not the campaign.

3 In other words, a misrepresentation that --

4 MR. HILE: Maybe it would help if I read it
5 again.

6 MR. CERASALE: Please, go ahead.

7 MR. HILE: Misrepresenting the percentage or
8 amount of any charitable contribution that will go to a
9 charitable organization, or to any particular charitable
10 program after any administrative or fundraising expenses
11 are deducted. That's the one you were commenting on,
12 right?

13 MR. CERASALE: Right. I want to make sure that
14 that applies not to the call itself, but to the campaign
15 and what is viewed as the campaign. For example, if a
16 charity is set up with a -- where they're paying off the
17 administrative expense right up front, and then later
18 when you make the call in the beginning of the campaign,
19 100 percent of my donation may very well go to the
20 administrative expenses, but overall in the campaign,
21 you're going to have 50 percent go to the -- go to
22 administration or 10 percent go to administration.

23 Where you want to have it applied to the
24 campaign, and not to the particular call, because the
25 call itself, depending on where you are in your

1 spending, know the exact dollars that Jerry Cerasale
2 gives to the charity may be used anywhere in the
3 campaign. I think you want to try to look at the
4 overall campaign and clarify at least that it's not
5 pinpointed to the call that if there were some way to
6 follow where Jerry Cerasale's money went, that it went
7 to administration, then there was a misrepresentation,
8 when, in fact, we may have said 50 percent goes into
9 administrative and 50 percent goes to this, and that is
10 true, but Jerry's money all went to administration.

11 I don't know, did I confuse you, Allen? I'm
12 sorry if I did.

13 MR. HILE: I'm afraid you did, because I guess
14 I'm -- do you mean to suggest that there's sort of a
15 sliding scale or a situation where we get to keep the
16 first, you know, \$100,000 that we collect? Isn't there
17 a contract at the get-go that says how much the
18 fundraising will be getting? How much will be for
19 administrative?

20 MR. CERASALE: The contracts can go in a lot of
21 different ways. Some can be -- you're going to pay so
22 much. I'm going to spend \$100,000 on this and we expect
23 to collect a million. Which would mean that the first
24 hundred -- it might be set up that the first \$100,000
25 collected by the charity goes to administrative

1 expenses, and I may give to the -- I won't give the
2 first \$100,000, I can promise you that, but we may
3 give -- my contribution might be within the first
4 \$100,000, so it all goes to administration, and then but
5 if your contribution came in the second \$100,000, 100
6 percent would go to the beneficiary.

7 And I just think you want to clarify that the
8 misrepresentation is on the campaign, not on the
9 particular call. I'm not saying -- this is just an
10 added assurance of protection for me. I'm not certain
11 that anybody would push that if you gave -- if you told
12 people 10 percent was going to overhead and that it was,
13 in fact, the case, that no one would probably go down
14 and look at specifically where did Jerry's money go, but
15 just in case, to clarify it.

16 MR. HILE: I don't think we would be trying to
17 trace a particular asset.

18 MR. CERASALE: Yeah, that's why I think maybe if
19 you make that, the percentage not of any charitable
20 contribution, but the percentage or amount of
21 contributions in the program, in the particular program
22 go. So, make the representation on the amount of the
23 contribution that is in the program where it will go.

24 Thanks.

25 MR. HILE: Mr. Callan?

1 MR. CALLAN: Yes, and again, apart from the
2 question of whether it's appropriate to be regulating
3 fundraisers at all, I would just like to raise the
4 question about just generally on all of these
5 misrepresentations, on whether this is even necessary.

6 The fundraising community as it applies to the
7 nonprofits and charities is very heavily regulated in
8 the states. Certainly misrepresentations of any kind
9 are prohibited under the state charitable solicitation
10 laws in virtually every state. And those are enforced
11 aggressively, certainly based on my experience, and the
12 question is, does it make any sense to add another layer
13 of regulation here that is virtually duplicative of the
14 state prohibitions. Certainly from a fundraising
15 community standpoint, I don't think it's necessary, it
16 does add additional compliance costs, which ultimately
17 takes money away from the non-profit client.

18 MR. HILE: Does anybody have a reaction to that,
19 to Mr. Callan's comment?

20 MR. MITCHELL: I agree with it, but other than
21 that.

22 MS. MAEHARA: I do, too.

23 MR. HILE: Go ahead.

24 MR. MULVIHILL: David Mulvihill on behalf of the
25 Make-A-Wish Foundation.

1 I would respectfully disagree from our
2 perspective with the suggestion that the industry is
3 sufficiently and adequately regulated, and in fact, on
4 behalf of the Make-A-Wish Foundation, we not only
5 support the proposed prohibited misrepresentations, as
6 well as the NAAG suggestion about location, but we have
7 urged the Commission to include in Roman I, before
8 nature, the identity, nature, purpose, et cetera, and
9 that's based on our experience.

10 I mentioned in my introduction that we do not
11 engage in telemarketing and we've always had a policy
12 against it. Despite that fact, we are and for years
13 have been inundated with complaints about telemarketers
14 who we were told have represented themselves as being
15 with our organization, or calling on our behalf. The
16 problem is that these complaints are usually from people
17 who have been treated rudely or have been subjected to
18 what they consider unmerciful harassment by
19 telemarketing, and because it's done in our name, we are
20 the ones that kind of bear the burden.

21 When we submitted our comments to the
22 Commission, we submitted also an appendix of several
23 hundred sample complaints that we've received over the
24 years. I brought with me a supplemental appendix of
25 some of the complaints we've received in the last two

1 months since we filed our original submission. There
2 are, if I counted correctly, 57 of them in the last two
3 months.

4 It's an enormous problem, and what's so
5 difficult for us is frequently there's not much of
6 anything that we can do, either than to do everything
7 within our power to persuade the person that it wasn't
8 us who upset them, and if it appears to be coming from a
9 specific geographical area, we will issue a news release
10 reminding consumers to be careful and telling them that
11 if they hear from somebody they can be sure it's not us,
12 no matter what the solicitor says, but often times
13 because of the caller ID question, which I know was a
14 separate issue, there's no way that we know who's
15 responsible.

16 So, we would ask that the Commission add
17 identity to the list; and one other suggestion that we
18 have based on our experience is many of the people who
19 we hear from report that during the solicitation they
20 are told that they donated \$15 last year and that
21 they're hopeful that we can count on you for our
22 support -- for your support this year as well, and so
23 the thought occurred to us that perhaps an appropriate
24 added misrepresentation would be misrepresentations
25 regarding a donor history when, in fact, there is none.

1 MR. HILE: Thank you.

2 Jerry, do you want to add something?

3 MR. CERASALE: Yeah. First, it's not just
4 nonprofits that have the problem of someone misusing
5 their name, but adding identity would be an overload in
6 the sense that the -- that this is the misrepresentation
7 for it, the required disclosures portion of the rule
8 does say you must identify the charitable organization
9 and there is a requirement that you can't make it -- lie
10 about that. So, I think that that's already -- that is
11 already covered.

12 The point being, the other point is, all the
13 misrepresentations against Make-A-Wish Foundation are
14 already violations of the law, because that is a
15 deceptive -- a horrendously deceptive practice, so that
16 there is already a huge body of law, not just in the
17 federal government, but also in the state governments to
18 use and hopefully go after those individuals who are
19 trying to usurp your name and trying to make a profit
20 and also hurt you. And the beneficiaries, because not
21 only is it hurting your name, it's also taking away
22 funds that could have been given to you.

23 MR. MULVIHILL: It's also defrauding legitimate
24 donors.

25 MR. CERASALE: Yes.

1 MR. HILE: Elliot?

2 MR. BURG: I just want to -- Elliot Burg for
3 NAAG.

4 I just wanted to acknowledge the importance of
5 enforcement at the federal level, it's true that the
6 states, many states are quite aggressive in pursuing
7 charities fraud; on the other hand, many of the paid
8 fundraisers for charities operate on a regional or
9 national level, and the states end up chasing these
10 companies from one jurisdiction to the other, and in the
11 bigger cases, it seems to me that it would be incredibly
12 important to have the FTC involved.

13 We also support the addition, if the Commission
14 is willing, of identity, and other past donations to the
15 list of misrepresentations.

16 MR. HILE: Katie, I believe you have a follow-up
17 question?

18 MS. HARRINGTON-McBRIDE: I do. To Jerry's
19 suggestion about the percentage disclosure, I'm
20 wondering if anyone at the table might have a reaction
21 to this: And I think I'm understanding it. It doesn't
22 seem to me that it's problematic the way that Jerry has
23 framed it if you have a situation where the million
24 dollars is actually collected, not just the first
25 \$100,000, and so what I'm wondering is, is there a

1 potential for fraudsters to exploit it if we were to
2 adopt that provision and can anyone suggest curative
3 language?

4 (No response.)

5 MS. HARRINGTON-McBRIDE: Take a minute and
6 think.

7 MS. MYERS: If I understand your question,
8 Katie, I guess ultimately the fraud question is dealt
9 with in the sense that in the final analysis it's only
10 deceptive if it did stop at the first \$100,000, and what
11 Jerry has proposed is that it be no misrepresentation
12 based on the overall campaign.

13 So, in other words, if let's say a fundraiser,
14 to use Jerry's example, raised the first \$100,000, and
15 said, well, got our money, we're out of this, we can go
16 home now, that if they had represented that the
17 administrative costs were only, for example, 10 percent
18 of the campaign, it would have been a misrepresentation.

19 I do think, though, you have to be careful
20 because not to fraudulently use the Make-A-Wish name in
21 my response, but much of charitable solicitation is a
22 make-a-wish. It's depending on the generosity of the
23 response of the American public, and like any direct
24 marketing campaign, it's not always entirely
25 predictable.

1 So, I do think, I'm not sure -- I don't have a
2 specific answer for the precise language, I would have
3 to think about it, but I think the point that Jerry
4 makes is very important.

5 MR. HILE: If it's true that you can't say what
6 percentage of contribution -- well, contributions as a
7 whole would be going to administration and which part
8 would go to the good works, wouldn't it be prudent to
9 say we really won't know until we're finished with the
10 campaign, and that way you would avoid making a
11 misrepresentation.

12 MR. ANDERSON: But, Allen, doesn't that sort of
13 throw the baby out with the bath water, and --

14 MR. HILE: I would like to hear these people
15 tell me whether it's a baby in bath water.

16 Yes?

17 MR. CERASALE: Allen, you're right in the middle
18 of something that's happening on this in a different
19 channel of communication, and that being mail. Many
20 states require that you say what percentage of the
21 campaign is going to go to overhead, and that's a
22 requirement, and it's not an estimate, so some states
23 have an estimate, other states have a requirement of how
24 much you're going to do. In order to meet that
25 requirement, some charities that go and sign a contract,

1 because they don't have lots of money up front, but they
2 sign a contract with a fundraiser, someone is going to
3 help them, a letter shop, putting together all the
4 mailing costs, et cetera, that you get 10 percent of the
5 proceeds.

6 So, in that way there, I can affirmatively say
7 10 percent, or 50 percent, I mean, whatever, as long as
8 you don't lie, whatever it might be, and people know it.
9 Making that kind of contract violates the Federal Postal
10 regulations because it becomes a cooperative mailing
11 that the fundraiser now has a piece of the pie and
12 actually has an interest in the campaign, and therefore
13 you're not allowed to use non-profit mail rates.

14 So, it's a catch-22 for many charities where
15 there may very well be court cases and so forth on it,
16 they're still trying to work administratively with the
17 Postal Service on it. So, not to -- we don't think you
18 shouldn't be here, but by being here, the way you wrote
19 the prohibition on misrepresentation is the right way to
20 write it. Stay away from forcing you to give the actual
21 percentage, because then you put the charities in a
22 catch-22 situation that it forces them on a certain --
23 the only way to do that, if they're using an outside
24 vendor, is to go to the percentage basis, because they
25 don't know the full end.

1 They have histories, you can give estimates, you
2 can say what you believe, because you have histories, I
3 know 9/11 changed some things, but things are coming
4 back to more normal on charitable giving, but I think
5 there are histories, I think you can ask any of the
6 charities here, that they know basically what they
7 expect this campaign to produce, and how much they
8 expect to give to the beneficiaries.

9 So, I think you want to leave it in that
10 direction, rather than try and get really down to the
11 point, because then you get into the problems of
12 estimation.

13 MR. HILE: I don't think there's any suggestion
14 that we would require disclosure.

15 MR. CERASALE: Yeah, right.

16 MR. HILE: Susan Grant?

17 MS. GRANT: But I do think it makes sense that
18 if you can't really say how much is going to go to what
19 at the time of the solicitation, that you simply then
20 shouldn't make a representation in that regard.

21 I do want to support the Make-A-Wish proposal
22 about misrepresenting identity. That's something that
23 we also said in our comments. We hear a lot of
24 complaints from consumers about professional fundraisers
25 who are using names similar to the names of well-known

1 charities, and we know that that's a significant
2 problem. We wouldn't think that you would necessarily
3 have to spell all of these things out, but it is very
4 helpful for law enforcement to have particular
5 violations to point to, and you wouldn't think that
6 these things would be a burden for legitimate
7 fundraisers either, since I'm assuming that at least
8 none of the fundraising companies that are represented
9 here would do any of these things.

10 MR. HILE: Could we hear from Paulette, then
11 Anne, and Thomas.

12 MS. MAEHARA: Thank you very much.
13 Let me speak to a couple of issues that have
14 been raised.

15 MR. HILE: Speak into the microphone.

16 MS. MAEHARA: One is percentage-based
17 compensation, and Allen, I would like to disagree with
18 Jerry's comments relating to professional fundraisers.
19 Our 26,000 members are required to sign a code which
20 prohibits them from receiving a percentage of dollars
21 raised. And they also need to encourage their
22 organizations to stay away from those practices.

23 So, by and large, our members do not do that.
24 If they do, they are subject to potential violations of
25 the code and the enforcement procedures that we have in

1 place. So, from that perspective, the practice probably
2 does still continue, but I do not believe that it is
3 pervasive in the industry.

4 Regarding the percentage of funds raised and the
5 issue that is being put on the table as it relates to
6 disclosure, and the point that Jerry made a minute ago
7 regarding direct mail solicitation, most direct mail
8 programs do include the percentage of dollars that go to
9 programs and/or services as computed by the total
10 revenue and expense for the organization. So, if you
11 wanted a disclosure requirement to the public as it
12 relates to percentage of funds raised, you could use the
13 overall organization's dollars that go into their
14 programs and services or dollars to mission as computed
15 by the overall amount of fundraising costs.

16 Now, there are a lot of us in this room that can
17 debate how those numbers are achieved, but that is one
18 way to provide language to the individual from -- or
19 disclosure language to the individual.

20 Regarding the disclosure requirements that have
21 been proposed, AFP does not believe those are
22 burdensome, and in fact, believe that they should be
23 done. As it relates to an address, we're, you know,
24 from our perspective, we don't know what that actually
25 adds, because many times organizations are doing

1 cross-country -- cross-state boundary solicitation, and
2 an address may not be meaningful, but if the donor were
3 to ask for an address, we would believe that it should
4 be disclosed. But I think there is -- there is a way to
5 provide disclosure regarding the percentage of dollars
6 raised, if that is what the FTC is looking to do.

7 MR. HILE: Anne, can you hold just one second,
8 because I think Keith has a follow-up that he wants to
9 ask.

10 MR. ANDERSON: I just was curious to know from
11 Paulette, why, what's the reason for prohibiting your
12 people from doing percentage-based?

13 MS. MAEHARA: That's a long discussion and I'm
14 happy to get into it.

15 MR. HILE: Just the short version, please.

16 MS. MAEHARA: But the short version, the short
17 version is very simple. Philanthropy is based on the
18 desire to give, and it is a -- it's an act of charitable
19 giving. I mean, it's not -- it's not private inurement.

20 To add the burden of or to add the
21 percentage-based compensation component to it provides
22 potential personal inurement to an individual, who may
23 or may not have any relationship or any involvement in
24 securing a gift. And so we do not believe that it adds
25 anything to the charitable giving process.

1 MR. HILE: We're getting a little feedback on
2 these mikes.

3 Anne?

4 MS. SCHNEIDER: You learn some interesting
5 things at these hearings. This has been interesting.

6 I simply wanted to point out that in terms of
7 required disclosures and percentages or amounts spent on
8 fundraising expenses or administrative overhead, the
9 only disclosures that are currently required are in the
10 terms of registrations filed with the states. There are
11 no requirements that I'm aware of ever since the Riley
12 case that require an actual -- a voluntary disclosure I
13 guess on the part of the charity on the professional
14 fundraiser to make that disclosure during the
15 solicitation itself.

16 MR. HILE: Thomas?

17 MR. GOODMAN: Yeah, thanks.

18 As far as Hudson Bay is concerned, calling for
19 small advocacy groups, there are lots of things that
20 could be misrepresented that go beyond what these rules
21 specify. For example, you could be as a caller
22 misrepresenting facts on the ground about why money is
23 needed for National Organization for Women or the Sierra
24 Club or Mothers Against Drunk Driving, or any of those.
25 But you can't list them all. And it seems to me, we

1 could go around the table forever listing all the things
2 that could be misrepresented.

3 For example, the identity, the location, the
4 cost of funds ratio and so on, those are just things
5 that spring to mind, but there's 30,000 others I could
6 continue to name, such as what legislation is coming up
7 that affects women, I could be lying about that in order
8 to induce a contribution.

9 So, it seems to me what all we really need here,
10 and we're in support of, is a general rule that says
11 that you may not misrepresent any material fact.

12 MR. HILE: Well, we have a sort of catch-all
13 provision which suggests -- which is at 310(3)(a)(4)
14 which is a prohibition against making a false or
15 misleading statement to induce any person to pay --

16 MR. GOODMAN: That's all that's needed.

17 MR. HILE: -- for goods and services for which
18 would be considered a charitable contribution.

19 MR. GOODMAN: There's something more, too, and
20 that is as far as cost of funds ratio. When my client
21 calls for these small groups, and asks for funds for,
22 you know, Freedom for the Kurds or, you know, whatever,
23 Save the Snail Mariners, whatever the cause is, there is
24 no way to know in advance how popular that is going to
25 be and there's no way to predict how much money you are

1 going to get.

2 We know the denominator, we know how much it
3 costs to call. It costs whatever it costs to call, a
4 buck a call or whatever it is, but we don't know the
5 numerator. So, there's no way that anybody could
6 misrepresent a cost of funds ratio unless they're
7 actively saying something.

8 So, it seems to me that the general prohibition
9 against misrepresentations, all that's needed, and I
10 respectfully suggest we need to move on.

11 MR. MITCHELL: Al, could I just comment, please,
12 Al, on that subsection 4, the catch-all provision?

13 MR. HILE: Yes.

14 MR. MITCHELL: The question is whether some of
15 your prohibited misrepresentations are over burdensome,
16 and that one is, for the simple reason that it's much
17 too broad. The catch-all forbids a false or misleading
18 statement.

19 MR. HILE: Which is already prohibited by
20 section 5.

21 MR. MITCHELL: Yes, that's true, but in this
22 context where the target is the charitable fraudulent
23 misrepresentation, it should be limited to a material
24 fact. The way you've written it here or someone has
25 written it, it would include statement of an opinion, it

1 would include statement of a material fact, and neither
2 of which should be a basis for the violation of the
3 rule, particularly where the target is fraud.

4 MR. HILE: Tyler?

5 MR. PROCHNOW: Tyler Prochnow on behalf of ATA.

6 I think we would just like to support the
7 comments of Mr. Goodman. Also, I think conceptually,
8 everybody around this table is in agreement maybe for
9 the first time over the last three days, completely in
10 agreement that there are no -- there's no such thing as
11 a novel or an acceptable misrepresentation, and short of
12 going through Mr. Goodman's list of 30,000 different
13 things, I think we probably do need to stop trying and
14 list them, the minute you start getting into lists, you
15 end up with situations like Jerry pointed out, campaign
16 versus contribution, you start getting into
17 interpretations, and if you leave it at just that
18 blanket prohibition on misrepresentations and certainly
19 misrepresentations of a material nature, you've covered
20 what you needed to do without bringing any subjectivity
21 into it.

22 MR. HILE: Although we've already touched on
23 required disclosures as opposed to misrepresentations, I
24 want to move on and ask some more specific questions
25 about them, but before I ask the question, I want to

1 read the provision. We are talking about 310.4(e),
2 Required Oral Disclosure in Charitable Solicitations:
3 It is an abusive telemarketing act or practice and a
4 violation of this rule for a telemarketer on an inbound
5 telephone call to induce a charitable contribution, to
6 fail to disclose truthfully, properly and in fair and
7 conspicuous manner to the person receiving the call the
8 following information: One, the identity of the
9 charitable organization on behalf of which the request
10 is being made; and two, that the purpose of the call is
11 to solicit a charitable contribution.

12 The question is, are the proposed disclosures
13 adequate to protect owners, and secondarily, are the
14 required disclosures overly burdensome to charities?

15 Yes, sir?

16 Only if you want to speak have your tent up,
17 okay?

18 MR. CALLAN: And I have a question on the item
19 2, for the purpose of the call is to solicit a
20 charitable contribution, the definition of charitable
21 contribution is very broad.

22 MR. HILE: Yes, we are going to cover that next.

23 MR. CALLAN: And the question then -- the
24 question I have is how that disclosure is to be made.
25 For example, many of our clients are not traditional

1 charities, they're not 501(c)(3) organizations, they're
2 501(c)(6), (c)(5), (c)(4), (c)(8). They're not
3 charitable organizations, simply in a legal sense. The
4 question for us is how is this disclosure to be made.
5 It seems to me the disclosure should be a truthful one.
6 To me it's somewhat misleading, certainly in the context
7 of our clients, to say that the purpose of the call is
8 to solicit a charitable contribution. The purpose of
9 the call is not to solicit a charitable contribution,
10 it's to seek -- to get their message across and also to
11 seek financial support for that organization and their
12 cause.

13 Now, whether or not that's a charitable
14 contribution under the legal definition, it really is
15 not a charitable contribution in the true sense. So,
16 I'm assuming that we could comply with this particular
17 disclosure by indicating specifically why we're calling.
18 And not using the terminology "charitable contribution."

19 MR. HILE: Okay. Elliot, I think you were next.

20 MR. BURG: Elliot Burg, NAAG.

21 I wanted to note that many states now require
22 two mandatory disclosures in paid fundraiser calls that
23 are not on this list, and one of those is the -- to use
24 the words of Riley, the professional status of the paid
25 fundraiser. In Vermont the disclosure would go, my name

1 is such and such, and I'm a paid fundraiser for the
2 American Red Cross, and the second is the name of the
3 caller, and we believe that both of those disclosures
4 are well within what is allowed under Riley, to the
5 extent that the Commission might consider there to be
6 some problems with mandating disclosure of the purpose
7 of the call, because it may be a mixed purpose and it
8 may be partly to alert people to a particular cause, or
9 partly to solicit. It might be possible to bump (E)(2)
10 into the prohibited misrepresentations, because I'm not
11 sure that the purpose of the call is right now a listed
12 prohibited misrepresentation.

13 MR. HILE: Does anybody have a reaction to
14 Elliot's suggestion that additional required disclosures
15 be added mainly that the caller is representing or is a
16 professional fundraiser? Anybody have a reaction to
17 that? Anybody disagree with it?

18 Yes, sir?

19 MR. MULVIHILL: David Mulvihill, Make-A-Wish
20 Foundation.

21 We, too, urged the additional disclosure of the
22 fact that someone is a paid professional fundraiser, and
23 also noted in our comments that despite the trilogy of
24 Supreme Court cases, the Supreme Court in Riley
25 specifically carved out -- said nothing in this opinion

1 should be taken to suggest that you can't require a
2 fundraiser to disclose unambiguously his or her
3 professional status; on the contrary, such a requirement
4 would withstand First Amendment scrutiny.

5 So, we do believe that's important because a
6 number of the people who call us to complain believe
7 that it is a Make-A-Wish volunteer who is calling them,
8 and as the Supreme Court in Riley pointed out, it
9 requires or suggests at least requiring the disclosure
10 of someone's professional fundraising status, gives
11 notice to the consumer that some portion of their
12 donation may go to the fundraiser rather than the
13 organization. And that allows them the opportunity to
14 ask follow-up questions if they deem it appropriate to
15 do so.

16 MR. HILE: Jerry, do you have something to add
17 on Elliot's suggestion that there be another required
18 disclosure that the caller is a professional fundraiser?

19 MR. CERASALE: Jerry Cerasale, DMA.

20 Yes, just trying to bring in my comments from
21 two days ago as the discussion of whether you implied --
22 are applying this to the professional fundraiser or not,
23 that a charity doing it on its own behalf on the regs
24 and trying that umbrella. I talked about creating
25 different stratum, a larger -- the largest charities

1 would be able to use their own in-house organization,
2 some of the smaller ones would use volunteers, but the
3 vast majority are required, they don't have to try and
4 hold down costs to try and work the best.

5 We use professional fundraisers. I think you
6 just really setting up, if you would put it in the
7 required disclosure here, you're setting up another
8 class, another distinction among nonprofits, and you
9 have to understand that the -- even if you're -- even if
10 you go forward, we don't -- we don't in that, but even
11 if you go forward with this, you are covering only those
12 that are using outside telemarketers, and you're just
13 really setting up a strata of helping certain charities
14 and significantly harming others.

15 MR. HILE: Does anybody else have anything to
16 add on this?

17 MR. MITCHELL: Yeah.

18 MR. HILE: Glenn?

19 MR. MITCHELL: Yeah, I have just a very narrow
20 comment, this is Glenn Mitchell.

21 We have a concern, with respect to the word
22 "promptly" juxtapositioned with the purpose of the call,
23 there are many -- there are some members --

24 MR. HILE: That's not the issue I'm asking
25 about. I'm asking about whether it's a good idea to add

1 another required disclosure of the professional status.

2 MR. MITCHELL: All right, I'll --

3 MR. HILE: Does anybody have a response to that,
4 and we'll get to it later.

5 Thomas?

6 MR. GOODMAN: My client, Hudson Bay, has a
7 calling center in Lincoln, Nebraska. One of their
8 clients has an in-house calling center in Ohio. When
9 the in-house calling center, and they're all paid by the
10 organization, they call for good government purposes,
11 they're in favor of term limits and things like that.
12 And when the calling -- internal calling center gets
13 overburdened, they take some of the names that they were
14 going to call and they hire a for-profit calling center
15 in Lincoln, Nebraska to make the calls.

16 The people who make the calls in Nebraska are
17 saying exactly the same words as the people in Ohio.
18 They're calling for exactly the same purpose. There's
19 no fraud involved. The invasion of the calling
20 recipient's privacy is exactly the same, and I don't
21 understand how it advances any governmental interest to
22 make one set of callers say one thing and another set of
23 callers to say the other when all funds go for the same
24 purpose to the same advocacy group.

25 MR. HILE: Thank you.

1 I would like to move on now.

2 Elliot, do you actually want to speak, or is

3 your tent just up from before?

4 MR. BURG: Well, I actually omitted reference to

5 one other issue under disclosures, if we're still

6 talking about that. It really goes to the issue of no

7 preemption, but I wanted to note that there are many

8 states that require, again, I think consistent with

9 existing case law, a disclosure that financial

10 information on the percentage split between a paid

11 fundraiser charity is available from a particular

12 source, for example, from the state. You may have to

13 list a telephone number or website.

14 Now, if we're not asking that that be added to

15 the rule, but --

16 MR. HILE: You just don't want it preempted?

17 MR. BURG: Exactly.

18 MR. HILE: Moving on now to the next set of

19 questions which focus on the definition of charitable

20 contribution, we start by reading it. It's at --

21 MR. MITCHELL: Well, Al, I think we just left

22 this proposed disclosure.

23 MR. HILE: You want to talk about "promptly?"

24 MR. MITCHELL: I did, and I'm wondering what the

25 press is on time, since we have a jump on this session

1 and we go until 1:00. Am I missing something on the
2 timing here? We seem to be under a rush and I don't
3 know what the rush is.

4 MR. HILE: Go ahead. I want to keep the
5 discussion focused on the things that we need.

6 MR. MITCHELL: I see.

7 MR. HILE: I'm not going to drop past you, I'm
8 certainly going to give you an opportunity to say what
9 you want to say, but I want to make sure we get what we
10 need.

11 MR. MITCHELL: I just want to talk about this
12 very narrow question with respect to the "promptly"
13 disclosure of the purpose of the call is to solicit a
14 charitable contribution.

15 And let me give you an example of one member of
16 the coalition, Mothers Against Drunk Driving. Many
17 times they will call on behalf of the MADD, and the
18 intent to raise money comes at the end of the
19 conversation. The real purpose of the call is to enlist
20 support for the work of MADD, and only when the
21 recipient of the call begins to enter into discourse
22 does the solicitor or the person calling on behalf of
23 MADD get into the subject of money.

24 Now, under this particular regulation, it would
25 require a prompt disclosure of the purpose of the call,

1 i.e. to solicit a donation, when that is not the case.
2 It seems to me that would be solved if you deleted the
3 word "promptly" from that regulation.

4 MR. HILE: Well, how do you square that with the
5 requirement of the PATRIOT Act that says that the
6 Commission is to add "a requirement that any person
7 engaged in telemarketing for the solicitation of
8 charitable contributions, donations or gifts of money or
9 any other thing of value shall promptly and clearly
10 disclose to the person receiving the call that the
11 purpose of the call is to solicit charitable
12 contributions?"

13 MR. MITCHELL: One way to do it would be to
14 limit that when the purpose, the only purpose is to
15 solicit funds, from the purposes of a political message
16 or a charitable message or any other message as the
17 First Amendment protects, then that caller should not be
18 burdened by the requirement of this rule which says I
19 must promptly at the outset of my message say I'm here
20 to raise money when, in fact, that's not the case.

21 MR. HILE: How does a call that isn't about
22 raising money have any relevance here? If you're not
23 raising money, it's not covered.

24 MR. MITCHELL: Well, we are raising -- one of
25 the purposes of the call is to raise money, if there's a

1 reception by the person who calls to indicate that she
2 supports the purpose of the call, then money becomes an
3 issue. But on the issue, you've got to announce at the
4 outset.

5 MR. HILE: This person is supposed to volunteer
6 to contribute, they're not being asked to contribute?

7 MR. MITCHELL: No, but that could come in the
8 fourth minute of the conversation, and we would violate
9 this rule if we didn't say it promptly right up front.

10 MR. HILE: Thomas?

11 MR. GOODMAN: Among the calls my client makes is
12 for global organizations who are just getting started,
13 for example, local zoning laws get passed, and the
14 neighbors get together, form a non-profit, and in about
15 two days, and the vote is coming up before the city
16 council, and in three weeks or two weeks and they have
17 to call 2,000 people to let them know about what's
18 happened, what's actually happened a couple of times in
19 the last couple of years. They've been locating an
20 amphitheater in a residential neighborhood and you have
21 to notify the whole neighborhood. Now, they call and
22 they want to notify the neighborhood about this new
23 controversial zoning ordinance that's about to be passed
24 and they have to pay for that call because they can't
25 notify everybody with volunteers.

1 How do they get that call to be paid for? Well,
2 at the end of the call, after they've notified
3 everybody, they get -- I'm getting to the "promptly"
4 point. After they notify everybody about the
5 controversial zoning ordinance and what effect it will
6 have and so on, they say, by the way, can you spare a
7 couple of bucks so I can make the next call to go to the
8 next person, let them know about this.

9 Now, what's the purpose of the call, is it to
10 let people know or is it to raise funds? Well, it's
11 both. It's to raise funds so that you can let people
12 know about the mission of the call. The purpose of the
13 call. The purpose of the call is to -- is awareness.
14 The raising funds is only to raise awareness. Now, if I
15 have to in that call, I'm a caller, if I have to
16 promptly say at the beginning of the call, promptly,
17 under penalty of criminal sanction --

18 MR. HILE: No criminal sanction.

19 MR. GOODMAN: Oh, no criminal sanction. Civil
20 sanction. The purpose of this call is to seek a
21 charitable contribution, that would be misleading,
22 number one. Number two, it interferes with my messages,
23 and it's unconstitutional under Riley. Under Riley,
24 it's important for the speaker -- this is protected
25 noncommercial, noncommercial, fully protected free

1 speech, and I'm notifying my neighbors about a
2 controversial issue. And the fact that I'm also raising
3 money in the process is irrelevant, and I don't think
4 that you can hinge anything -- certainly not telling me
5 when to say that the purpose of the call is to ask for
6 money. They'll find out that I'm asking for money soon
7 enough. I first have to hook them into it.

8 Now, at the risk of droning on here, and feel
9 free to cut me off, but in Mexico, if you're an alien, a
10 non -- if you're an alien to Mexico, you're from
11 Guatemala and you move to Mexico without permission,
12 your children can't go to school. So, all the
13 undocumented Mexicans who are from Guatemala and Costa
14 Rica, places like that, their children are roaming the
15 streets. And if you want to start up a charity and you
16 want to call for those kids who are not going to school
17 in Mexico, and you want to fund a school in Mexico, do
18 you have to start off that call by saying, I'm trying to
19 raise money from you? You will get a hang-up before you
20 ever get the mission out. You want to first get those
21 people interested in your issue, then ask them for
22 money.

23 MR. HILE: Jeff?

24 MR. KRAMER: Jeff Kramer, AARP.

25 I'm sorry, we have to -- AARP, we certainly go

1 along with the fact that we need to disclose promptly
2 that you're raising money. This really smacks of the
3 whole problem that we have with telemarketing in general
4 is that you get people on the line and start to talk to
5 them for an extended period of time and then you come
6 back and try to sell them a product or service. And
7 many times certain numbers of consumers have shown over
8 the years, the longer you keep someone on the phone the
9 more vulnerable they are to purchase a product.
10 Sometimes they may want it and other times they may not.
11 So, I think it's the same thing with a charitable
12 contribution. If you're talking about a charitable
13 contribution and the person is philanthropic, they can
14 make a decision based on that. But I don't think you
15 can drag them along and say by the way, we're raising
16 money.

17 MR. HILE: Susan Grant, and then we're going to
18 move on.

19 MS. GRANT: I think it is important for
20 consumers to know up front that you are asking for their
21 financial support, and I think that that could be done
22 in the first few sentences of the call by explaining
23 that you want to tell somebody about something and seek
24 their financial support, you can then go on to elaborate
25 on the problem and wrap it up, but I don't think that

1 there's any difficulty with making that clear in a
2 prompt way.

3 MR. HILE: Okay. Now we're going to go on to --
4 go ahead.

5 Paulette?

6 MS. MAEHARA: Glenn just told me I'm going to
7 say the wrong thing. Paulette Maehara, Association of
8 Fundraising Professionals.

9 While I think we would be very sympathetic to
10 the issues of raising awareness and education, I do
11 agree with Susan, I think there is a reasonable way to
12 promptly disclose that you want to talk about the
13 mission and purpose of the organization, as well as
14 seeking financial support if that individual would be
15 receptive to that message. If not receptive to the
16 financial support message, then continue with the
17 awareness message. I think there is a reasonable way to
18 do that.

19 MR. HILE: Thank you. Okay, the definition --

20 MR. GOODMAN: Allen, can I ask a quick question?

21 MR. HILE: Sorry, Michael, I didn't see you.

22 MR. CALLAN: Mr. Goodman, if the call recipient
23 interrupts the pitch and says, "is this a call to
24 solicit a donation," what is the answer provided by your
25 caller?

1 MR. GOODMAN: The answer is truthful. The
2 answer is we're trying to make you aware of the
3 situation, and ask for your help. And if there's
4 legislation pending, it would go on and say, we are
5 asking you to support the legislation, we are asking for
6 your funds, we are asking for you to tell your
7 neighbors, anything you can do to help us would be good.
8 We are not selling anything in the call, what we are
9 doing is raising awareness, sometimes it's a get out to
10 vote, membership drive, sometimes it's simply a survey,
11 sometimes it's a learning member to call their
12 legislator.

13 It depends. There's sometimes five or six
14 different purposes, but calling for advocacy nonprofits,
15 the fundraising, is for the purpose of the calling, not
16 the other way around. And your rules, your proposed
17 rules, as currently constituted, don't assume that.
18 They assume that the fundraising is to raise -- that
19 they are calling to raise funds, and for most of our
20 client's clients, the fundraising is to raise money so
21 that you can continue to call and make people aware of
22 things. It's like a newspaper ad or a billboard.

23 MR. HILE: Okay. The definition of charitable
24 contributions that's in the proposed rule is: Any
25 donation -- again, this is at 310(2)(F).

1 "Any donation or gift of money or any other
2 thing of value provided, however, that such donations or
3 gifts of money or any other thing of value solicited by
4 or on behalf of the following shall be excluded from the
5 definition of charitable contributions in accordance
6 with this rule: One, political clubs, committees or
7 parties; or two, constituted religious organizations or
8 groups affiliated with and forming an integral part of
9 the organization where no part of the net income inures
10 to the direct benefit of any individual and which has
11 received a declaration of current tax exempt status from
12 the United States Government."

13 The questions -- the questions that we want to
14 pose here are, is the definition of charitable
15 contribution a workable one, and are political clubs,
16 committees or parties and constituted religious
17 organizations appropriately excluded from the
18 definition?

19 Paulette?

20 MS. MAEHARA: Paulette Maehara, Association of
21 Fundraising Professionals. Do we have to keep repeating
22 that?

23 MR. HILE: We're mostly interested in making
24 sure that the court reporter hears you, and then the
25 people in the room.

1 MS. MAEHARA: Thank you.

2 From our perspective, I think the definition is
3 confusing. First of all, if it is not the IRS
4 definition of a charitable contribution, and in your
5 example, other types of tangible related --

6 MR. HILE: You mean any donation or gift of
7 money or any other thing of value?

8 MS. MAEHARA: Any other thing of value, thank
9 you, I was looking for the wording. I mean, you could
10 include blood in that, volunteers, well, there is
11 telemarketing for blood contributions, or blood
12 donations. So, I think it is a confusing definition.

13 Certainly churches are 501(c)(3)s, and
14 contributions to churches are eligible for tax
15 deductions by the individuals making those gifts. So, I
16 think it is a confusing definition, and the IRS
17 definition may be the better one, but it does include
18 religious institutions.

19 So, from our perspective, religious institutions
20 that are (c)(3)s, which most are. So --

21 MR. HILE: Is it your position that religious
22 fundraising should not be exempt from this definition?

23 MS. MAEHARA: We haven't taken a position on
24 that. I think probably the First Amendment would
25 probably prevent that, but we have not taken a position

1 on that. So --

2 MR. HILE: Thomas?

3 MR. GOODMAN: I'm Tom Goodman from Hudson Bay.

4 I think the definition of what a political club

5 is is vague, to say the least. Let's just find out, how

6 many participants here think the ACLU is of Ohio is an

7 exempt political club? Raise your hands if you think

8 the ACLU is a political club. Anybody? Okay, we've got

9 one. How about the Sierra Club? Is that a political

10 club?

11 MR. MITCHELL: It is, in part.

12 MR. GOODMAN: Okay, we've got two. Now,

13 remember, there are sanctions if you get these wrong,

14 and we don't have unanimity here at the table. We've

15 got the Minnesota State Bar Association that calls to

16 renew its members and lobbies the state legislature. Is

17 that a political club? Young Republicans of a college

18 campus. Let's see a show of --

19 MR. HILE: Do you have a suggestion for how that

20 part of the definition might be clarified?

21 MR. GOODMAN: Yes, I do. I think when we're

22 talking about advocacy groups of fully protected speech,

23 and you have to examine that. And I don't think you can

24 exempt the group, I think you have to exempt the speech.

25 And I think -- I'm not making this up, I don't think we

1 get to invent this here at the table or the FTC gets to
2 start over like we're at some kind of Constitutional
3 Convention.

4 We're talking about fully protected speech,
5 noncommercial speech, and there are rules about that
6 that are already laid down by the Supreme Court in the
7 First Amendment, and we have to respect those rules.
8 And those rules say that you don't get to exempt certain
9 speakers, you don't get to exempt the Catholic Church,
10 or the Methodists. You can -- you have to deal with
11 what they're saying.

12 For example, they could be selling surplus
13 classroom equipment in a commercial way. And you can
14 regulate that. If the National Abortion Rights League
15 wants to call in favor of pro-choice, they should have
16 the same playing field and the same rules as the
17 Catholic Church calling against abortion. Those rules
18 have to be the same. And it's protected by the First
19 Amendment.

20 Whatever the rules are, whatever they are, they
21 have to be the same for both groups, number one. And
22 number two, they have to respect the free speech
23 restrictions. That is to say, you have to respect the
24 First Amendment on these. And as presently constituted,
25 I don't think they do. I think you used the word

1 burdensome in the question, but it's more than
2 burdensome.

3 MR. HILE: Jerry?

4 MR. CERASALE: Thank you, Jerry Cerasale, Direct
5 Marketing Association.

6 I think, you know, as we said in our comments,
7 we think that there are -- you recognize, the FTC
8 recognizes and notices the First Amendment problem by
9 number 2 in the definition of sub 2, exempting religious
10 organizations. We think that the -- there's a First
11 Amendment problem straight off.

12 MR. HILE: We'll stipulate that there are First
13 Amendment issues here, for sure.

14 MR. CERASALE: And I do want to reiterate that I
15 think a definition of the IRS definition consistently
16 within government, I think even the Postal Service tries
17 to follow the IRS definitions, that that would probably
18 be less confusing within the community itself, within
19 the non-profit community itself.

20 I'll also just raise, I don't straight off,
21 looking at the PATRIOT Act, in defining charitable
22 contributions, I don't see anything that would grant the
23 ability to exempt any charity to you.

24 MR. HILE: Michael?

25 MR. CALLAN: Well, I would certainly not

1 recommend that religious organizations or political
2 groups or any others that are subject to fully protected
3 speech would be subject to the requirements of the
4 amendments. Like Mr. Goodman, I don't understand how
5 you can make the distinction between political groups or
6 religious groups, and in our case, non-profit
7 organizations. That to me puts value over freedom of
8 religious speech over other types of speech, which the
9 Supreme Court has repeatedly said that it's contrary to
10 the First Amendment and I hope that the FTC would be
11 sensitive to that and act accordingly by exempting that
12 type of activity completely from the TSR.

13 MR. HILE: Tyler, your tent is up.

14 MR. PROCHNOW: Yes. I think on behalf of the
15 ATA, we would probably support the idea of changing the
16 definition to conform with the IRS definition, but if
17 you chose not to do that or were choosing to continue
18 with this definition and tinker with it, in discussion
19 with our members, I can't see any way that you could
20 continue to include the "other thing of value" in this
21 definition and have this be any way workable.

22 We've heard from our consumer advocates
23 panelists for the last two days how the time getting up
24 to go to the phone is valuable, I mean, everybody's time
25 is valuable, and you would be talking about covering

1 every call out there asking somebody to use their time
2 to do something, whether it was the time to lobby their
3 state legislature on behalf of a particular issue, if
4 you asked them to come down and help stuff envelopes,
5 you've taken a -- such a broad definition when you use
6 that term, "other thing of value," that I can't see how
7 it could possibly work.

8 MR. HILE: Can you suggest what we might do in
9 light of the fact that the PATRIOT Act uses that phrase,
10 it amends the definition of telemarketing to include a
11 charitable contribution, donation or gift of money or
12 any other thing of value. So that the breadth of this
13 definition really is based on the PATRIOT Act. I
14 entertain any suggestion that you might have, what we
15 could do about the PATRIOT Act.

16 MR. CERASALE: To avoid the time item, I don't
17 know if it avoids the seeking blood item, which is
18 there, but you could try and go to, you know, real
19 property, personal property, and intangible personal
20 property as a thing of value, not -- and that would
21 exclude time. I don't know --

22 MS. MAEHARA: What about blood?

23 MR. CERASALE: I don't know how blood is
24 defined, I guess that's a personal property.

25 MS. MAEHARA: Isn't it a thing of worth?

1 MR. CERASALE: I don't know how to get around
2 that one. I'll leave to that other better minds here at
3 the table.

4 MR. MITCHELL: Just one brief point. I don't
5 think tinkering with the definition solves the
6 constitutional problem that you recognized with respect
7 to what the federal government here proposed to do,
8 which is encumber certain nonprofits and not encumber
9 others. There is no rational basis for that, there is
10 nothing in the PATRIOT Act that suggests that the FTC is
11 authorized to do that. There are a number of cases
12 which say it's improper.

13 And so the way to solve this is to exempt all
14 nonprofits. Now look at your video display, out in the
15 hall and over there, Telemarketing Sales Rule, we're
16 here to talk about non-profit organizations. Clearly
17 the U.S. PATRIOT Act, it's legislative history. Senator
18 McConnell who sponsored it made it very, very, very
19 clear, he never intended for the FTC to promulgate a
20 rule that applied to non-profit organizations. Thank
21 you.

22 MR. HILE: Does anybody else have anything on
23 these issues, on the PATRIOT Act changes?

24 Tyler?

25 MR. PROCHNOW: I'm sorry, I'm through.

1 MR. HILE: Elliot?

2 MR. BURG: I just wanted to add that I've been
3 informed that the Virginia code has an explicit
4 exemption of blood from the definition of "thing of
5 value," so it can be done.

6 MR. HILE: Katie, do you want to take this? I
7 think we're finished with this.

8 MR. GOODMAN: Well, I had one comment.

9 MR. HILE: Okay.

10 MR. GOODMAN: I hope this isn't redundant.

11 MR. HILE: I hope so, too, you made your point
12 and we have the written comments and we are aware that
13 there are First Amendment issues here.

14 MR. GOODMAN: Well, it's more than First
15 Amendment.

16 MR. HILE: But we do want to give you plenty of
17 time to say what you want to say.

18 MR. GOODMAN: Cut me off if you want, I think
19 this is valuable. I've only seen two purposes for this
20 regulation, one is the privacy of consumers, that is
21 their freedom from annoyance, and the second is the
22 antifraud, and I think besides the constitutional
23 issues, the First Amendment issues, we have to try to
24 get, cover, somehow, the governmental interest, and if
25 you're going to regulate and apply this to nonprofits, I

1 have to see how that somehow enhances privacy and
2 protects fraud.

3 MR. HILE: Are you talking about the whole rule,
4 or just the do-not-call part?

5 MR. GOODMAN: The whole rule.

6 MR. HILE: What do you think the PATRIOT Act
7 did?

8 MR. GOODMAN: Well, that's a good question. It
9 tried to -- it tried to apply the antifraud provisions
10 of telemarketing to charities. And in trying to do so,
11 it ran into constitutional quagmire, but remember, that
12 people who represent themselves to be charities already
13 promptly disclose who they are, and so requiring that
14 they disclose promptly who they are is -- does nothing
15 to enhance the fraud, antifraud provisions.

16 Also, for my client's groups, the Organic
17 Consumers Association, nobody calls up and says I'm from
18 the Organic Consumers Association, please donate money.
19 They're going to pick the Make-A-Wish people, they're
20 not going to pick Organic Consumers that nobody has ever
21 heard of. They're not going to pick the small
22 antizoning type groups that I'm talking about. And it
23 seems to me that as long as the rule picks up
24 everything, it runs not only into constitutional
25 problems, because of the First Amendment, it runs into

1 just being rationale problems, it runs into due process
2 problems.

3 MR. MITCHELL: Allen, could I just follow up on
4 your good question as to what the U.S. PATRIOT Act was
5 really intended to do?

6 MR. HILE: Please keep it brief.

7 MR. MITCHELL: With respect to the subject
8 matter that we're here to talk about. It says it right
9 in the first sentence of the proposed amendment, or the
10 PATRIOT Act says that the sales rule shall address
11 fraudulent charitable solicitations. That's what it
12 says.

13 Now, later it says when you talk about abusive
14 practices, you have a rule which says identify the
15 purpose of the charity and identify who you are, but the
16 target of the U.S. PATRIOT Act is that, fraudulent
17 charitable solicitations.

18 Senator McConnell says 15 times in the one page
19 of The Congressional Record, we're trying to fight these
20 bogus charitable organizations who are trying to raise
21 funds fraudulently. He's not talking about these
22 legitimate nonprofits, MADD, Mothers Against Drunk
23 Driving, who uses a professional solicitor to raise
24 funds because they made a free market decision that it's
25 more efficient and more effective to do it that way.

1 So, I think the FTC should back off, it should
2 go right to what your title is, Telemarketing Sales
3 Rule, it has nothing to do with non-profit organizations
4 that operate legitimately and nonfraudulently.

5 You know, while we're on this, this will be my
6 last time, I promise you. Some of us who are old enough
7 to remember in the mid-seventies, the FTC proposed a
8 kid-vid rule, I don't know if anybody --

9 MR. HILE: Let's not go into that, that's too
10 far afield.

11 MR. MITCHELL: This is my last sentence, I'm
12 going to just finish here. It was popular initially,
13 but when it was subjected to sunlight and it had the
14 kind of scrutiny we're giving here today, the FTC had
15 the good judgment to back away from it. And I submit
16 that's what they should do here with respect to
17 nonprofits.

18 MR. HILE: Michael, did you have something?

19 MR. CALLAN: A couple of brief comments that I
20 would like to share mainly on behalf of my client base.
21 And it's not a constitutional subject, it has to do with
22 the very practical impacts that the do-not-call registry
23 would have on them and there are real and immediate
24 concerns that in some cases have to do with even their
25 very survival. They, as we, expect that if the national

1 do-not-recall registry is implemented and it does apply
2 to fundraising on behalf of nonprofits and fundraisers
3 on behalf of nonprofits, a significant number of people
4 are going to opt into it. And I think the FTC's
5 estimate is 40 percent, we think that may even be
6 conservative based on some of our experiences in other
7 states.

8 If you eliminate 40 percent of the potential
9 donor base from a non-profit activity here, that's going
10 to have a devastating impact on what we're going to be
11 able to bring in on their behalf, and the message we're
12 going to be able to circulate on their behalf. And not
13 only that, the rule as it's presently constituted, the
14 problem is compounded by the fact that we're not even
15 going to be able to call prior supporters of these
16 organizations, perhaps even long-time supporters, if
17 their name appears on that do-not-call list.

18 Again, the economic impact, the realistic impact
19 in terms of getting across their messages is very
20 impairing, and these groups are going to have to cut
21 back their programs if this is in place, in some cases,
22 they're going to have to perhaps even cease existence.

23 So, I want you to understand that the
24 implications of this proposal are very, very
25 far-reaching and detrimental to the non-profit

1 community, especially small charities.

2 MR. HILE: I see tents up down there, are they
3 just residual or is there some other comment?

4 MS. MAEHARA: Well, it does --

5 MS. HARRINGTON: Your tent is up, would you put
6 your tent down.

7 MR. MITCHELL: I'm sorry, it's not really my
8 tent.

9 MS. MAEHARA: My comments do address the
10 do-not-call issue, but if that is premature, I will hold
11 my comments. We've jumped to there, so I'm just asking
12 a question.

13 MR. HILE: Well, actually, do-not-call was on
14 the first day, but if you have something you want to
15 say, go ahead.

16 MS. MAEHARA: Well, and I do know that you have
17 covered the subject, but certainly from AFP's
18 perspective, we are very troubled by the do-not-call
19 list, for many of the reasons that this gentleman has
20 already articulated very well. Particularly because it
21 does -- it does create an uneven playing field for
22 organizations who don't use professional solicitors
23 to -- or telemarketing firms to those that use their
24 in-house volunteer corps. And I don't think the intent
25 of the legislation was to inhibit charitable

1 contributions or philanthropy, and so we are troubled by
2 the do-not-call list, but I will hold my comments.

3 MR. HILE: What do you do now when a consumer
4 says don't call me anymore?

5 MS. MAEHARA: Well, our organization -- the
6 members of our organization are required, every year, at
7 least every year, to give their donors the option to opt
8 out of any solicitation calls, or any recognition of
9 their giving. Many organizations do that many more
10 times during the year, some do it in every type of
11 publication or information that goes out to their donors
12 and prospective donors. So, that is in what we call,
13 it's proactive. We go -- we ask for our members to do
14 that right up front.

15 MS. HARRINGTON: But what do you do when you
16 call someone and they say please don't call me anymore?

17 MS. MAEHARA: Then they come off the list.
18 Absolutely.

19 MS. HARRINGTON: Thomas, do you have something
20 that's not in your comments? I think we're having a lot
21 of repetition with what's been submitted, and there is
22 no greater weight given to comments that are repeated.
23 So --

24 MR. GOODMAN: Yes, it's a question. My -- this
25 is Tom Goodman, again, and I don't mean to be

1 repetitive, but my question is, I don't see the
2 difference between an in-house professional caller,
3 that's someone who's hired to call on behalf of the
4 charity, or an advocacy group, and a for-profit center
5 where they hire the same type of people to do it. To me
6 it's like the difference between having a copier
7 in-house and going out to some copy shop, Kinko's or
8 whatever, and hiring somebody who has a copier. And to
9 me, I would like to hear someone identify why there's a
10 difference, or why one is regulated and the other isn't.
11 They're both paid.

12 MS. HARRINGTON: Okay, that concern is noted.
13 Mallory?

14 MR. DUNCAN: Just very briefly, because some of
15 these participants were not here on the first day. I do
16 think this underscores the need for the established
17 business relationship issue that we discussed before,
18 obviously it would have to be expanded to establish a
19 participant or contributor relationship as well.

20 MS. MAEHARA: Can I just make one other point?
21 Many organizations, particularly universities, use
22 students to call. They are not, most often, paid. So,
23 these are volunteers who are actually doing calling, and
24 so many organizations, particularly educational
25 institutions, use students, student volunteers as

1 callers. And they're very effective. But I don't
2 believe these regulations in this situation would apply
3 in that instance. As I understand it.

4 MS. HARRINGTON: Okay. I think we're finished
5 with this discussion. We will resume as scheduled at
6 1:30 to pick up on prison-based telemarketing. Enjoy
7 your break and we'll see you at 1:30.

8 (Whereupon, at 12:00 p.m., a lunch recess was
9 taken.)

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1 AFTERNOON SESSION

2 (1:40 p.m.)

3 MR. GOODMAN: We're going to get started. I'm
4 Michael Goodman with the FTC and this panel is entitled
5 Prison-Based Telemarketing. Why don't we go around and
6 if you're new you can say your name and a little bit
7 about the organization and if you want to add a sentence
8 about prisoner telemarketing, go ahead and do so, but
9 just a sentence.

10 We'll start with the first new person might be
11 Mr. Worsham.

12 MR. WORSHAM: Me?

13 MR. GOODMAN: Yes.

14 MR. WORSHAM: I'm Michael Worsham, I'm a
15 consumer and environmental attorney in Maryland, and I
16 guess to give you one sentence basically saying that I
17 am opposed to prison-based telemarketing. I do have
18 a --

19 MR. GOODMAN: Make sure --

20 MS. HARRINGTON: Sound room, can we get some
21 sound on the mike?

22 MR. GOODMAN: There seems to be no one over
23 there.

24 MR. WORSHAM: Can you hear me now?

25 MS. HARRINGTON: No.

1 MR. WORSHAM: Is this working now? I'm Michael
2 Worsham and I'm a consumer environmental attorney in
3 Maryland. I'm opposed to the prison-based telemarketing
4 concept. I have a hand-out that I would like to
5 distribute so that everyone on this panel has it. It
6 has basically my position and it has attached to it a
7 letter from then-Governor George Bush of Texas to April
8 Jordon, she gave me permission as long as I blocked out
9 her address to distribute this, and it has a statement
10 of George Bush on inmate access to personal information.
11 So, I will distribute that around.

12 MR. GOODMAN: Okay, yes. We'll keep on with the
13 introductions.

14 MR. FAULKNER: My name is Michael Faulkner, I'm
15 senior vice president of Direct Marketing Association,
16 and I would just like to say that as our association is
17 a consensus of our members that we believe that this is
18 a state issue and that if it's appropriate for the
19 states to determine whether or not the telemarketing
20 should be conducted by prison-based marketers, then it
21 should be used for that.

22 MR. PETERSIK: My name is Tom Petersik, I
23 represent Citizens United for Rehabilitation of Errants.
24 We are a grass roots organization representing inmates
25 and their families, and obviously we very much support

1 inmates being able to work and succeed in the
2 telemarketing industry.

3 MR. GOODMAN: And it looks like it's veterans
4 for the rest of the table.

5 Having done just an informal survey of my family
6 members, a lot of people I think are unfamiliar that
7 prisoners are involved at all in telemarketing. So, I
8 think that it would be useful to hear from one or two of
9 the advocates of prisoner telemarketing to provide some
10 history, some background, some scope on this practice so
11 that we're all drawing on the same information. But try
12 to build upon what was already covered in your written
13 comment with some new information.

14 And for the new people, when you want to speak,
15 you put your name tent on its side and then I'll know
16 when to call on you. Yes, sir?

17 MR. PETERSIK: It sounded like I was being
18 invited to speak. I'm not an expert on inmate
19 telemarketing, but we know that for a number of decades
20 now, and I'm thinking back to the Transworld Airlines
21 and Best Western Hotels and so forth, that inmates have
22 been involved in telemarketing in a number of states for
23 pretty much the gamut of telemarketing activities, and
24 it's been -- the part that I'm familiar with is called
25 PIE, Prison Industry Enhancement Program, in which

1 inmates have an opportunity to work in open market jobs,
2 and in exchange for that, they have obligations to
3 reimburse the taxpayer, to reimburse victims and to pay
4 child and family support in addition to money for
5 themselves.

6 There's probably no better and less tapped
7 opportunity for participation in the legal labor force
8 or for reducing crime than allowing people who have been
9 offenders in the illegal labor force to become honest
10 and legal members of the community. And the PIE program
11 and other programs are working very hard to find
12 occasions where persons who are incarcerated can become
13 hard-working, responsible citizens. And I think
14 telemarketing needs to be seen in the context both of
15 meeting the social priorities of reducing crime and
16 reducing poverty and economic growth, and also in terms
17 of the importance of these people being participants for
18 the sake of their own families.

19 There are more minor unsupported children of
20 inmates in this country than there are inmates, also
21 looking at other people around the table, a significant
22 contributor to poverty in this country, the female
23 household to poverty and the elderly to poverty is the
24 burden of caring for the children of inmates. So, the
25 need to be employed is particularly critical for not

1 only inmates but for many other populations.

2 MR. GOODMAN: Thomas, your comment and then your
3 statements on the record here, I think are general to
4 inmate employment programs generally, and not to
5 telemarketing specifically, what can you say about the
6 practice of telemarketing specifically and the
7 advantages that it provides?

8 MR. PETERSIK: The key advantage for
9 telemarketing is that -- that the correctional
10 institution does not have to import lots of capital
11 equipment, people don't have to flow in and out, it's
12 very easy to set up telemarketing centers inside
13 correctional institutions, so it becomes an advantageous
14 kind of industry for that location.

15 Also, other comparative advantages, I think,
16 that are offered by correctional institutions are the
17 very detailed screening of employee applicants, needless
18 to say we know a lot about those applicants, so we can
19 screen them very well. We get excellent workers, the
20 turnover rates are I believe much lower, so far as we
21 can tell, in correctional settings. The security and
22 the control over the movement of information is much
23 tighter in a correctional institution than it is
24 elsewhere.

25 So, there are, I think, tremendous comparative

1 advantages inside those locations.

2 MR. GOODMAN: I am not picking on you, but I may
3 call you out more often than has happened earlier,
4 because I think you may be the one person on the panel
5 specifically advocating the practice. So, don't feel
6 badgered or anything.

7 MR. PETERSIK: Thank you.

8 MR. GOODMAN: Along those lines, I have another
9 question for you.

10 MR. PETERSIK: Okay. But I don't feel badgered.

11 MR. GOODMAN: If you could just say a little bit
12 about the other employment opportunities that are
13 available besides telemarketing to provide some context
14 for it, how important that one practice is for the
15 employment programs.

16 MR. PETERSIK: I believe of -- well, there are
17 about two million inmates in this country at state,
18 federal and local levels, about one million in state
19 prisons, 250,000 or so in federal and the rest in local
20 jails, but of those, only about 4,000 persons are
21 involved in open market activities at all, and I believe
22 the telemarketing component of that, I stand to be
23 corrected, is a few hundred of that, I think about 350,
24 if I'm not mistaken.

25 So, it's certainly a significant subset, if I am

1 counting everything in the right categories, correctly.

2 The other work that is done is primarily in assembly
3 work, like furniture assembly, light assembly of various
4 sorts, textiles also tends to be a major part of the
5 work, and then it's a smattering of other things.

6 Any other detail that you want?

7 MR. GOODMAN: Does telemarketing specifically
8 provide advantages to prisoners that those other
9 opportunities do not provide?

10 MR. PETERSIK: I'm not certain that
11 telemarketing offers -- there are obviously some
12 differences in the characteristics of the work itself,
13 but I think the main opportunity -- there are so few
14 opportunities to have a job in a correctional
15 institution at all, that the biggest opportunities for
16 this and the others are the opportunity to support one's
17 self and to support one's family.

18 When you think about there are huge in-flows of
19 money from poor families to inmates and when they're
20 working in telemarketing or other industries, there's a
21 flow in the opposite direction, so that's a huge
22 advantage. Many of them have the opportunity to earn
23 far more than minimum wage in telemarketing. That makes
24 a significant difference for this industry over others.
25 They have a chance to be entrepreneurial, which I think

1 is a wonderful opportunity that may not come in others.

2 Most of the work that I observe tends to be very
3 entry-level work with not a whole lot of creativity
4 involved and I think telemarketing certainly offers
5 challenges to people in those areas. I can go on with
6 some other things, but they're common rather than
7 unique.

8 MR. GOODMAN: Well, I believe we've been joined
9 by someone else, why don't you introduce yourself and
10 give us an idea about your organization position on
11 this.

12 MR. ROSTAD: My name is Knut Rostad with the
13 Enterprise Prison Institute. We are a research and
14 consulting group involved in prison work programs. Our
15 concern as it has to do with what's on the agenda today
16 is the unauthorized or overregulation of prison-based
17 telemarketing or the inappropriate regulation of
18 prison-based telemarketing. So, that's why we're here.

19 MR. GOODMAN: And the way to signal you would
20 like to speak is either I'll call on you and look at you
21 or you will put your name tag or table tent up on its
22 side. Yes, that would be fine.

23 Just to mix it up a little bit, I would like to
24 throw a question at the telemarketing industry people to
25 say a little bit about their position here and then I

1 imagine there will be some follow-up. So, if an
2 industry rep could chime in here, that would be good.

3 Art?

4 MR. CONWAY: Art Conway, Dial America.

5 I was going through the NPR, and it came down to
6 the national do-not-call registry, the statement was
7 made, a pattern of unsolicited telephone calls which the
8 reasonable consumer would consider coercive or abusive.
9 Now, I don't think it's a stretch for the average person
10 to believe that the -- that the reasonable consumer out
11 there is going to find -- the reasonable consumer would
12 find -- I don't think it's a stretch that the reasonable
13 consumer would find being called by a prisoner in a
14 penitentiary, that the reasonable consumer would find
15 that abusive.

16 Abusive in the sense of that there's a
17 conversation going on with a prisoner whom that consumer
18 does not know is a prisoner and who has access to
19 personal data, perhaps telephone numbers, certainly the
20 name. I've got to believe that the reasonable consumer
21 is going to find that abusive. And that's a
22 justification for National Do-Not-Call Registry, I think
23 this goes beyond that, and if the FTC can find grounds
24 to create a National Do-Not-Call Registry under the
25 abusive or coercive, then I clearly think they can find

1 grounds for this telemarketing practice to be abusive
2 and coercive and therefore ban it.

3 MR. GOODMAN: Is your position on this outbound
4 calling only or inbound and outbound calling?

5 MR. CONWAY: My position on this would be
6 inbound and outbound. I think if you're talking to a
7 prisoner, you have the right to know you're talking to a
8 prisoner. And I think that -- I don't want a prisoner
9 calling my home, nor do I think the industry wants to
10 have this type of practice, which a reasonable consumer
11 is going to find beyond abusive, just shouldn't be done.
12 I don't think telemarketing needs this kind of practice.

13 As Michael Worsham is going to point out, it's
14 got to -- we probably don't have the greatest reputation
15 out there, I don't think this enhances that reputation.

16 MR. GOODMAN: Michael?

17 MR. FAULKNER: Just to restate that we think
18 it's a state issue, but the states could control the
19 practice just by not allowing it to be a practice. So,
20 it would handle the issues that Art is talking about,
21 and deal with concerns over the practice as whether it's
22 being done according to the guidelines of, for example,
23 the industry practices. I don't know this to be a fact,
24 but you said that equipment and technology that is
25 available could be brought in to do the calls, but in a

1 traditional direct marketing environment, there's a
2 supervisor for every four to ten callers. So, issues
3 like would their supervisor be available, are the calls
4 monitored, are records kept, and would they follow the
5 same -- would they be required to follow the same
6 guidelines that our members have to follow in terms of
7 recordkeeping and so forth.

8 MR. GOODMAN: Knut?

9 MR. ROSTAD: I would like to go back to Art's
10 comment about abusive activity. I think in terms of a
11 reading of what the -- of what the regulations require
12 and put that in context for what is on the record, which
13 has been submitted to the record, I think it's clear
14 that we haven't even come close to reaching the
15 definition or that threshold in terms of -- in terms of
16 abusive conduct.

17 Now, you may have a lot of other definitions for
18 it, but in terms of the -- in terms of the legal
19 definition, I don't think we even come close to that.
20 And if you want to move away from that concept to the
21 fairness analysis, I would say the same thing, that
22 again, based on what's been submitted to on the record,
23 we don't even come close to meeting each of those
24 thresholds.

25 Now, in terms of the second comment, and

1 changing subjects here a little bit, regarding the
2 precautionary measures that are in place in these
3 prison-based telemarketing operations, as we've
4 submitted on the record, I think if you look at the
5 extent of the precautions, they meet or in some cases
6 probably exceed the types of precautions that we see in
7 the civilian side, so to speak.

8 So, I think in terms of those precautions, I
9 think they're already there and that's been made a part
10 of the record.

11 Thank you.

12 MR. GOODMAN: Elissa?

13 MS. MYERS: Excuse me, Elissa Meyers, ERA.

14 ERA neither advocates nor -- it doesn't advocate
15 in one direction or the other on the issue but closely
16 follows the DMA view, but I wanted to make the small
17 point that I think this issue, again, illustrates the
18 importance of the harmonization of public policy between
19 the federal government and the states.

20 It's incumbent on American business to use the
21 most efficient, cost efficient and efficient labor force
22 available to it, and a company that's torn between an
23 acceptable public policy on a state level as evidenced
24 by the state's operation of the prisons, and a federal
25 policy that frowns on it is put in something of an

1 untenable position with its stockholders.

2 And I couldn't help but make the point while I
3 have the microphone quickly to following the discussion
4 this morning, I was thinking how many disadvantaged
5 people would benefit from the great work of the
6 charities whose rights we were concerned about this
7 morning are employed by telemarketers. It's a field
8 that is particularly accessible to people who are
9 physically disadvantaged in prison or elsewhere.

10 MR. GOODMAN: Katie?

11 MS. HARRINGTON-McBRIDE: I have a question about
12 scope that perhaps Thomas could answer for us. If you
13 were suggesting that there might be that 350 individuals
14 incarcerated in the United States who are participating
15 right now in telemarketing sales, do you have any
16 further data on whether they are in state or federal
17 prison?

18 MR. PETERSIK: Do you have any more detail on
19 that? Because I don't.

20 MR. ROSTAD: Tom's estimate is very close to
21 ours. When we were preparing for this, we did an
22 estimate of 300 in the states. To my knowledge, right
23 now, I don't believe that there's a single one at the
24 federal level involved in this. So, it's 300 in the
25 states that are working in a commercial telemarketing

1 environment. Which, in fact, ties into what we are
2 suggesting in terms of keeping this a state issue, as
3 was suggested down here just a little while ago.

4 And making note, as the Commission already has,
5 that the states have been active, as part of the record
6 already, in providing guidelines for these activities.

7 MS. HARRINGTON-McBRIDE: So, just 300
8 individuals?

9 MR. ROSTAD: That is our estimate. That are on
10 the commercial side. There are more, as I -- as has
11 already been noted in the record, on the -- that work
12 through the government agency side. Such as, as was
13 noted on the record, many states have their -- have the
14 tourist bureau calls handled through -- through these
15 systems.

16 If I could just make one other quick comment in
17 response to another comment down there, in terms of the
18 consumer's reaction to this, I would suggest that you go
19 back and you -- you look at the record over ten years in
20 the state of New Jersey, does anybody come from the
21 state of New Jersey here? Two responses.

22 More importantly, has anybody called the tourist
23 bureau in the state of New Jersey? The tourist bureau's
24 calls go into a women's prison, they are handled by the
25 maximum security unit, it's been going on for ten years

1 in New Jersey. What is interesting to me as it relates
2 to this point down here earlier, is that every year or
3 two, the state proactively brings in the media, they
4 invite all the media to come in, take a look at it, see
5 what's happening. They have a flourish of stories.

6 If you happened to be watching Jay Leno last
7 September, Jay Leno got ahold of this, so it went beyond
8 the state of New Jersey and was on his show for several
9 days. The point of the story to me is that there is
10 a -- and this may not seem -- this may not sort of sound
11 right, but there seems to be a certain level of
12 tolerance for this, and I know it's different from
13 outbound telemarketing, I understand that, but I think
14 what exhibits, there's a level of tolerance that may
15 not -- that we may not appreciate by the fact that there
16 has not been marches on Trenton, legislators have not
17 been defeated for re-election because of this, and
18 again, every one or two years, they go through the same
19 motion. So, I just -- I thought that would be relevant
20 for the point that was being made.

21 Thank you.

22 MR. GOODMAN: In the comments that I read on
23 this topic on the record, I didn't see universally
24 applied standards to these practices. I saw words like
25 many of the programs do this, most do that, and some do

1 this, but I didn't see a universal standard for
2 screening or for monitoring or for sanctions.

3 MR. ROSTAD: Let me respond. Like so many other
4 parts of our public life, we are not a single
5 government, we are 50 states, and 50 states take pride
6 in doing things differently. That being said, let me
7 also say that there will -- you will see in every single
8 state-run operation that you were to visit, that you
9 might visit, a certain set of procedures in terms of how
10 the inmates are screened, and in terms of what screens
11 are being used, but even before you get there, and this
12 I think is a key point in terms of understanding the
13 reality of how these come about and how these stay in
14 operation, because there was an obvious recognition of
15 the political sensibilities, I will guarantee you that
16 there's somebody in the governor's office that knows
17 what is going on there. I will guarantee you that there
18 is an informal monitoring going on, because this is just
19 the facts of political life, and I would argue that,
20 again, that in some ways, these operations are more
21 closely monitored than many on the -- in the civilian
22 world.

23 MR. GOODMAN: Michael Worsham?

24 MR. WORSHAM: Thanks. Hi, Michael Worsham.

25 I think one thing that might need to be

1 discussed here is how do you define personal
2 information. Because when the GAO looked at prison work
3 programs, they did their report in August of 1999, in
4 the front of the report, they give a definition, and
5 they stated that of the Bureau of Prisons and the 19
6 state prisons that I guess they got a lot of their
7 feedback from, out of 1.2 million inmates, about 1,400
8 had access to personal information as the GAO defined
9 it, but later on in their report they gave a figure of
10 about 5,500 in the Bureau of Prisons in 31 state prisons
11 had access to names and addresses or telephone numbers
12 to correctional industry work programs.

13 And I think most of the public would consider
14 name plus address or name plus phone number as personal
15 information enough to identify them and they would find
16 that objectionable. And so that's something that if the
17 Commission is going to consider some parameters on
18 prison-based telemarketing is how we define the personal
19 information, because to me, and I've laid out some facts
20 in my paper, I just think it's unfathomable that in this
21 day and age with -- and as the Commission knows, because
22 it regulates it, identity theft rising as a major
23 problem, to give things like credit card information or
24 social security numbers to prisoners.

25 So, if the line is drawn back some, it's where

1 is it, is it -- can you give out name, or name and phone
2 number, and that that's an issue that needs to be looked
3 at.

4 MR. GOODMAN: As I move along, I just want to
5 also raise the first question that's on the agenda, so
6 as you make your comments, you can consider this
7 question as well. Is the FTC the appropriate agency to
8 regulate prison-based telemarketing? If not, who, if
9 anyone, is?

10 And so, you can go ahead with your comments, but
11 also if you can address the question would be useful.

12 MR. ROSTAD: Well, just to focus on that
13 question, I guess there are four points that I would
14 like to make to suggest that the FTC is not the
15 appropriate body to regulate it, is it first has to do
16 with a discussion of abusive practices and the -- and
17 how that strictly and narrowly defined vis-a-vis the
18 statute, and juxtaposed to what we have on the record in
19 terms of incidents of misuse, and I think that is key in
20 terms of this whole discussion.

21 Secondly, I would point out that just based on
22 the -- what is on the record, and I'm glad Michael
23 brought up the GAO report, as you know, we submitted
24 some of that information in our submission as well, that
25 in addition to what Michael pointed out in terms of the

1 number of inmates who had access to information, it also
2 pointed out that it had searched for misuse and abuse,
3 it came up with nine incidents over a period of nine
4 years.

5 Even though it didn't go back just nine years,
6 it was made clear to me by a staff person there that
7 they went back as far as they could. They called the
8 attorney general's offices, they called all the
9 opponents to these programs for assistance in
10 identifying incidents of misuse. They came up with
11 nine. Of those nine, only three, as I can determine it,
12 were of commercial telemarketing instances, so only
13 three of those nine hypothetically could have been
14 covered by an FTC regulation so to speak.

15 So, I think that is key in terms of who is best
16 to regulate. And then also the other point in that GAO
17 report, it was said clearly that of all the -- of the
18 inmates with access to this information, 93 percent were
19 working for government agencies, and only seven percent
20 were working for commercial private entities, which
21 again I think helps lead to the conclusion that the --
22 in terms of the FTC's reach on this, it would not be --
23 it would not be entirely effective in terms of the
24 activity out there.

25 Finally, I would like -- I would just like to

1 reiterate that the FTC acknowledges that the similar
2 risks may occur from telemarketers employed for those
3 who are outside prison as well, as would those that are
4 inside prisons. So, in terms of who, what entity or
5 what body is best to regulate this based on those
6 issues, we believe very strongly that the states are the
7 best entities to regulate this, and I think the record
8 demonstrates that they take an active interest in doing
9 so.

10 MR. GOODMAN: Char and then Thomas.

11 MS. PAGAR: Yes, Char Pagar for the PMA.

12 I just wanted to state for the record that we
13 have not taken a position with respect to the use of
14 prison-based telemarketers, but I did want to say in
15 response to this question that it seems to me that it
16 makes sense that the states run the prisons and that the
17 states would be the right entity to regulate this sort
18 of activity.

19 MR. GOODMAN: Thomas?

20 MR. PETERSIK: Two points, one extending the
21 point that Knut was making earlier, if one simply looks
22 at the evidence in front of us, I think a fair
23 conclusion would be that the rate of abuse inside
24 correctional institutions is equal to or much less than
25 on the outside, given the anecdotal evidence available.

1 So, if one's concern were for reducing incidents
2 of harm, it would appear as though these are superior
3 places to do work and not inferior ones. That's looking
4 at the numbers.

5 Second, with respect to the point that a citizen
6 would consider herself or himself abused if he found
7 that he or she were contacted by persons incarcerated,
8 something I think we might all at least take to heart as
9 policy makers is that we're kind of a schizophrenic
10 population. When we're looking at prisoners whom we
11 don't know, then we may tend to feel that way, but when
12 it's our daughter or our son or the kid up the street,
13 and I think that most of us find that even though our
14 own households might not have been affected, you don't
15 have to go many households away, no matter how wealthy a
16 community in which you live in, and you will find
17 someone in your family or in your neighborhood who is on
18 the other side of that wall, and then we're all saying
19 we ought to do something for that person, we ought not
20 just let them sit there.

21 So, I think we have to think about who those
22 people are on the other side of that wall and think
23 about whether we're being abused or not.

24 MR. GOODMAN: Art?

25 MR. CONWAY: Thinking about the way the FTC

1 needs to do this, this is clearly a practice in
2 telemarketing, using prisoners to make outbound calls,
3 and I'll stay on the outbound side, that's a practice
4 that's taking place in telemarketing.

5 So, now, the FTC administers the telemarketing
6 sales rule, and that has to do with practices in
7 outbound telemarketing, as well as inbound
8 telemarketing. I contend that a reasonable consumer
9 would find it abusive that his name and phone number are
10 given to a prisoner and that prisoner is allowed to call
11 into his household, talk to himself, or members of his
12 family.

13 I think -- I don't believe it's a stretch to
14 come to that conclusion that the average American out
15 there, the average American consumer would find that
16 abusive as somebody that's allowing a prisoner to call
17 into the household, and therefore I think the FTC has
18 the right, given the telemarketing sales rule, has the
19 right to look at this practice and say is a reasonable
20 consumer going to find this practice abusive.

21 And I don't think you can come to any other
22 conclusion other than that the reasonable consumer and
23 the average American out there would find this abusive,
24 and therefore given the fact that the TSR, you can say
25 that this practice is banned. I think you have the

1 authority to do that.

2 That's what struck me when I read this in
3 context of the National Do-Not-Call Registry, then I get
4 to the back and see you took a pass card on the prisoner
5 in telemarketing and I said, whoa, wait a second, this
6 is -- you can't take a pass card on prisoner
7 telemarketing and yet have all this explanation of why
8 you are going to go to the National Do-Not-Call
9 Registry. That just hit me like a ton of bricks. It
10 doesn't make sense. You're going to address National
11 Do-Not-Call Registry, how can you take the pass card on
12 prisoner telemarketing?

13 MR. GOODMAN: I'm curious to hear from the NAAG
14 representatives, whether there's any state enforcement
15 experience or any other comments on this issue.

16 MR. BURG: Elliot Burg for NAAG.

17 We have no comment in our comments on prisoner
18 telemarketing, and really don't have a position to
19 relate here, but I did want to share one possible route
20 of solution here based on some state-initiated prisoner
21 use in telemarketing, and that's in the governmental
22 context.

23 In Vermont, for example, I understand that
24 there's a limited use of prisoners to provide
25 information when people call in to our state motor

1 vehicles department. The prisoners are used to simply
2 read from a script, somebody calls in and wants to know
3 how to register a vehicle, they have a prepared
4 description. But before the consumer is put through to
5 the inmate, apparently there is some kind of automated
6 message that informs the consumer that that's whom he or
7 she is going to be speaking to, and it seems to me that
8 if the Commission is concerned about the privacy issues
9 here, as was just related, that it may be that if
10 there's reluctance to endorse an outer ban, then the
11 other method is to require some kind of automated
12 disclosure, for example in inbound upsells.

13 So, outbound telemarketing it's pretty difficult
14 to do, you can't start a conversation with a recorded
15 message, but you could conceivably do it on upsells.
16 This is not a proposal from NAAG, but it just occurs to
17 me that that would be a logical way of honing consumer
18 privacy if you didn't want to go all the way to a ban.

19 MR. GOODMAN: I would like to hear from Knut,
20 and also regardless of your comment, also address the
21 idea of a disclosure as an alternative to a ban.

22 MR. ROSTAD: Thank you.

23 Let me just suggest right up front, that in
24 terms of the nature of the disclosure that's being
25 suggested right here, what you've got is a paradox.

1 What you would be doing is addressing the state-run
2 operations as you -- as was suggested here, that you --
3 that the FTC does not have the jurisdiction over it, and
4 you would not be addressing the outbound commercial
5 telemarketing operations which you do have potential
6 jurisdiction over.

7 So, in terms of that -- in terms of that
8 disclosure, or in terms of that method, I don't see how
9 that works very well. But in terms of just a -- in
10 terms of just a simple principle in terms of disclosure,
11 I think the basic difficulty is that you're not going to
12 be achieving the results you want because the access to
13 the information is already going to be there for the
14 inmate. It's already on the screen, or it's already on
15 the -- on the card.

16 So, if the goal is to -- is to not allow -- not
17 allow inmates to have access to this information,
18 vis-a-vis a nondisclosure practice, I just don't think
19 that -- I just don't think that works.

20 MR. GOODMAN: Is there any prisoner
21 telemarketing that does go on or that could go on that
22 does not involve identifying information about consumers
23 being presented to the prisoners?

24 THE WITNESS: Well, as was it Mark at the other
25 end of the table that was making the distinction that

1 the GAO made about the different types of information,
2 personal information on the one hand, which include what
3 you might have on a driver's license, or Medicaid form,
4 which the states are operating on, versus what I call
5 market information, which might be a name and an
6 address.

7 So, if the question is whether these outbound
8 telemarketing operations could operate without the
9 inmate seeing that -- any of that information, I guess
10 I -- from a technical point of view, I'm not the best
11 person to speak to in terms of the equipment and the
12 technology out there. I've never heard of it being
13 done, and I will go back to what I said before, that
14 given the environments in which we're working in in the
15 states, if it were available at a price that doesn't
16 prohibit it, I would be most assured that it would be
17 out there in operation.

18 MR. GOODMAN: Thomas?

19 MR. PETERSIK: Two quick remarks. I happened to
20 be in California a few years ago when an incident in a
21 correctional institution broke, it broke in the Los
22 Angeles Times and it got a lot of coverage. Two things
23 about it. One is that Knut mentioned earlier, it was
24 amazing to see everybody from the governor's office on
25 down jumping that they deal with that. So, they get

1 tremendous amounts of attention from the political chain
2 of command.

3 Second of all, they began then to -- through
4 this reservation center -- to announce who they were,
5 and over the 48 hours that I happened to be there to
6 track it, they had one customer object, and this was a
7 TWA reservation center, they were getting lots of
8 reservations at that time, and that one consumer also
9 completed the transaction.

10 So, I'm not certain, I think most people are
11 looking forward to good service and the work being done
12 for them, and that's the most important thing for them.
13 I'm not sure that they always feel they're being abused.

14 MR. GOODMAN: Your feeling by the prisoner that
15 hello, Mr. Jones, I'm a prisoner, I want to sell you
16 something, that wouldn't be -- well, I think it may be
17 called a kill message or sort of an end the call type
18 scenario.

19 MR. PETERSIK: I am certainly not advocating
20 disclosure unless asked, but that instance, at least,
21 the consumers who were told it didn't stop their
22 transactions, it continued.

23 MR. GOODMAN: Is there a policy that you know of
24 that prisoners are to answer in the affirmative when
25 they are asked by the consumers, are you a prisoner?

1 MR. PETERSIK: I don't know of a policy, but the
2 one case that I'm aware of separate from where I'm
3 talking about, their instruction was to acknowledge when
4 asked.

5 MR. GOODMAN: Art?

6 MR. CONWAY: The disclosure on inbound is an
7 entirely different story than the disclosure on
8 outbound. If you could disclose inbound, the customer
9 calls in, they haven't given their name, they haven't
10 given any information, they know they're talking to a
11 prisoner, that's one -- that's one scenario. On
12 outbound, this is every program we do, you're going to
13 have personal information in front of a salesman.

14 And so you take prisoner telemarketing and you
15 call up on an outbound call and say, hi, I'm so and so,
16 I'm an inmate in wherever, and I would like to sell you
17 something. It's too late at that point. The name, the
18 address and everything is there, in front of that
19 person. Before the consumer has agreed in this case
20 would agree to take that phone call.

21 So, on an outbound side, look, I don't care,
22 keep doing it on an inbound side for the tourist center,
23 I'm talking about calls placed into a household where
24 unbeknownst to that consumer in that household, that
25 call is being handled by a prisoner. I just think that

1 that -- that the average consumer is going to find that
2 an abusive practice in the way the FTC has used the word
3 abusive. And I think the FTC can stop outbound
4 prison-based telemarketing.

5 MR. GOODMAN: I think the record has your view
6 of the abusiveness of this practice.

7 (Laughter.)

8 MR. GOODMAN: Mike?

9 MR. FAULKNER: Mike Faulkner, DMA.

10 To the issue of disclosures of sales calls by
11 prisoners, and incidentally, this would include sales
12 calls by non-prisoners as well, 65 percent of all
13 selling activity by telephone is lead generation. So,
14 if you took the \$700 billion that we claim from your
15 WEFA study as telephone sales, 65 percent of that number
16 is lead generation and traffic building where no
17 personal identifiable information is necessary.

18 So, on the disclosures on most calls, there's no
19 need for that kind of information. I just wanted to
20 make that point.

21 MR. GOODMAN: I could use a little more
22 information on what you mean by lead generation.

23 MR. FAULKNER: Okay. In a total number of
24 dollars that are committed to direct marketing,
25 telemarketing sales, about \$700 billion, round number,

1 65 percent of that is a result of a two-step or
2 three-step sales approach where the sales telephone
3 marketing call goes to a person, six out of ten times,
4 the call is to generate interest to sell in another
5 medium, or to drive a person to a retail outlet to buy
6 the said product or service.

7 So, the majority of telemarketing, there is no
8 personal identifiable information provided in that call.
9 So, lead generation sets up for a follow-up call with
10 maybe the telephone, but sometimes another medium as
11 well.

12 MR. ANDERSON: Michael, can I do a follow-up
13 here? How does that break down between business to
14 business and business to consumer?

15 MR. FAULKNER: That's the average between the
16 two. On the business to business side, it's a little
17 higher, it's about 63 percent, on the consumer side it's
18 about 59 percent. So, it breaks out about 60 percent
19 all total.

20 MR. ANDERSON: And that's dollar volume?

21 MR. FAULKNER: Dollar volume, yeah.

22 MS. LEONARD: If I could just follow up, what is
23 the source of that information? Is that all part of the
24 WEFA?

25 MR. FAULKNER: The source of that is the Work

1 Economic Forecast Annual Impact of Direct Marketing

2 Study that is produced by WEFA each year.

3 MR. GOODMAN: Tyler?

4 MR. PROCHNOW: To your question regarding what

5 type of information and is it possible to conduct these

6 type of operations without personal information being

7 transferred or available to the prisoner, I do not speak

8 as an expert on this, but I -- for the one prison-based

9 facility that I'm aware of, the prisoners do not have

10 access to any information about the person other than

11 their name. And in some cases it is a name provided to

12 them at that point. In other cases, they don't have it

13 up front and the consumer gives their name on the

14 inbound portion of the call when they call in and then

15 it follows up on what Michael said on the type of

16 transaction, the lead is generated from that facility

17 and then transferred immediately to a commercial

18 verification program which is a non-prisoner-based

19 program where the personal information and any other

20 marketing information would be provided to the ultimate

21 seller.

22 MR. GOODMAN: Allen?

23 MR. HILE: On a slightly different tack, I would

24 like to ask Tom and Knut how many companies are involved

25 in commercial telemarketing in prisons? Number one.

1 And number two, for the state-run programs, I presume
2 they have a contractor in most instances who runs it for
3 them, and can you tell me who does that and how many
4 companies there are that do that?

5 MR. ROSTAD: Our current estimate is that the
6 300 inmates that are currently employed in the states
7 represent about ten companies. And typically it is a --
8 it is a small -- it's a small shop, and the owner is
9 very hands-on and will -- he won't have his office
10 inside there, but he will have his -- have somebody in
11 there that he hires.

12 So, it's -- it is run by the commercial
13 telemarketing shop.

14 MR. HILE: Does that mean that the average
15 prison-based phone room has 30 individuals selling?

16 MR. ROSTAD: Thirty or less. Because a couple
17 of those companies may have more than one location. So,
18 they are -- they are small. They are definitely small.
19 There's no doubt about that.

20 MR. HILE: And what about the state programs for
21 answering tourist bureau calls and stuff like that? I'm
22 sure the state doesn't have a state employee doing that.
23 They must have a contractor who takes care of that.

24 MR. ROSTAD: A contractor, actually managing the
25 room?

1 MR. HILE: Yeah.

2 MR. ROSTAD: In most instances that I am
3 personally aware of, it is the same employer. It is a
4 state employee. Yeah, I don't -- I can't think of one
5 where it's an outsourced position.

6 MR. PETERSIK: Usually a corrections employee.

7 MR. HILE: Thank you.

8 MR. GOODMAN: Michael?

9 MR. WORSHAM: Yeah, I agree that the FTC does
10 have the authority to regulate this, but I think maybe
11 your question was more at should it or is it the best
12 agency to be doing this as opposed to maybe the Bureau
13 of Prisons. It sounds like there's -- we heard that
14 maybe zero is the number of federal systems doing this,
15 and only 300 in the states.

16 So, it sounds like we're not talking about a
17 whole lot of people, even though for the reasons I think
18 announced and I've mentioned in my hand-out, recidivism,
19 you know, those 300 people could potentially be 300
20 people with problems, unless they're given something to
21 do, and I think that there are multiple options which
22 the GAO lists where there's not access to personal data
23 that are available to prisoners.

24 And I think that one part of the discussion that
25 I haven't heard yet is about the various restrictions is

1 what -- what kind of limitation would you put -- recent
2 derailment of the bill in Colorado that because of the
3 public outreach they didn't want to be called by
4 essentially violent criminals, would you limit it to
5 only nonviolent offenders, and if you did that, then I
6 think you would go one more step with what about
7 nonviolent offenders who have committed crimes that
8 involve fraud, deceit, forgery, check kiting and an
9 element of dishonesty, and eventually make it to the
10 point where your pool is pretty small.

11 That's an aspect that I think if you consider
12 it, because if the Commission does pass a bill, or
13 excuse me, a regulation that essentially legalizes
14 prison telemarketing, it's going to get a lot more
15 attention than it is now, because people aren't aware of
16 it.

17 I wasn't aware of it, I called a tourist board
18 in Utah and I didn't know, I mean I can't complain
19 because my name and address are all over my website, but
20 a lot of people are not aware of this, and when the rule
21 comes out, they will be aware of it, privacy groups and
22 consumer groups will put it up on their website, about
23 their frequently asked questions about how to avoid
24 telemarketing, and I think the Commission should be well
25 aware that it's going to be a lot more well known as a

1 result of whatever action the Commission takes.

2 MR. GOODMAN: Thomas?

3 MR. PETERSIK: A couple of more points. I
4 assume we are all sensitive to the issue of personal
5 information, and that the states are probably best said
6 to decide who should be screened and they're very
7 sensitive to that. The idea of, say, screening out
8 violent versus nonviolent sounds reasonable, and it may,
9 in fact, be reasonable, I think the corrections experts
10 will tell you that a significant proportion of people
11 who are in prison for violent crimes are persons who
12 killed a significant other and that's their one violent
13 event, so that may not necessarily be a rule, but I
14 think that the states would be the best choice for that.

15 The second point simply is that while I'm not
16 proposing anything as a general statement, I'm aware of
17 a particular firm whose outbound calls involve personal
18 information and the customers are well known to the
19 callers. And so you -- and it works very well. So, I
20 just, again, don't know how blanket rules would tend to
21 work.

22 MR. GOODMAN: Knut?

23 MR. ROSTAD: I would like to respond to the
24 issue of screening also as it relates to I guess the
25 level of risk or concern that we should have, and I go

1 back to the record, and I go back to the value of the
2 GAO report and the incidents that they would uncover,
3 and put that front and center in terms of the scope and
4 the magnitude of the concern that I think we ought to
5 have, and I also want us to balance it in terms of your
6 second question, I know we're coming to the end here,
7 your second or third question concerning the costs
8 versus the benefits of this.

9 And I think in terms of the record, I counted
10 about three incidents that the -- of misuse in terms of
11 the FTC has brought up, maybe there were a couple of
12 more that I missed there, and I brought forward the GAO
13 report which I count three more from their report, so I
14 have six cases of abuse reaching back at least ten years
15 on the cost side, and that is a cost. That is a cost.

16 And then on the benefit side, let's go back to
17 one of these small prisons which have these small call
18 centers and in terms of what was mentioned down there
19 before in terms of the benefit there, but it's more than
20 the benefit to these 300 individuals, and I think one in
21 the west, in fact I made it part of the record, some
22 comments from some female inmates in terms of what this
23 meant to them.

24 It's more than what it means to them, because
25 when you -- because when that job is available, that

1 means about half the other women in that prison want --
2 also want to get that job. And the upward incentives
3 that are created by just having those 12 or 14 jobs
4 there have a ripple effect, that affect about half of
5 the other population. This is fundamental prison
6 management in terms of using carrots and sticks, and
7 when you walk into that prison and offer a minimum wage
8 job in this case, there's nothing else that they would
9 rather do.

10 So, in terms of costs and benefits, the benefits
11 far exceed the 300 individuals that might have this job
12 at some point. And that's the point I wanted to make.

13 Thank you.

14 MR. GOODMAN: Thomas?

15 MR. PETERSIK: I noticed that that was the
16 second point in benefits versus cost, and Knut talked
17 about the costs. On the benefit side, I do think that
18 we've got to recognize the importance of being a
19 participant in the labor force and what it means for the
20 economy overall, and for the communities and for the
21 families who are there involved, and also you come up
22 with your own estimates, we've got about a million
23 victims of crime who are not being compensated because
24 the person who is the offender can't compensate them
25 because they're not working.

1 So, we've got, we think today that about ten to
2 20 percent of the children on welfare are children who
3 are unsupported children due to corrections. So, there
4 are huge benefits to the economy and to society towards
5 moving these people towards legal, honest and successful
6 participation, and would certainly have to be taken into
7 account.

8 Thank you.

9 MR. GOODMAN: Are there approaches short of a
10 ban, such as 100 percent monitoring that would cure the
11 potential for abuse while still allowing for the
12 practice to continue?

13 Knut?

14 MR. ROSTAD: Well, I guess I would like to
15 address that in terms of, you know, cure the abuse.
16 And, you know, I guess I would like to start from the
17 basic premise that unless we are all going to take our
18 savings and go down to the bank and put it in a CD at,
19 what, one percent now, three quarters of a percent, that
20 we are going to experience some level of risk in terms
21 of where we put our money.

22 Well, I would like to suggest that we -- that we
23 use the same principle here. And that if we're going to
24 approach this that we're going to eliminate all risk,
25 then the easiest thing is just to ban all telemarketing,

1 because that way we don't have any risk, but in terms of
2 bringing it down to, you know, in terms of the hard
3 facts, I think the record speaks for itself that based
4 on the procedures and the policies and the world that we
5 are dealing with inside the prison, we've got a very,
6 very good record already of about as few number and
7 incidents of misuse I think as anybody in this table
8 could imagine.

9 I would like to have asked this -- the folks
10 around this table a month ago before you might have
11 looked at our brilliant submission whether you would
12 have -- what you would have guessed in terms of what was
13 on the public record in terms of incidents of misuse,
14 and I will guess that most people around this table
15 might be a little surprised at how little reported
16 incidents there are.

17 So, I think we need to keep that in mind as we
18 go forward.

19 Thank you.

20 MR. GOODMAN: Allen?

21 MR. HILE: I would like to ask the industry, is
22 there -- do you have any idea if the status of being an
23 ex-offender disqualifies you as a -- for employment as a
24 telemarketer in most instances? Would you knowingly
25 hire somebody who had been in prison?

1 MR. CONWAY: Only if he -- this is Art Conway,
2 only if the EEOC made us. And I'm not sure what the
3 status of that is. But if somebody puts down on their
4 application that they were -- that they had -- that they
5 had been a prisoner, if we're allowed not to hire that
6 person, we're not hiring. I just don't know what the
7 EEO -- where the EEOC comes down on that.

8 MR. HILE: Mr. Faulkner, do you have anything to
9 add?

10 MR. FAULKNER: No, we've done some research on
11 the demographics of the telephone workers, but there's
12 nothing in the research to show how many were prisoners
13 prior to.

14 MR. GOODMAN: Michael?

15 MR. WORSHAM: Yes, I wanted to respond to
16 something that Knut Rostad said about there being very
17 few instances. Last night when I was preparing for
18 this, I went through the issues of prison legal cases
19 that April Jordon sent me and I was trying to figure out
20 something to her case and it was describing another
21 incident and I had to ask her, well, wait a minute,
22 you're saying about the same time there was another
23 incident involving another separate family with a 15
24 year old who had been telemarketed by a convict, and she
25 said, yeah, it was the case, however that person did not

1 want to go public, and so I had to sort that out.

2 April Jordon sought to go public. So, in normal
3 telemarketing, obviously everyone that doesn't like it
4 doesn't complain. In prison-based situations, perhaps
5 even more so, people don't want to let, you know, it's
6 an upsetting issue and still is upsetting for April
7 Jordon. And so the GAO report that whatever the nine
8 that were in there, you know, I don't think that's a --
9 going to be a representative, because like in anything,
10 you know, everybody doesn't complain about that.

11 MR. GOODMAN: I think we're going to give Art
12 the last word so we can have a quick break before the
13 last session.

14 MR. CONWAY: Okay, just to put things in
15 perspective, you said 300, is that outbound or total?

16 MR. ROSTAD: Total. Total commercial.

17 MR. CONWAY: Well, take 300. We employ 10,000
18 sales reps, okay, let's say it's 9,000, so we can do
19 this math in our head. 300, ten years worth, would be
20 3,000, right? The 300 times ten years, 3,000, we're
21 9,000, so we're four -- we have a -- we have a sales
22 force out there that's equivalent of four months, four
23 months to your ten-year record. Are you following me on
24 this?

25 MR. PETERSIK: No, I'm not.

1 MR. CONWAY: Are you following me?

2 MR. ROSTAD: Yeah, I'm following you.

3 MR. CONWAY: Four months. Now, if we had an
4 April Jordon situation, that would be unbelievable for
5 us. We don't see those kind of situations. And
6 certainly in the last four months, haven't seen it in
7 the last four years. Those are bad, bad situations. We
8 don't see those.

9 So, to go back on your ten-year record, we can
10 go back -- you go back ten years with 300, we go back
11 four months with 9,000, we just don't see those kind of
12 instances.

13 MR. ROSTAD: Just in terms of finishing his
14 comparison, that record did not include just those 300,
15 there was a record that also included everybody in the
16 state. Everybody in the state. So, it's more than 300.
17 So, in terms of making apples and apples comparison,
18 it's not quite the proportions I think you're
19 suggesting.

20 MR. GOODMAN: Okay, we're going to stop here,
21 take maybe a three or four-minute break, and come back
22 as close to 2:30 as possible.

23 (Whereupon, there was a brief recess in the
24 proceedings.)

25 MS. HARRINGTON-McBRIDE: Welcome back to those

1 of you who are back, and welcome aboard to the rest of
2 you.

3 I think this panel will probably be one that
4 will be a little bit more diversified, because although
5 these things are all exemptions and alike in that way,
6 each of the exemptions implicates different interests,
7 and so we have a lot of people at the table who are
8 probably only here to talk about one of the five
9 proposed changes, and so we're going to try to structure
10 this in such a way so that we really do stay on topic
11 that we can move through these in the time remaining.

12 I am assuming and, please, anyone raise your
13 tents if I am incorrect on this, that it would not hurt
14 any feelings if we were to be out a little early on a
15 Friday afternoon. So, there is no point in having
16 administrative inefficiency delay us, so if it's
17 content, that's fine, but otherwise we'll keep it
18 moving.

19 The Commission has proposed in its NPRM a
20 variety of changes to its exemptions provisions, and
21 what we would like to do is use our agenda as a guide to
22 go through these pretty much in the order that they
23 appear in the rule. So, we will begin by asking whether
24 the compliance with the do-not-call, caller ID, and what
25 we term the "threats provision" of the rule for exempt

1 sellers and telemarketers of the three categories,
2 franchisers, pay-per-call and those whose sales involve
3 a face-to-face transaction, whether that requirement
4 that there be compliance would be burdensome for
5 business. So, anyone who is here to speak to that
6 issue, that will be what we're going to begin with.

7 In the interim, to give you a minute to collect
8 your thoughts and since we have so many new people at
9 the table, I would like to go around and ask anyone who
10 was not here at the last session, to introduce
11 themselves for the court reporter and for our
12 edification. If you are new to the table entirely, if
13 you could tell us what provision you are here to
14 address. We will proceed to the left.

15 Elissa, you were here. Let's see, Rita, were
16 you here last time?

17 MS. COHEN: Yes.

18 MR. BOHANNON: Mark Bohannon, I am general
19 counsel and senior vice president of public policy for
20 the Software and Information Industry Association, we
21 are the principal trade association of the software
22 developer and information content.

23 While our comments addressed a number of issues
24 in the rule, we are primarily here for the last question
25 of the last panel of the last day, i.e. web services.

1 MS. HARRINGTON-McBRIDE: Stratis?

2 MR. PRIDGEON: Stratis Pridgeon representing the
3 American Resort Development Association.

4 I seem to have lost my card and my name tag, so
5 but I have been up here before and we are interested in
6 several of these issues, including the face-to-face
7 exemption.

8 MS. HARRINGTON-McBRIDE: I assume you're not
9 suggesting it was identity theft.

10 MR. PRIDGEON: I just need them to know who I
11 am.

12 MS. HARRINGTON-McBRIDE: We will give you a
13 maker at the very least. Jeanne or Jeannie Delgado.

14 MS. DELGADO: Jeanne Delgado, I'm with the
15 National Association of Realtors, and we're here, I'm
16 here to talk about specifically the face-to-face
17 exemption.

18 MS. HARRINGTON-McBRIDE: Jeff, are you back at
19 the table or did I just miss you last time?

20 MR. KRAMER: I'm back.

21 MS. HARRINGTON-McBRIDE: Next we have Ron
22 Plessner for DMA. Ron?

23 MR. PLESSER: Ron Plessner for DMA.

24 MS. CARLSON: Lisa Carlson, Funeral Consumers
25 Alliance, with a piece of candy in my mouth.

1 MR. ELVIG: I am Paul Elvig from Seattle,
2 Washington, I'm with the International Cemetery and
3 Funeral Association. I'm a former regulator of
4 cemeteries in our department of licensing and now I'm in
5 the private sector in a private cemetery in the Seattle
6 area and we're here obviously interested in the
7 exemption issue for funeral homes and cemeteries, and a
8 little bit on the issue of advertisement and that nature
9 as far as national do-not-call lists are concerned.

10 MS. HARRINGTON-McBRIDE: Okay.

11 MR KIVOWITZ: Hi, my name is Stuart Kivowitz,
12 although I go by Sandy, and I am with SBC
13 Communications, and I am here to express my concern that
14 the proposed elimination for the business to business
15 exemption of Internet and web-based services will thwart
16 the development of new technologies that serve as
17 critical competitive tools for small businesses.

18 MS. HARRINGTON-McBRIDE: Thank you.

19 MR. WEBB: My name is John Webb, I represent the
20 Direct Selling Association, obviously representing the
21 direct selling industry, Avon, Mary Kay Cosmetics and
22 obviously we are interested in the face-to-face
23 exemption and the general meeting exemption.

24 MR. SUHRKE: My name is Henry Suhrke, I am here
25 for the Non-Profit and Charitable Coalition and also to

1 oppose the business -- the revocation of the
2 business-to-business exemption for charitable
3 solicitations.

4 MR. FREEMAN: I'm Reed Freeman from Collier
5 Shannon Scott here on behalf of Personal Legal Plans
6 here to talk primarily about the face-to-face exemption.

7 MR. BUSSEY: My name is Len Bussey, I represent
8 the Yellow Pages Integrated Media Association, and this
9 is the association representing the Yellow Pages
10 industry, both print and electronic.

11 My concern is that the proposed change to except
12 the sale of Internet website services from the
13 business-to-business exemption would place an undue
14 burden on legitimate business without evidence that it
15 would stop fraud.

16 MS. HARRINGTON-McBRIDE: All right, thank you.
17 Is there anyone we've missed?

18 (No response.)

19 MS. HARRINGTON-McBRIDE: Okay, for new
20 participants at the table so that you know, if you have
21 a response to a question that is raised and you would
22 like to speak, please raise your tent.

23 And with that we will return to the question
24 that I had asked, would it be burdensome for business to
25 comply with the do-not-call, caller ID and threats

1 provision of the rule for the three industries
2 mentioned, or the three instances of marketing,
3 franchisers, pay-per-call and those sales that involve a
4 face-to-face meeting before payment.

5 John?

6 MR. WEBB: Sure. Direct selling industry
7 registers about \$25 million in sales a year, 11 million
8 different distributors with the United States.
9 Typically our --

10 MS. CARLSON: Put your mike closer so we can
11 hear you.

12 MR. WEBB: I'm sorry. Is that better?

13 MR. HILE: You have to get right up on it.

14 MR. WEBB: Okay. Typically the type of sales
15 that we're talking about are calls that we're talking
16 about sitting in a face-to-face meeting would be the
17 concept of a party plan or something of the like. You
18 might be a Pampered Chef representative and you might
19 call friends or friends of friends to set up a party to
20 sell Pampered Chef products within that kind of
21 environment.

22 And obviously with the current exemption
23 basically being -- basically a total exemption and
24 moving to where the face-to-face exemption would
25 basically not protect as far as the specifically we're

1 concerned about the do-not-call provision, and having
2 someone who basically is working from their home to
3 comply with that part of the rule would be a great
4 burden on them. They wouldn't have the kind of
5 technologies that a typical telemarketer would have, and
6 obviously we don't consider them telemarketers, but
7 roughly 350 percent of their sales come from these type
8 of activities within the context of the face-to-face.

9 And if I can quote from your own website, which
10 I downloaded the other day, it says the goal of the rule
11 is to protect consumers against deceptive and abusive
12 practices that can arise in situations where the
13 consumer has no direct contact other than the telephone
14 sales call itself with an invisible and anonymous
15 seller. A face-to-face meeting provides the consumer
16 with more information about and direct contact with the
17 seller and helps to limit potential problems the rule is
18 designed to remedy.

19 And obviously we can mention the cooling off
20 rule which comes into effect in a face-to-face sale.
21 So, we think this is a totally different type of
22 situation than your typical sales call and we think that
23 the exemption should stay as it is.

24 MS. HARRINGTON: John, let me follow up on that
25 with a question. I understand what you're saying about

1 face-to-face meetings providing an opportunity for the
2 consumer to obtain additional information and prevent
3 against deception, but we're talking about initial calls
4 being subject to the do-not-call provision.

5 MR. WEBB: Right.

6 MS. HARRINGTON: Where a consumer doesn't want
7 to go to a follow-up meeting, doesn't want to get any
8 additional information, simply doesn't want to get any
9 calls at all.

10 MR. WEBB: Right.

11 MS. HARRINGTON: Your rationale doesn't seem to
12 apply to that.

13 MR. WEBB: Well, I mean I think obviously
14 there's been -- the last two days there's been
15 discussion about whether or not there's the statutory
16 authority to do the do-not-call list, and I won't get
17 into that, but the situation that we're talking about
18 are not calls, and I don't think statistics would show
19 these are the kind of calls that people are typically
20 complaining about, because most of the time they're from
21 people that are either known to the person or could be a
22 family friend or neighbor or the like. It could be in a
23 different context, it could be the Girl Scout down the
24 street calling to ask if you want to buy cookies.

25 I mean, we're not talking about the kind of

1 sales that people typically associate with telemarketing
2 from an anonymous person from some company they've never
3 heard of calling to sell them something. And I think
4 that that in itself is such a great distinction that it
5 should continue, as, you know, it was in -- in the rule
6 as it presently is.

7 MS. HARRINGTON: Now, under the fee proposal,
8 which is not subject to discussion here, nonetheless,
9 under the proposed fee rule, I believe it's the case
10 that if a seller is obtaining phone numbers for strictly
11 local calling, there wouldn't be a fee, because that
12 would likely be for one or very low number of area
13 codes.

14 MR. WEBB: Sure.

15 MS. HARRINGTON: And there is an exception. So,
16 what's the burden then?

17 MR. WEBB: Well, say for instance I get the
18 do-not-call list just for one area code, I mean, I'm not
19 sure how many thousands and thousands of numbers that
20 might potentially be, and if I'm a stay-at-home mom and
21 I'm an Avon lady on the side, I mean, the technology to
22 take that list and say, okay, is my neighbor Sally on
23 this list, and go through these thousands and thousands
24 of names, I don't -- I'm not even sure exactly how they
25 would do that.

1 They don't have the technology available that a
2 lot of telemarketers might have to be able to, quote
3 unquote, scrub a list. And so I think it would be
4 tremendously burdensome on someone in that situation.

5 MS. HARRINGTON-McBRIDE: Jeff?

6 MR. KRAMER: Thank you. Jeff Kramer, AARP.

7 We would support this provision by the
8 Commission. I look at it kind of as a substantive
9 versus procedural argument, in a consumer procedural end
10 of it, while the substantive side is maybe the
11 face-to-face sale, the procedural side is the consumer
12 doesn't want phone calls and wants to be on a
13 do-not-call list and it should apply to all those calls.
14 The same with the caller ID provision and obviously with
15 the threat provision.

16 And the other thing about some of these smaller
17 marketers, obviously if a Girl Scout calls and you have
18 a real concern with that and you ask them not to call
19 you again, chances are if it's a neighbor or a Girl
20 Scout, they are not going to call you again. And I
21 think we're talking about some of these bigger ones and
22 I think the concern again is that the consumer doesn't
23 want to be called, then the consumer should not be
24 called.

25 MS. HARRINGTON-McBRIDE: I should note for the

1 record that the calling time restrictions would be
2 implicated in this as well, I think you all know that,
3 but just so we're all on the same page for this
4 discussion.

5 Char?

6 MS. PAGAR: Well, Char Pagar for the PMA.

7 I just wanted to note, our concern with the
8 face-to-face, the face-to-face exemption, we think it
9 should stay as it is. As it's currently formulated with
10 respect to the do-not-call list, if Nordstrom's calls me
11 to tell me my size 5 shoes are in, that call would be
12 prohibited, and I don't think that that would be, you
13 know -- that that would be a call that I would want,
14 would I sign a form saying that yes, Nordstrom can call
15 me, I doubt that I would go to that step, but if they
16 would do me the courtesy of calling me, I would probably
17 go in and buy the shoes and I don't see anything
18 deceptive, abusive, coercive or anything about that.

19 MS. HARRINGTON-McBRIDE: Ron?

20 MR. PLESSER: Of course DMA opposes generally
21 the do-not-call list, but this circumstance and I guess
22 the next two on the list really points out the concern
23 with the failure to recognize prior business
24 relationship because a lot of these situations,
25 particularly in the face-to-face areas, where there is

1 some prior knowledge, there is some implied consent,
2 there is some interaction, as we will talk previously,
3 talk even more in some of the other areas, so I think to
4 put on to that to have a do-not-call list without --
5 without some kind of prior business relationship, would
6 be really difficult, and the question is a burden on
7 industry, and I think would be a tremendous burden
8 generally on the industry, particularly in these areas
9 of exemptions where there's probably more connection
10 between the marketer and the individual.

11 MS. HARRINGTON-McBRIDE: Mallory?

12 MR. DUNCAN: Mallory Duncan, National Retail
13 Federation.

14 I want to associate the federation with the
15 comments made by John as well as those made by Ron. I
16 realize that the matter that's up for the June 28th
17 comments is not on the table, but this does go to the
18 question of how many small businesses, particularly our
19 smaller members, maintain their books and customers.
20 They literally have a card file or a binder with the
21 names of maybe a thousand customers or so that they have
22 developed over the years, and so even if one were to
23 make a computerized printout with phone numbers and the
24 area code, it would be extraordinarily difficult for
25 them to go through a few thousand numbers and try to

1 match those up against a list that might change every
2 month and cross out those numbers.

3 The present system, which allows
4 company-specific opt-outs for those favorite customers
5 is probably the best approach. If they call the
6 customer and the customer says, don't call me again,
7 they call up the customer by name, the name is
8 immediately labeled there in the book, they can cross
9 them out or add a DNC next to it and not make a call to
10 that customer in the future. That is extremely
11 difficult to accomplish under the mechanisms that the
12 Commission is talking about for this do-not-call
13 national list.

14 MS. HARRINGTON-McBRIDE: Elliot and then
15 Stratis?

16 MR. BURG: Is it within -- Elliot Burg, NAAG.

17 Is it within the scope of this discussion to
18 point out a couple of words in the face-to-face
19 exemption that make it problematic here?

20 MS. HARRINGTON-McBRIDE: Certainly.

21 MR. BURG: For the record, NAAG opposes this
22 exemption, is concerned about the difficulty of
23 rectifying the misrepresentation or misunderstanding
24 from a telemarketing call and later face-to-face
25 meeting, but if the Commission were inclined to maintain

1 this provision, there were two words that I wonder if
2 they are best chosen here, one is with respect to
3 payment or authorization not being required on the -- on
4 the initial telemarketing call.

5 I'm wondering if the Commission meant requested,
6 because you may have situations where the telemarketer
7 can legitimately say we didn't require authorization for
8 payment, but we did ask the consumer if he or she wanted
9 to provide the credit card number and the person said
10 yes. And it's not required, if I'm following the
11 exclusions.

12 Secondly, the term "sales presentation" is used
13 both with respect to commercial calls and charitable
14 solicitations, and I'm not sure what sales presentation
15 is in the context of a charity solicitation.

16 MR. PRIDGEON: Stratis Pridgeon, ARDA. I kind
17 of echo the sentiments along with the other side of the
18 table as well, DMA and NRF.

19 I think we have a concern with the additional
20 costs involved, I think even as most of our members are
21 certainly larger companies, there is a movement out
22 there after licensed salespeople and brokers to make
23 calls from their home, and they will not have the
24 do-not-call and may not have the caller ID capabilities.
25 I think there is reason to have a concern over

1 certain -- any deceptive practices and certain
2 disclosures, but even in that context, when there's a
3 face-to-face meeting at the -- before the purchase is
4 made, there is an opportunity to provide necessary
5 disclosures, and certainly in the area of real estate
6 and things like that, that require significant
7 disclosures, those may only be able to be made
8 effectively within the context of a face-to-face
9 setting.

10 And also, I certainly do not want to take this
11 as picking on the Girl Scouts, but that was the example
12 that was made, but it has also been brought up recently
13 by the Supreme Court in an Ohio case, with regards to
14 home solicitation. If we start singling out groups, I
15 mean, whether it's, you know, time share or real estate
16 or something else as being less popular than Girl Scout
17 Cookies or something like that, I think -- I don't think
18 you make that distinction because some people are
19 interested in those other types of products, and I think
20 in this Ohio case that's being brought out now, that the
21 Jehovah's Witnesses are bringing, the Supreme Court made
22 comments to are you going to require, you know, trick
23 and treaters and Girl Scouts to get a license prior to
24 making solicitations.

25 So, I think that's an analogous situation, it's

1 not directly related, but it's an analogous situation
2 that we should take note of.

3 MS. HARRINGTON-McBRIDE: Paul?

4 MR. ELVIG: Paul Elvig, ICFA.

5 The question you have before the group at this
6 time uses the word burdensome, yes, it is burdensome to
7 the types of organizations we represent. Funeral homes
8 and cemeteries across America are individual
9 establishments, some are owned by chain organizations,
10 the one I work for is privately owned. Each one that
11 uses the telephone to establish appointments to discuss
12 funeral arrangements with people do so with local people
13 because you need to know the area, you need to know the
14 churches of the area, you need to know the ministers of
15 the area, and so to have to utilize a national list
16 somehow to marry it to what would be for us the Puget
17 Sound area would become as we see it quite a task, a
18 task quite burdensome.

19 And so we think whether an organization is owned
20 by a large chain or by a local one like us, it's local,
21 do-not-call lists that are developed, we maintain them
22 off of the local phone, we maintain them by local people
23 in a local situation, and we do feel that a national
24 do-not-call list would be burdensome for us.

25 MS. HARRINGTON-McBRIDE: Jeanne?

1 MS. DELGADO: Yes, the National Association of
2 Realtors opposes removing the exemption for the
3 face-to-face presentation for a number of reasons, but
4 mostly the -- our membership is made up of 67 percent of
5 the firms have fewer than five agents. So, they're
6 relatively small business folks, especially in cases of
7 new agents, this is a valuable tool for them to use.
8 They don't have the resources to take on an expensive
9 marketing campaign, advertising campaign.

10 So, for that reason, but also, the real estate
11 industry is already highly regulated. So, beyond, you
12 know, I think it's important to go past the telephone
13 call to what actually happens next in the face-to-face
14 presentation, because even then, it's not then that the
15 sale is made, it's a meeting to talk about the services
16 that they can offer, and if they choose to hire them for
17 their services, whether it's to list their home or to
18 purchase a home, even then they're signing a contract
19 and they're not paid until a result is achieved, which
20 is the selling of the home at a certain agreed-upon
21 price or the purchase of a home.

22 So, there's already so many built-in
23 protections, and somebody said earlier --

24 MS. HARRINGTON-McBRIDE: Again, we're trying to
25 focus here, though, not so much on the fraud or

1 deception aspect. So, if we can try to stick to that.

2 Reed, do you have something?

3 MR. FREEMAN: Yes. I want to thank the
4 Commission for the opportunity to comment.

5 I have four main points regarding face-to-face
6 exemption. I think it's important to note that if
7 somebody expresses a willingness not to be called,
8 you're still going to be called. They are going to be
9 called in intrastate calls, they are going to be called
10 by entities that are not regulated by the Commission and
11 they will be called where it's exempt already. I think
12 the issue is whether it's fair or appropriate for those
13 people to be called for the do-not-call list to apply in
14 specific situations.

15 My first point is that not allowing the
16 face-to-face exemption is arbitrary. Some calls are
17 allowed to be made, for example, noncommercial or
18 survey -- commercial surveys or marketing research,
19 where there's no intent to induce a sale are made.
20 Those are commercial in nature, though, and it's hard to
21 distinguish them from a call that we made designed to
22 set up a later face-to-face meeting. One is commercial
23 and is a little more indirect, one is commercial and is
24 slightly more direct. To ban one from making calls on
25 the do-not-call list but not the other, based on that

1 subtle distinction, is difficult to defend.

2 Second, I think a bright line rule regarding --
3 a bright line rule that would require sales only that --
4 calls that only result in a sale during the call is more
5 workable and is less likely to chill legitimate
6 activity. The Telephone Fraud and Consumer Protection
7 Act uses the term that telemarketing is conducted to
8 induce the purchase of a sale.

9 Well, that's a vague term, "designed to induce
10 the sale." What does that mean? This by operating on
11 that term and by requiring folks who are going to do a
12 sale and later do a face-to-face meeting to decide
13 whether they are inducing a sale, it's going to chill
14 activity, it's not at all clear and it's going to be an
15 enforcement problem for the Commission.

16 Third, I think the state experience is
17 instructive. The Commission has said already that it
18 will look to the state experience and here I think it's
19 clear that a number of states, 18 is the number I
20 understand, have do-not-call lists that do have a
21 face-to-face exemption, and one that's been in place the
22 longest, Florida has not seen fit to impose the
23 do-not-call list on calls that will result in a sale
24 after a face-to-face meeting.

25 Finally, I want to just pick up on a point

1 mentioned a moment ago. By requiring entities or firms
2 that will make calls that result in a sale after a
3 face-to-face meeting to abide by the do-not-call list is
4 going to have a disproportionate impact on small
5 business. Small businesses are also businesses that are
6 more likely to be owned and controlled by women and
7 minorities.

8 Why small businesses? Because these sales
9 necessarily require a contact every place where the
10 consumer is called. Small businesses that operate
11 locally are likely to have that. And just because they
12 call locally, of course, we being in the District and
13 myself living in Virginia, it's clear that interstate
14 can happen locally.

15 So, with all of these concerns, that it -- there
16 is an arbitrariness problem, that it's more workable to
17 do it -- to try the do-not-call list only where the call
18 will result in a sale. The state experience and the
19 impact on small business, it seems prudent for the
20 Commission to exercise some restraint and not impose a
21 do-not-call list on calls that will result in a sale
22 after a face-to-face meeting when it rolls this rule
23 out, but wait and see if these factors continue to
24 apply.

25 MS. HARRINGTON-McBRIDE: All right. Does anyone

1 have any comments about requiring compliance with
2 do-not-call for franchises or pay-per-call?

3 (No response.)

4 MS. HARRINGTON-McBRIDE: All right. I think we
5 can move on to our next issue, the impact of the newly
6 proposed exceptions to the general media exemption for
7 credit card loss, protection and business opportunities
8 other than those covered by the franchise rule. What
9 impact will this newly proposed or these newly proposed
10 exceptions have on both businesses and consumers?

11 Anne?

12 MS. SCHNEIDER: I think I can sum up NAAG's
13 response on probably all of these issues by saying that
14 we have historically opposed these exemptions and
15 support any narrowing of them, and speaking to the
16 no-call issue in general, from the consumer's
17 perspective, it doesn't matter whether it's a small
18 business, whether they're selling a securities interest
19 or, you know, or that they're a direct sales
20 organization. One call is much like the other when they
21 have expressed their preference when they don't wish to
22 receive those calls, and I think that that needs to be
23 considered paramount in assessing whether various
24 industries should comply with no-call.

25 MS. HARRINGTON-McBRIDE: Elissa?

1 MS. MYERS: ERA -- Elissa Meyers, ERA.

2 ERA is concerned about any deterioration of the
3 opportunity to use power, the wonderful media available
4 to us, television, the Internet, to help educate
5 consumers on the merits of complex services and products
6 that they may not fully understand. We strongly support
7 enforcement of the laws that are fraud and we think
8 there are laws, certainly the Federal Trade Commission
9 has very effectively addressed deceptive marketing of
10 some fraudulent business opportunities, but we are not
11 sure what you mean by business opportunities in this
12 current context. So --

13 MS. HARRINGTON-McBRIDE: As we discussed in the
14 notice of proposed rulemaking, there is a history of
15 prevalence work-at-home schemes being marketed by
16 telephone. We have been doing a lot of enforcement in
17 that area, and that would be one example.

18 MS. MYERS: And that example we applaud your
19 reference, it's just that we were a little nervous about
20 the et cetera.

21 MS. HARRINGTON-McBRIDE: John?

22 MR. WEBB: Certainly we support the -- your
23 efforts, and --

24 MS. HARRINGTON: John, you need to speak right
25 into it.

1 MR. WEBB: Certainly we support your efforts in
2 trying to root out fraudulent activity, but in the case
3 of business opportunities, which typically would be the
4 type of situations that would be associated with direct
5 selling, because typically to get started in some kind
6 of direct selling activity, be it Avon lady or Mary Kay
7 or whatever, typically the costs are under the \$500
8 limit that was in the franchise rule.

9 The Federal Trade Commission has obviously
10 chosen not to regulate these specifically in the
11 franchise rule and put a limit on that cost. Most of
12 the states have done something similar, with I think the
13 lowest limit being \$200. Most of our business
14 opportunities in direct selling are below the \$200
15 level.

16 So, the cost of getting started in these type of
17 situations are relatively minor in the scheme of things,
18 and to require someone, say an Avon lady who puts an ad
19 in a local paper and says, you know, would you like to
20 be an Avon lady, and then they call up that person in
21 response to a general media ad, and now you're basically
22 making the Avon lady a telemarketer as far as some of
23 the activities that she has to -- or recordkeeping that
24 she has to be engaged in, when none of her other
25 activities may in any way bring her under the rule, just

1 this one exemption or restriction of the exemption would
2 bring her under it.

3 So, it would be tremendously burdensome in that
4 situation on our direct sellers who are recruiting new
5 salespeople to comply with the rule in this case.

6 MS. HARRINGTON-McBRIDE: Do you have any
7 statistics, John, about the number of your members who
8 use the telephone as a recruit tool versus other
9 methods?

10 MR. WEBB: I don't have anything specifically on
11 that. As far as general media, that is something that
12 they might use. Obviously a lot of times they're
13 recruiting people that they know, friends, family,
14 whatever, but there certainly are cases where they might
15 put something on the bulletin board of maybe a shopping
16 mall or whatever. Anything that might come under that
17 kind of situation as far as the ad.

18 The question is, is -- when they're receiving an
19 inbound call from a consumer, should that be covered,
20 because it's in response to a general media ad. And I
21 think that's sort of turning, you know, putting the cart
22 before the horse in a sense, and totally turning the
23 rule on its head to say that those kind of calls to our
24 direct sellers should be covered when you could have a
25 situation where, like I said, Avon lady, in no other

1 circumstance would she be covered by the rule, she
2 doesn't do anything that would be remotely considered
3 telemarketing, but because she receives calls about
4 potentially becoming an Avon lady then she's going to be
5 covered. That seems at least odd in its interpretation
6 of the way this should work.

7 MS. HARRINGTON-McBRIDE: Elliot?

8 MR. BURG: Elliot Burg for NAAG.

9 Unfortunately, for every legitimate MLM, there
10 are lots of companies big and small out there that are
11 engaged in promoting false earnings claims and we see
12 them with initial advertisements in many media, and I
13 find it hard to understand the difference in terms of
14 the type of enforcement and regulation that's
15 appropriate. I find it hard to distinguish between an
16 outbound call from a deceptive MLMer, let's say, and an
17 inbound call from a consumer responding to a poster in
18 his or her neighborhood that said "Earn lots of money,
19 call this number," or a small ad in the newspaper that
20 says the same thing.

21 There's very little money -- excuse me, very
22 little information conveyed in those kinds of initial
23 general media ads, and really outbound/inbound may not
24 be the same thing.

25 MS. HARRINGTON-McBRIDE: John, if I could go

1 back to you for a moment, and conveniently your tent is
2 up. My question for you is this: Would compliance with
3 the provisions of the rule other than the recordkeeping
4 provision burden those you represent?

5 MR. WEBB: Well, obviously, I don't think it's
6 per se necessary, because obviously a lot of --

7 MS. HARRINGTON-McBRIDE: And if you can specify
8 the ways in which that would be burdensome, that would
9 be helpful as well.

10 MR. WEBB: Specifically we're speaking to the
11 recordkeeping requirements, because I think that's the
12 main thing that they would be covered by, I think also
13 the time limitations. Well, actually the time
14 limitations wouldn't be relevant since obviously it's an
15 inbound call, but that would be I think the most
16 burdensome thing. Basically having to keep those kind
17 of records for a one basically person business, is
18 probably something that would be difficult for them to
19 do.

20 MS. HARRINGTON-McBRIDE: Thank you.
21 Jeff?

22 MR. KRAMER: Thank you.

23 AARP would like to associate itself with the
24 comments of NAAG and Elliot in support of both the
25 direct mail and the general media exemption. For the

1 very same reasons that they've mentioned, I mean, we see
2 for the most part as a way to get around the
3 telemarketing sales rule, by providing, you know,
4 advertisements with very little information and just
5 enticing people to call.

6 So, they have little information to work with
7 and then on the phone call just as if they had gotten
8 the call from the telemarketer.

9 MS. HARRINGTON-McBRIDE: Elissa?

10 MS. MYERS: Strangely, Jeff, we also support
11 AARP and NAAG's position with the caveat that we would
12 like to distinguish those forms of advertising that do
13 disclose the material terms of the offer versus those
14 that provide inadequate disclosure.

15 MS. HARRINGTON-McBRIDE: We're going to get to
16 that.

17 John?

18 MR. WEBB: I mean, there's been a lot of
19 comments made specifically about, you know, that there
20 are bad actors out there. Fine, there are bad actors
21 out there, everybody knows that, go after them. If
22 somebody is doing something deceptive in advertising, go
23 after them, by all means. I'm not even sure exactly
24 what compliance with this by, say for instance a direct
25 seller or legitimate business is in some way going to

1 prevent that, because they're going to keep these
2 records, I'm not sure, like I said, exactly how that's
3 going to make it less likely that someone is going to be
4 deceived or less likely that someone is going to be in
5 some way harmed by them complying with it in the first
6 place.

7 MS. HARRINGTON-McBRIDE: Tyler?

8 MR. PROCHNOW: Katie, to your question regarding
9 other costs and burdens to small businesses engaged in
10 this type of activity, if they were forced to comply
11 with the law, I think another area which you might find
12 some problem or at least some very awkward moments would
13 be in situations like many of the ones John's described
14 here today, Avon and whatever else where you receive a
15 call from somebody else and you're automatically under
16 the disclosure requirement. You can't say, hi, Tyler,
17 how are you doing today, great to hear from you, et
18 cetera, et cetera, immediately you have to start in with
19 my name is, I'm calling to sell you something today, in
20 many of the instances of John's clients that I am
21 unfamiliar with, there's also usually a prize associated
22 with people attending some of these events, if you had
23 to start telling them the odds of winning, making other
24 disclosures related to the prize promotion or
25 recipients, I think you start getting into consequences

1 again on the burdens.

2 MS. HARRINGTON-McBRIDE: The exception is
3 focused on credit card fraud protection and business
4 opportunities, just to frame that.

5 MR. PROCHNOW: Sure.

6 MS. HARRINGTON-McBRIDE: Elliot?

7 MR. BURG: Oh, I'm sorry.

8 MS. HARRINGTON-McBRIDE: John?

9 MR. WEBB: Well, no, I certainly appreciate your
10 comments. Certainly I think the disclosure provisions
11 would also be difficult for them in the situations that
12 they're calling from -- for, because even though it is
13 a, quote unquote, business opportunity and we work on
14 these laws all over the United States, and certainly
15 have worked with the FTC on it at the federal level,
16 there is a -- there is a point at which they will have
17 an opportunity to explore the opportunity and this is
18 not typically a situation where someone is selling this
19 over the phone.

20 It would be a situation where, okay, there's a
21 general media ad, they call in to the direct seller, to
22 the Avon lady as it were, and she discusses it with
23 them. Obviously at some point, at least within our
24 industry, there's going to be a contract signed, and
25 like I said, the money involved -- now the mike is

1 really great, so I don't have to be close at all -- and
2 so I'm just saying in that situation, I think the
3 chances for fraud and deception are somewhat limited,
4 and I'll get back to the point I said a while ago, not
5 to repeat myself. I'm not sure by requiring this, how
6 you're going to get to the bad actors anyway.

7 MS. HARRINGTON-McBRIDE: Concern is noted. Is
8 there any other discussion of the general media
9 exceptions proposed in this NPRM?

10 Anne?

11 MS. SCHNEIDER: I just want to bring your
12 attention to some litigation that the State of Missouri
13 was in over the last year or so with a company by the
14 name of International Brands Marketing. This company
15 was running advertisements on television, general media,
16 advertising click lights, Euro slicer, some other small
17 items, offering them for free with the payment of
18 shipping and handling and then there were upsell issues
19 as well. I mean, there were practices that we want the
20 TSR to be covering, and applicable to. But that
21 exemption arguably would take it out of the whole TSR,
22 which is, you know, certainly not in consumer's
23 interest, not in the Commission's interest, and I don't
24 think in the state's interest.

25 MS. HARRINGTON-McBRIDE: All right, we will move

1 along now to the -- oh, Lisa, do you have something?

2 MS. MYERS: This Lisa.

3 MS. HARRINGTON-McBRIDE: The other Lisa.

4 MS. MYERS: I just wanted to tell someone who
5 does not represent that particular company but uses that
6 media to sell products, I was just wondering if there
7 was clarification what about that litigation was
8 problematic to you. What were they doing that bothered
9 you?

10 MS. SCHNEIDER: It was the conduct on the
11 telephone call that bothered and the consumer responded
12 to the advertisement.

13 MS. HARRINGTON-McBRIDE: Okay. We're going to
14 move along to the direct mail.

15 MR. PROCHNOW: Katie, just one quick comment?

16 MS. HARRINGTON-McBRIDE: Yes, Tyler?

17 MR. PROCHNOW: And just for the record, those
18 types of activities that they are talking about would
19 not be covered by this, they are not business
20 opportunities.

21 MS. HARRINGTON-McBRIDE: Right, and I think
22 NAAG's argument is that there should not be an
23 exemption, let alone pulling back through exception.

24 MS. SCHNEIDER: That's correct.

25 MS. HARRINGTON-McBRIDE: So they are arguing for

1 a general broadening.

2 Direct mail, with that provision, we have done
3 something similar to what we have done with the general
4 media exemption, the credit card loss protection and
5 business opportunities other than franchise would be
6 included now, under that provision. What discussion on
7 that topic? Yes, particularly things that were not in
8 your comments or were not already said in the context of
9 the general media exemption.

10 Elissa?

11 MS. MYERS: Oh, I'm sorry.

12 MS. HARRINGTON-McBRIDE: Okay. Remarkable
13 restraint, thank you.

14 MR. PLESSER: Just wait.

15 MS. HARRINGTON-McBRIDE: I think on the second
16 part of this we may have some discussion, though, on the
17 inclusion, the Commission's determination that emails
18 and fax messages would be included as direct mail for
19 purposes of the rule.

20 Ron?

21 MR. PLESSER: Well, this is going to surprise
22 everybody, but I think by and large DMA supports the
23 Commission position with one caveat that we did discuss
24 in our comments, but I think it's worth just mentioning,
25 that we think it should be up to the marketers to where

1 the disclosure comes, whether or not it comes in the
2 email piece or if it goes in the telephone call, because
3 we really wanted to get away from the idea of regulating
4 particularly email context what the context is, if the
5 disclosures might be in either place, it seems to us
6 appropriate.

7 So, that would be the only, and I'm not sure the
8 Commission had a clear position on that one way or the
9 other, I think that's our caveat and I think that's,
10 other than that, I think we -- we would like to see it
11 considered direct mail.

12 MS. HARRINGTON-McBRIDE: One question I had,
13 Ron, when I read the DMA's comment was, it wasn't
14 exactly clear to me why there should be a distinction
15 between direct mail that is sent via email, direct mail
16 that is sent via fax and direct mail that is sent via
17 regular mail and why the disclosures would be required
18 on the mail piece, direct mail piece sent through U.S.
19 Mail, but not required presumably in either of the other
20 two contexts, or are you arguing only for the email?

21 MR. PLESSER: I think what we're arguing for is
22 the option. We're not saying that it doesn't matter.
23 It could be an email or it could be in the telephone
24 conversation, I think the practice of having direct
25 marketing is the way that is really where that's

1 developed. So, we would like to really create it for
2 precedential purposes and other concerns of not having
3 the content of email directed.

4 So, if the disclosure is being made, we think
5 that's sufficient.

6 MS. HARRINGTON-McBRIDE: On that specific point,
7 does anyone have any further comment?

8 MS. MYERS: Yes.

9 MS. HARRINGTON-McBRIDE: Elissa?

10 MS. MYERS: My mother has taught me many things,
11 and one of them was that you shouldn't look a gift horse
12 in the mouth, and so for purposes of this rule, we're
13 delighted to see email covered here, but because of the
14 potential precedential nature of categorizing email as
15 direct mail, we do have some concerns about that.

16 We had the privilege to participate in some of
17 the discussions that you had around .com disclosures and
18 I think during the course of those discussions, we saw
19 that there is some significant number of complexities in
20 the nature of email that distinguish them from a
21 catalog. One such exception or one differentiation, for
22 example, is that in the catalog, you may have as many
23 pages as the mailer can afford to send, but at some
24 point, when the catalog goes to the printer and gets put
25 in the envelope, that's the end of the disclosures.

1 MS. HARRINGTON-McBRIDE: And nowhere in the
2 exclusions, exemptions, exceptions to those things
3 wrote --

4 MS. MYERS: I know, I'm not supposed to look a
5 gift horse in the mouth, but I'm just --

6 MS. HARRINGTON-McBRIDE: No, I'm wondering if
7 there's a similar argument that you could make if you
8 take catalogs out of the pie and leave there only direct
9 mail pieces that would look like, you know, pieces of
10 paper as opposed to whole thick catalogs, is there a
11 distinction there?

12 MS. MYERS: I don't think so. I think that
13 almost every other form of marketing medium, including a
14 television advertisement, even one that runs as long as
15 30 minutes or longer on a 24-hour shopping channel, I
16 think there is an end game to the content. And in email
17 advertising, while a recipient of an email advertisement
18 may choose to bypass many layers of underlying
19 information, and go directly to the phone, therefore
20 missing the disclosures, the -- a marketer can put in an
21 infinite number of disclosures and can continue to
22 strengthen the disclosures behind the email marketing
23 message, should they determine the customers are missing
24 it.

25 So, we're not arguing against what you propose

1 here, but on the -- for the record, questioning the
2 categorization of email as direct mail.

3 MS. HARRINGTON-McBRIDE: Anne?

4 MS. SCHNEIDER: It was partially the possible
5 complexity or the length or infinite length of those
6 emails that gave me a little pause, primarily because
7 through faxes and emails, the marketer, while they send
8 it out, they don't have much control over how it's being
9 received. Whether it's formatted, whether it all prints
10 out, and so forth, whether it can all be read by the
11 consumer at that end of the transaction -- of the
12 communication. And it's a technical issue, a technical
13 concern that I think is one that we ought to think
14 about.

15 MS. HARRINGTON-McBRIDE: Char?

16 MS. PAGAR: I'm actually going to agree with the
17 person from NAAG, yeah, but I think that, you know,
18 originally in the '95 proceedings, the Commission, I
19 believe, ended up concluding that the Internet and email
20 was going to be outside the scope of this rule, and I
21 think that that's actually to be candid, the appropriate
22 approach just because of those complexities that were
23 mentioned by Elissa and also by I think it's -- is it
24 Anne from NAAG, I just think that that would be a better
25 approach, and if you choose to go forward with this

1 proposal, then I would suggest you consider the DMA
2 approach, which is to allow companies to do an either/or
3 or both.

4 MS. HARRINGTON-McBRIDE: I don't know if this
5 point of clarification is necessary, but I will make it,
6 because it seems to me it's at least possible that it
7 is. The Commission has stated clearly in the notice of
8 proposed rulemaking that was published this January that
9 in fact its position is not to regulate the Internet via
10 the telemarketing sales rule, but rather this proposal
11 would include as pieces of direct mail items sent via
12 email that are driving calls. And so that's the
13 connection, I think if you don't connect those dots,
14 this may seem somewhat confusing.

15 Mark?

16 MR. BOHANNON: I just wanted to say that as the
17 Commission knows, this was not an area where our
18 comments focused originally, but we have had a chance to
19 go through all the other submissions and those of DMA
20 and others, and I think actually where the Commission is
21 headed is exactly the right decision based on our
22 experience, and I think if we were to poll our members
23 more in depth, I think that they would find the kind of
24 flexibility that Mr. Plessner outlined really trying to
25 get to the same goal.

1 So, I think I wanted to associate ourselves with
2 agreeing with where the Commission was headed on this.

3 MS. HARRINGTON-McBRIDE: Anne, do you have
4 another comment?

5 MS. SCHNEIDER: Sorry.

6 MS. HARRINGTON-McBRIDE: Okay. Any further
7 comment on the proposed changes to the direct mail
8 exception?

9 (No response.)

10 MS. HARRINGTON-McBRIDE: Exemption. All right.
11 Now may be an opportune time. We are joined by two
12 members of the funeral care industry and they have
13 specific concerns regarding our notice of proposed
14 rulemaking and its position that the Commission's
15 funeral rule will cover sufficiently some concerns that
16 are had by the industry.

17 If we could maybe take a few minutes to discuss
18 the specific concerns of your industry, it would be
19 helpful to have that on the record.

20 Lisa?

21 MS. CARLSON: We don't believe that the funeral
22 rule will deal with telemarketing at all, that
23 absolutely the do-not-call is going to be welcomed.
24 Number one, it's not going to be a burden to the
25 industry, because we're all going to die and they're

1 going to get our business anyway. If anything, it will
2 reduce the burden of paying Commission sales reps.
3 Those that are scrambling to try to improve market
4 share, we find, are exceedingly onerous in their
5 approaches.

6 I passed around a copy of Stewart's, the third
7 largest corporation, sales training material. The sales
8 people have to complete eight hours -- ten hours a week
9 the first week, eight hours a week thereafter, of
10 telemarketing. They're at risk of losing their medical
11 benefits, if they don't proceed with that.

12 The people who are targeted tend to be the
13 elderly, the grieving, it is standard practice to call
14 family members after a death, including unlisted phone
15 numbers obtained from the funeral home. We think this
16 is fraudulent, unfair business practices.

17 MS. HARRINGTON-McBRIDE: Paul?

18 MR. ELVIG: I'm very happy to have the
19 opportunity to talk about why we're concerned about the
20 removal of the exemption on the funeral side. I am Paul
21 Elvig with the ICFA, and yes, Lisa, we know you don't
22 like the funeral practice, much less the prospect of
23 dying. That's not why we're here. We're here talking
24 about the exception or the exemption and removing it
25 from this rule.

1 The agenda itself refers to telemarketing sales
2 practices within preneed. The sales of cemetery and
3 funeral preneed products do not occur on the telephone,
4 and I cannot emphasize that enough. Appointments are
5 made when and where it's determined somebody is
6 interested in talking about either funeral, about
7 cemetery property, or about cremation, and by the way,
8 cremation is a big issue with a lot of people today,
9 especially in our market, and so we're not talking about
10 sales on the telephone. We're talking about qualified
11 appointment, and we qualify that by the fact that there
12 are many people who do not want to talk about, nor do
13 they need to talk about pre-arrangements.

14 You take a 19-year-old married couple, they have
15 no interest in pre-arrangements, and the organization
16 ought not spend its time with them, but in the case of
17 some folks that are going through retirement practices,
18 and analysis, they will want to talk about these things.
19 If they do not want to talk about it, they will not make
20 an appointment, we cannot force ourselves that way.

21 I was asked, how do you know sales aren't made
22 on the phone? Well, let me tell you this: That if you
23 could buy a grave, which you can't, over the telephone,
24 it would mean you could buy cemetery property and never
25 agree to its rules and regulations by your signature.

1 And so therefore, it's absolutely essential, and many
2 state laws require that a signature be applied to an
3 actual contract conferring and concurring in rules of
4 the cemetery. So, therefore, sales can't occur over the
5 telephone. So, the very subject item is mislabeled.

6 Now, we're concerned also about the concerns
7 that we have about intimidation. We think that there
8 should be more definitions offered up by the FTC,
9 especially in the area of intimidation. My presence is
10 intimidating to Lisa, does that mean that I shouldn't
11 ought to be here?

12 MS. HARRINGTON-McBRIDE: I doubt it.

13 MR. ELVIG: I want to say this -- well, she
14 seems to find it that way. I want to say this, my own
15 choir director made the comment one time, knowing the
16 profession that I am in is intimidating.

17 I think that if we're going to talk about
18 definitions in the telemarketing rule, the FTC should
19 look at defining definitions a lot more. The ICFA has
20 urged and encouraged the FTC in previous hearings on the
21 telemarketing rule to tighten down the exemptions, to
22 tighten them down so that they truly are appointments
23 getting and not sales making. We have supported that
24 all along the way.

25 And in concluding my comments, so we can get

1 right to the point, we feel with the ICFA that the
2 record is what should stand for examination. We
3 requested under the Freedom of Information Act several
4 years ago any and all complaints filed about the funeral
5 and cemetery industry. We finally got some, we got a
6 total of about 98 that had come in over a period of four
7 years. We have that recap here. Of those 98
8 complaints, nationwide, 6,000 deaths a year, a day, by
9 the way, out of all of those complaints, only two
10 touched on the question of telephone contact. The
11 mailing -- the letter that Lisa has passed around
12 indicates that this family accepted an appointment.
13 They did not make a sale over the telephone.

14 And so we feel that the -- that the complaints
15 that the FTC has are so sparse in the area of complaints
16 about telemarketing it's not worthy of even touching the
17 exemption rule. So, we're here to ask that you not
18 remove the exemption rule for funerals and cemeteries.
19 And yes, I have other comments if you wish.

20 Thank you.

21 MS. HARRINGTON-McBRIDE: Paul, I for one would
22 like to say that I believe, and I hate to endorse any
23 sort commercialism while I am here, but that the HBO
24 series Six Feet Under has made your industry much less
25 intimidating, at least for me.

1 MR. ELVIG: Well, can I tell you that that
2 series asked for permission to film on our property in
3 Seattle.

4 MR. BUSSEY: Did you grant it?

5 MR. ELVIG: It was a very interesting
6 experience. No, they chose not to use it after they saw
7 what the place looked like.

8 MS. HARRINGTON-McBRIDE: They didn't like your
9 task at all.

10 Allen, any follow-up on that?

11 MS. HARRINGTON: Well, I just want to say for
12 those of you who find your interests piqued, we have
13 another rule review proceeding that's been going on in
14 the funeral rule area, one of our other rules and you
15 are all welcome to come back for that. So, this is sort
16 of the one-rule wrap-up, this afternoon, where we have
17 many people who we ordinarily see in the context of
18 other regulatory work all sitting around the table, at
19 once.

20 MS. HARRINGTON-McBRIDE: All right. Well, with
21 that, Jeff?

22 MR. KRAMER: Are you prepared to tell us when
23 that's going to be? We've been waiting about three
24 years for that one, I think.

25 MS. HARRINGTON: We've been very busy doing

1 this.

2 MR. KRAMER: But actually I do want to mention
3 that we have concerns with the --

4 MS. HARRINGTON: Lisa paid you, you can say
5 that.

6 MR. KRAMER: No, she didn't. We have concerns
7 because we're not sure, especially in something dealing
8 with something as personal as a funeral and a cemetery
9 arrangement, that the information the person gets over
10 the phone is the same thing that they're getting
11 face-to-face. We're concerned with a lot of industries,
12 but certainly with this one, that when they get the
13 face-to-face, that they're not able to rectify what they
14 heard over the phone and what they may walk away with
15 this perception.

16 MS. HARRINGTON-McBRIDE: Lisa?

17 MS. CARLSON: Just the very nature of funeral
18 purchases gets very emotional, and the letter that gets
19 passed around, those people were intimidated by the
20 salesperson, once -- even though they kept saying no,
21 don't call, we're not interested, he kept pestering, and
22 apparently intimidated them into making a purchase, and
23 unlike a lay-away plan, this lay-away plan is not
24 refundable.

25 MR. ELVIG: Madam chair?

1 MS. HARRINGTON-McBRIDE: Paul?

2 MR. ELVIG: Yeah, it was made -- the comment was
3 just made about other FTC hearings on funeral practices,
4 and given the unique nature of funeral practices on the
5 broad scheme of things, it would seem most appropriate
6 that the expertise that's developed there and that the
7 bank of information and data that's developed there is
8 the best place to address the appropriateness of any
9 phone discussions concerning funeral practices.

10 Allow me to say this: I myself operate in the
11 Seattle area. My father before he died responded to a
12 telephone inquiry for an appointment, and did based on
13 that make his arrangements at a cemetery about 100 miles
14 from where I live. And he was neither intimidated nor
15 feeling overwhelmed. Dad was glad that somebody wanted
16 to talk about what was on his mind, and he didn't want
17 to talk to his son about it. I will never get over
18 that, but at least he responded that way.

19 And so I'm suggesting that if we're going to
20 have a thorough discussion on what's invasion of
21 privacy, when you've gone over the brink, when you've
22 gone too far, the hearings that you've been holding
23 about the funeral practice industry is an excellent
24 venue for that and it should be continued there, not
25 here.

1 MS. HARRINGTON-McBRIDE: Lisa, I'll give you the
2 last word. Oh, and I see Elliot wants to speak to this
3 as well. We'll give Elliot the second to the last word
4 and we'll give you the last.

5 MR. BURG: All right. This topic raises again
6 the question of what a sales presentation is, and I
7 would simply pose it as an inquiry to our query to the
8 commission, if there is a telephone call on which the
9 various elements of a funeral package are -- or preneed
10 package are discussed, what's going to be in it and how
11 much it's going to cost and a bottom line figure, and
12 then there's the face-to-face meeting at which a
13 contract is required by the funeral rule, is presented
14 to the consumer with maybe a couple of words about it,
15 and here's, you know, here's what we talked about, is
16 that a sales presentation?

17 And it seems to me that the line is very fuzzy
18 there, and you may have situations where there really is
19 not substantive discussion face-to-face about what's
20 gone on, and yet might still be considered exempt under
21 the rule.

22 MS. HARRINGTON-McBRIDE: Lisa?

23 MS. CARLSON: Very often these sales pitches are
24 introducing a free burial plot, a free planning guide,
25 so there is an implication that they're getting

1 something for free. So that the beginning of the
2 transaction usually does start on the phone, it's not
3 just an appointment.

4 Lastly, I would say don't knock on death's door,
5 ring the bell and run, he hates that.

6 (Laughter.)

7 MS. HARRINGTON-McBRIDE: I'm almost looking
8 forward to getting the transcript now.

9 I think that leaves us nowhere to go but to the
10 business-to-business exemption, and what we have done
11 with that. Oh, we have a person with a comment, yes?

12 MR. SUHRKE: I'm anticipating the next one.

13 MS. HARRINGTON-McBRIDE: Oh, okay. I'm going to
14 call on you first, because you're really ready to go.
15 In the business-to-business exemption, I know that we
16 have several people at the table with a very specific
17 interest in that, and I think those folks would fall out
18 into two types, those who provide Internet or web
19 services as defined in the notice of proposed rulemaking
20 and those who represent charitable organizations. And I
21 think that we will likely hear a fair amount from both
22 of them about our proposal, the rest of you should feel
23 free to chime in.

24 You may feel free to go.

25 MR. SUHRKE: Thank you. As I said, I am Henry

1 Suhrke, I've spent really over 50 years of my life on
2 the practitioner side as a court witness on charitable
3 solicitation matters, publishing for over 30 years a
4 publication devoted exclusively to charitable and
5 philanthropic questions, and also a reference book we
6 published over 15 years on exactly what the state laws
7 regulating charitable solicitations are.

8 I have five points that I would like to express
9 particularly. The 1995 rationale of the rule that the
10 Federal Trade Commission put out justified and made
11 comment as to the justification for the rule that two
12 things, the business purchasers were uniquely
13 sophisticated buyers who were skilled in evaluating
14 offers, and second that they would find a seller's rote
15 adherence to the requirements of the TSR annoying and
16 disruptive in their ordinary business negotiation.

17 Now, I find that the -- and I'm happy to see
18 that the FTC itself has re-affirmed that the business
19 rule, the exception, should be maintained, and
20 apparently therefore these rationales are still true,
21 which I agree they are; however, I think there's no
22 reason at all to suppose that they would not apply for
23 businessmen dealing with a request to make a charitable
24 contribution. He still has the question of dealing with
25 a request, he is uniquely sophisticated about that sort

1 of thing, because he's been getting requests for
2 charitable contributions for a great many years.

3 In the selling web technology things, there was
4 a question that it was more sophisticated, et cetera.
5 Well, that doesn't really apply in charitable
6 solicitations either.

7 The other side of the coin is that not only
8 the -- is the rationale for the exemption the same, but
9 the consequences, if the exemption were lifted, would be
10 enormous, because charitable solicitation, the most
11 basic fact about it is that it's responsive. That's the
12 first thing most fundraisers learn. In other words, if
13 no one asks, there are going to be no charitable
14 contributions.

15 So, if you by the -- by business-to-business, by
16 withdrawing that exemption, and also parenthetically by
17 the do-not-call rule, if you reduce asking by let's say
18 40 percent, you definitely are going to reduce giving by
19 an enormous amount. In medicine, that goes without
20 saying, the operation was a success, but the patient
21 died. We just can't afford that, it seems to me, in the
22 field of what charities do.

23 Specifically, the second point, with regard to
24 small business, the demographics of this sector are
25 important here, I think, by and large, there are a

1 limited number of very large organizations in money
2 terms, but there aren't very many of them; however,
3 there are thousands and tens of thousands of very small
4 organizations that do not have large resources, and have
5 to raise money constantly. There's almost no
6 intermediate class to speak of. There are some, but not
7 a great deal.

8 What happens the very large, not-for-profits,
9 frequently have missions that go back decades,
10 centuries, in some cases. They have endowments that are
11 quite large. The small groups don't have that option.
12 The large ones, because of these other sources of
13 income, can do donor acquisition prospecting, and
14 develop a resulting average, the key word, of
15 fundraising costs that is very presentable to the
16 public. The small charity that doesn't have the
17 alternative sources has got to rely on other means, and
18 telemarketing has turned out to be one of the most
19 effective.

20 So that the -- and also, these groups, because
21 of -- because their mission is new, et cetera, are what
22 society relies on to do the social R&D, if you will,
23 whereas the establishment charities are doing good
24 things, but they're doing things they've been doing for
25 a long time.

1 The third point, the self-existing regulations
2 by the states, which as I say, we have in the charitable
3 solicitations statute, a special area of law, we have
4 looked after that and published it for many, many years,
5 it does a comprehensive job, I think, of regulating
6 charitable solicitation by no matter what media.
7 Fundraisers are required to be registered, they are most
8 frequently bonded, they do pre-solicitation
9 registration, they do regular financial reporting, in
10 many states they are forced to provide the scripts that
11 they're going to use before they can do any
12 solicitation. So, that all exists aside from
13 telemarketing.

14 Then in the states that do have additional
15 telemarketing statutes, the common practice is to exempt
16 charitable solicitation. And the do-not-call lists most
17 frequently are addressed to the consumer at his place of
18 residence so that this -- the business exemption really
19 doesn't apply.

20 The third point is that to withdraw the
21 business-to-business exemption for charitable
22 solicitations would be especially a hardship for the
23 very large number of the members of this coalition who
24 are members of charity that are uniform services
25 related. This is a special case that involves a very

1 large category of people.

2 The rationale behind this is that if these
3 people were to use an alternative means, if a policeman,
4 for example, or a firefighter face-to-face solicits
5 contributions, it would clearly be an improper appearing
6 situation, in any case. As a result of this,
7 historically, that whole group of people have used a
8 form of fundraising, the unique characteristics of which
9 establishes distance between the charity and the
10 contributor.

11 Normally, they provide a concert, or they do a
12 magazine and urge businesses to take in ads to it so
13 that it's not a policeman calling you up and saying,
14 hey, I want you to make a contribution, or his wife, or
15 volunteers who would be personally involved.

16 The result of this is that in a way, such
17 fundraising is "more expensive," but it's only more
18 expensive because it covers two costs, there's the
19 ordinary cost of registration and fundraising of which
20 registration is a big part, but there's also the part of
21 putting on the concert, or publishing the magazine, and
22 for that reason, there's been I think a bum wrap in some
23 cases that people say, in some enforcement categories,
24 that this is in need of more regulation, or as some of
25 the criteria that I read in some of the material goes,

1 this is a subject that has become important.

2 MS. HARRINGTON-McBRIDE: If I can interrupt you
3 for just a moment, would you remind me of your first
4 name?

5 MR. SUHRKE: Henry.

6 MS. HARRINGTON-McBRIDE: Good, I thought I had
7 it right, but I didn't want to get it wrong for the
8 record.

9 MR. SUHRKE: I'm almost done.

10 MS. HARRINGTON-McBRIDE: Henry, too, I was
11 wondering if you could focus your comments, it sounds
12 like many of them are focused in the context of
13 business-to-business transactions, if you could hone in
14 on the business-to-business aspect, that would be
15 helpful for this session.

16 MR. SUHRKE: Right. Let's see, I think the
17 question we're dealing with here, I dealt with the
18 responsiveness of the matter, new charities, I think,
19 particularly would be affected by the withdrawal of the
20 B-to-B exemption, because, again, they don't have the
21 existing money to devote to it.

22 One thing that bothered me that applies to this
23 particular question is I think one of the members of the
24 FTC staff said in some connection that there was no
25 universally applied standard for deciding to approach a

1 particular subject and new issue. It seems to me that
2 one of the problems here is that in deciding on this
3 particular exemption withdrawal, for example, is that
4 I've seen no standard when a problem rises to the level
5 of saying yes, we have to include this. Instead I've
6 seen abstract references to the states said this is a
7 big problem, or --

8 MS. HARRINGTON-McBRIDE: It's all part of the
9 record, and I think if you review the NPRM, we have
10 cited the evidence.

11 MR. SUHRKE: I have one further comment, if I
12 may. On November 20th the President of the United
13 States said there is a role in the federal government in
14 making sure that charitable organizations thrive and
15 flourish. I think that's an approach that I don't see
16 here. The President didn't say there is a role for the
17 federal government in making sure that nondurable office
18 supplies companies thrive and flourish. So, if you
19 think of our role as a positive one, I think that would
20 be very helpful.

21 MS. HARRINGTON-McBRIDE: All right. Anyone from
22 the web services Internet services world?

23 Yes, Sandy?

24 MR. KIVOWITZ: Thank you, I'm Sandy Kivowitz
25 with SDC Direct Communications.

1 My company has a unique and -- and companies
2 like mine -- has a unique and unparalleled symbiotic
3 relationship with small businesses. It's a sector of
4 the economy that's responsible for 50 percent of the
5 U.S. gross domestic product and it's a segment that's
6 frequently ignored by mainstream advertising services.
7 The vast majority of our customers are small businesses,
8 in most cases very small businesses, and the vast
9 majority of their advertising and marketing expenditures
10 are with companies such as mine.

11 They face an imperative to adopt Internet and
12 web-based services in order to remain competitive and
13 they have begun to do so in record numbers, but only
14 with the assistance of companies such as mine that have
15 the technical knowledge, the budgets and frankly the
16 self interest to develop and host these services.

17 I would like to share with you some statistics
18 regarding how fast and successful this industry has
19 evolved that will hopefully put the Commission's
20 allegations of fraud in the proper context. According
21 to the United States Small Business Administration, 85
22 percent of businesses with less than 100 employees have
23 computers today, 61 percent have Internet access. Firms
24 with fewer than ten employees invested more aggressively
25 in e-commerce infrastructure as a percentage of their

1 revenues than larger firms.

2 By the end of this year, it is estimated that 85
3 percent of small businesses will conduct at least some
4 business via the Worldwide Web, that includes
5 business-to-business transactions as well as
6 business-to-consumer transactions. Dunn & Bradstreet
7 estimates that 35 percent of small businesses today
8 maintain some sort of public web presence, and 10
9 percent are in the process of experimenting with
10 conducting electronic commerce transactions.

11 Two studies, one by the United States Small
12 Business Administration and another one by American City
13 Business Journals have demonstrated that small
14 businesses that use the Internet have grown in one study
15 46 percent, and in the other 50 percent faster than
16 those that have chosen not to use the Internet. Eight
17 percent of small businesses have declared the ability to
18 reach new and potential customers as their primary
19 reason for having a web presence and in a year 2000
20 report on electronic commerce and small business
21 conducted by the Small Business Administration, they
22 concluded with the statement "The Internet has inspired
23 and enabled small businesses to reach wider markets that
24 were only dreamed of a decade ago."

25 My concern ,and I strongly believe that the

1 current proposal to eliminate the exemption for
2 business-to-business telemarketing of web and
3 Internet-based services will do more to hinder the
4 growth of this industry than it will to combat fraud.

5 Thank you.

6 MS. HARRINGTON-McBRIDE: Ron?

7 MR. PLESSER: Well, let me -- I want to respond
8 on both issues, so --

9 MS. HARRINGTON-McBRIDE: I'll give you a minute.
10 I want to go to Mark.

11 MR. PLESSER: Well, I'll go do the Internet and
12 I wanted to say something on charitable and B-to-B.

13 MS. HARRINGTON-McBRIDE: You can do the Internet
14 now, we'll come back to you for the other.

15 MR. PLESSER: On the Internet and web services,
16 there are several issues. It's a very wide definition
17 that you've taken in the rule. We think that the
18 justification, if any, for the rule is based on a
19 defined set of cases that really talk about framing web
20 services in a particular way. If the Trade Commission
21 feels that it needs to go forward, it would seem to me
22 to go forward in the area of where there was some
23 support.

24 Internet and web services is extremely broad, as
25 you've just heard, an extremely strong part of the

1 market. There's a big competitive issue. There's
2 common carriers that compete in this space and noncommon
3 carriers that compete in this space, and by regulating
4 because of the limitations on the FTC not your choice,
5 something that was a decision made many, many years ago,
6 you can only regulate part of the competitors, and even
7 the common carriers who are providing a noncommon
8 carrier product, as we read the word, would be exempted,
9 and so I think you're really creating an unfair
10 competitive edge.

11 And I think the final part, and Mark and others
12 can make it, you know, Internet web sales are very
13 important part of our growing economy, and I think many
14 of us are concerned about kind of taking it out and
15 saying this is a specifically bad or fraudulent
16 industry, I think the precedent for that is bad, and we
17 would strongly oppose that.

18 Thank you.

19 MS. HARRINGTON-McBRIDE: Thank you. We'll go to
20 Mark and then Len.

21 MR. BOHANNON: Thank you.

22 As the Commission knows, we have worked with you
23 on many issues, telemarketing sales rule is not one that
24 we have a history of working with you on. But I think
25 we saw the possibility of bringing web services and

1 Internet services into a telemarketing sales role. I

2 think our jaws dropped to say the least.

3 As we note in our comments, I think the
4 Commission has got to be much more careful in talking
5 about this issue than it has and is currently proposed.

6 As we pointed out in our comments, our entire
7 industry, both on the software publisher side and those
8 who provide content just in the context, we're moving
9 away from the delivery and servicing of those products,
10 from a physical environment to a web-based environment.

11 I think we are very close to the situation where
12 virtually all software that will be delivered,
13 developed, serviced and implemented will no longer use
14 physical carrier medium within the next two years and
15 that it will be entirely Internet web-based in terms of
16 the servicing of what those products will do in an
17 enterprise context.

18 MS. HARRINGTON-McBRIDE: Does that mean no more
19 diskettes?

20 MR. BOHANNON: I think that we are, and let me
21 just say that a few Internet companies have publicly
22 stated in their plans that they intend to completely
23 eliminate the delivery in an enterprise context, I want
24 to be very careful here, because I don't want to affect
25 business-to-business, that we will no longer see in that

1 context the delivery both globally and in the United
2 States on diskettes. And that we are now moving into a
3 situation where software development occurs, both over
4 the Internet and in -- through web-based portals and
5 web-based facilitated development, but I also want to
6 point out that on the information content side, in the
7 business-to-business context, you know, while we may be
8 used to getting our periodicals, newspapers, and content
9 initially, we are now moving very quickly to industry
10 using the web to get those products serviced, developed,
11 customized, all through web-based services.

12 So, our goal here was to point out to the
13 Commission that you basically come up with a definition
14 of web services and Internet services that has the
15 potential of bringing in everything that is related to
16 the Internet. And I don't think that was what your goal
17 was.

18 Going to the specific issues that are in the
19 record, let me just say that we have looked at those
20 examples. I -- we think that there is no basis for
21 excepting web services and Internet services from the
22 exemption rule. The examples that are in the rule,
23 first of all, we note that there are no examples of
24 Internet services in the record. They are all, as Mr.
25 Plesser said, you know, web cramming, and I'll get to

1 that in a second, but none of the examples in the record
2 indicate the practices of Internet services. And I just
3 bring that to the attention of the Commission, a point
4 that we made in our comments.

5 With regard to the examples of web services, to
6 hone down the point, this was one very
7 compartmentalized, very particular kind of web services
8 that is far and away not by any measure significant when
9 it comes to all web services that are -- that are
10 currently being engaged. We would note that the
11 examples are from 1999, as our submission pointed out to
12 you, the evolution of web services has gotten much
13 bigger and one needs to be careful with that. And quite
14 frankly by the substance of the record, the FTC was
15 effective in using its own sector's private authority to
16 go after those.

17 So, we just lay it out that we do not think the
18 record stands on the basis of excepting those
19 exemptions, and that under the existing definitions, you
20 have the potential to just overwhelm industry and the
21 Federal Trade Commission in trying to implement this
22 rule for this particular section of these issues.

23 I also want to follow up, though, with what Ron
24 and the gentleman from the SBC said. We think there are
25 some potentially extremely anticompetitive aspects to

1 this rule, and it's not just the fact that it would only
2 apply to those areas that are specifically regulated by
3 the FTC, and of course the examples of it have been said
4 of banking and insurance where web services are in fact
5 a way to promote competition in those sectors, I would
6 also add health and transportation, which are also
7 sectors that are probably outside the FTC's jurisdiction
8 in this area.

9 But I also want to point out that particularly
10 when it comes to software development, the use of web
11 services is a very sensitive issue in the competition of
12 this industry. I take judicial notice of ongoing U.S.
13 Department of Justice and European Commission
14 activities, so I would encourage you to be very careful
15 in pursuing this too far, because we may have undue
16 consequences that are very essential in ensuring a very
17 competitive dynamic market for new players, and
18 two-thirds of our members of small and medium-sized
19 developers and publishers are effectively able to
20 compete in the business-to-business environment without
21 being restrained by burdens that are based on a real
22 harm that need to be addressed.

23 MS. HARRINGTON-McBRIDE: Len?

24 MR. BUSSEY: Len Bussey, Yellow-Pages Integrated
25 Media Association.

1 As I stated, we -- our association consists of
2 members who handle both print and electronic services,
3 and the services to small business are -- that is a
4 prime customer of companies like ours, and the Internet
5 and website services that are a part of the directory
6 process have become -- are invaluable to small business
7 in that they give us a flexibility that you didn't have
8 with the printed book and many other kinds of things,
9 and to create a situation where you have dual standards
10 or different processes to address a customer who may be
11 out there on the fringe that you are deciding whether or
12 not you can contact them anyway, because of the cost of
13 sales, would be problematic and I don't think at this
14 point it's justified.

15 Cost of sales from a premise visit compared to a
16 telephone sale, as we all know and others can quote the
17 statistics better than I, are significantly higher,
18 anywhere from three to seven times as high, and many of
19 these small businesses are seasonal in that the need for
20 these kinds of services as delivered by our industry are
21 such that you don't have a lot of time to respond.

22 You must be able to predict where they're
23 going to be, this could be a business that only works
24 and sells their products and services during a
25 particular time of the year, and then they go away.

1 The website services, Internet services offered through
2 the directory companies give them the ability to do
3 that.

4 So, at this time, I think it really just shows
5 that we don't have enough evidence that a new and
6 growing array of products and services desperately
7 needed by small business and large business, that we
8 should put the brakes on or create problems that would
9 perhaps cause companies to make decisions not to try to
10 market these services.

11 I would say, also, that small business, it's a
12 double-edged sword in that they are both users of these
13 kinds of services as well as consumers of these kinds of
14 services. So, I would recommend that we do not exclude
15 the exemption for these services at this time.

16 MS. HARRINGTON-McBRIDE: Ron?

17 MR. PLESSER: I just want to make two quick
18 points, one on the charitable issue that I think we went
19 through fairly quickly, I think DMA's position is that
20 business -- that charities should not be exempted from
21 the business-to-business exemption. I think that
22 businesses more and more, and I know in any law firm,
23 many firms have very established policies on charity and
24 giving and it's part of doing business and to treat it
25 somehow separately or to say that a charitable call, you

1 know, should be subject to a telephone sales rule on
2 sale of equipment or something shouldn't -- is just like
3 not in the reality of what's happening where relatively
4 small business, unless there's a case made on small
5 business, I think the difference between now and 1995 is
6 now you're talking about the do-not-call list, in 1995
7 you weren't talking about a do-not-call list, and I
8 think that really changes it.

9 I would like to make just one personal note on
10 the competitive issue, I was very gratified to hear
11 Sandy from SBC make essentially the same competitive
12 issues we were making, or at least agreeing with them on
13 common carriers. I think the issue is it would be an
14 unlevel playing field and it was very interesting to me
15 and I was grateful to hear that even though a common
16 carrier like SBC essentially supports the same issue.

17 Thank you.

18 MS. HARRINGTON: Could I ask someone who is over
19 on this side to open and prop the doors. The hotel
20 seems to be closing off the back doors, and I haven't
21 been able to get in any way other than those doors if
22 they're locked. So, can someone open it and just prop
23 it open, because we're about to move to the open mike,
24 and no one will be able to get in.

25 MR. PROCHNOW: I think it's more important to

1 get out.

2 MS. HARRINGTON: Katie observes and comments to
3 me that perhaps a lock-down would have been more
4 appropriate in the last session than this one.

5 Thank you, Jerry, thanks. Yeah, let's leave
6 those open.

7 Yes, Sandy?

8 MR. KIVOWITZ: Thank you.

9 First I don't recall making comments
10 specifically about the common carrier exemption, and in
11 fact it's SBC's position and mine that we would be
12 covered by the FCC's rules as it relates to that.
13 Whether that resulted in an unlevel playing field I'll
14 leave to future debate. That's not the purpose of my
15 comment right now.

16 What I would like to do is add to Mr. Bussey's
17 comment on the cost of development of the database for
18 a company like ours, database administration, database
19 maintenance and development, for a company like SBC it
20 may not be significant, but for 7,000 independent
21 Internet service providers that are all seeking to
22 provide valuated services that enable them to go to
23 a small business and say here's why you should let
24 me do your web-based development and advertising
25 programs.

1 I imagine the cost of this maintenance and
2 database development would be far more significant to
3 them than to a company like mine. However the increased
4 liability, and the exposure from the general public
5 being able to now bring suits against any of the 7,000
6 players for seemingly innocuous and minor violations is
7 going to change the cost structure of how we offer the
8 business.

9 It's going to change our insurance premiums, our
10 litigation exposure, our legal expense, and to the
11 extent that we're a remaining industry that's serving
12 all of small business, the number of small businesses
13 that can be effectively covered and by an industry such
14 as ours where the margins are not profitable yet, is
15 going to get smaller and smaller, and there will be
16 businesses on the smaller end of the small business
17 economy that would be neglected with 12 to 14 million
18 small businesses in the United States, if that's a 10
19 percent figure, we're talking about one and a half
20 million businesses; if it's a five percent figure, we're
21 talking 600 to 700,000 businesses; and even if we're
22 talking about one percent that are omitted from these
23 targeted marketing efforts, we're still talking about a
24 significant number of businesses.

25 Placed in the context of the allegations of

1 fraud, I can't see what the benefit is from eliminating
2 this exemption compared to what the damage is to those
3 businesses who, as the statistics clearly show, will
4 benefit from their presence on the web.

5 MS. HARRINGTON-McBRIDE: Elliot?

6 MR. BURG: Elliot Burg, NAAG.

7 There is a respect in which some of these
8 exemptions are not as finely tuned as they might be.
9 For example, with respect to business-to-business and
10 charitable solicitations, there is a subset of
11 charitable calls that are made by paid fundraisers on
12 behalf of public safety organizations, police, fire,
13 sheriffs and so on that have been distressingly common.
14 And there are lots of these cases that are at any point
15 in time under investigation by various states, often as
16 a result of misstatements of affiliation by the caller,
17 so that people who get the call assume -- the businesses
18 that get the call assume that it is a police officer
19 that's making the call.

20 Many of these campaigns are for advertising in
21 calendars or with books that are made up, ostensibly to
22 benefit the public safety organization, but the Lion's
23 share of the money ends up going to the fundraiser.

24 Now, it seems to me that the rule is not as
25 finely tuned as it might be, because one could

1 understand a concern about application of the
2 do-not-call regime to these kinds of situations, and
3 there are money people in safety organizations that
4 operate -- whose fundraisers operate in a legitimate and
5 straightforward manner, but I don't understand the
6 rationale for not applying the required disclosures and
7 the prohibitive misrepresentations to these kinds of
8 campaigns, and I'm wondering if there might be some
9 possibility of the Commission's reconsidering exactly
10 how these exemptions are configured in that respect.

11 MS. HARRINGTON-McBRIDE: I think it's now on the
12 record and it will be considered.

13 MR. BURG: Okay, thank you.

14 MS. HARRINGTON-McBRIDE: Henry?

15 MR. SUHRKE: In regard to that particular
16 allegation -- I'm sorry, in regard to that particular
17 point, I thought I had addressed that to some extent,
18 because it was interesting that Mr. Burg just said that
19 these were instances where the fundraiser kept most of
20 the money. This is exactly the error that most of these
21 allegations commit, because the fundraiser keeping the
22 money implies that its profit in his case, whereas as
23 I've indicated, it's double costs that are involved in
24 most cases. It's the cost of putting out a concert,
25 plus the cost of publishing the brochure, plus the

1 fundraising costs that your registration and other
2 things involve, so that making a special case for this
3 without taking a research as to exactly what the facts
4 are, it seems to me would be a move in exactly the wrong
5 direction.

6 MS. HARRINGTON: Len, did you want to speak
7 again or is your tent still up?

8 MR. BUSSEY: I had one more comment.

9 MS. HARRINGTON: We are going to give you the
10 last word in this session.

11 MR. BUSSEY: I would just like to say that at
12 this point there are ways to stop some of the fraud and
13 they're already being used, such as the Better Business
14 Bureau or the FTC prosecutions today, but there are
15 programs similar to the ones within our industry that
16 like would be analogous, and that is the Yellow Pages
17 bogus billing program in which the FTC has cooperated
18 along with the Postal Service. So, there are other
19 ways. We're not defenseless out there.

20 MS. HARRINGTON: Thank you very much. We are
21 going to break for five minutes while we get ready for
22 the open mike session. So, please be back, everyone, to
23 listen to our open mike in five minutes. Now, the only
24 way in and out apparently is going to be over here. So,
25 please don't close those doors.

1 (Whereupon, there was a brief recess in the
2 proceedings.)

3 MS. HARRINGTON: Okay, we have I believe one
4 person who has asked to speak, and that is a
5 representative from the Iowa Firefighters Association.
6 Hi. Would everyone please take a seat.

7 Do you want to introduce yourself for the
8 record, please.

9 MR. REED: My name is Jack Reed, I am the -- I'm
10 a firefighter, I'm a 25-year fire service veteran, I am
11 the state president for the Iowa Professional
12 Firefighters, and I represent as chairman for a
13 coalition of ten states of the firefighters associations
14 that do fundraising. All of these associations hire a
15 third party to do their fundraising for them, and it
16 supports the programs and the projects that they have in
17 their states and their communities. If the firefighters
18 are included in the do-not-call list, it will destroy
19 the programs that we have that thrive in the communities
20 to date.

21 As firefighters, we don't have a lot of time to
22 do fundraising, most firefighters work a 56-hour week,
23 24-hour shift. When they're not working, they're
24 usually doing schooling, family activities and so forth,
25 and so it's just impossible for us to attempt to do our

1 own fundraising program, nor could our associations
2 afford to purchase the equipment or do the training or
3 to bring people in to do fundraising for us, it's just
4 not possible.

5 We've thought about it, we have examined it, but
6 it's just impossible for us to do, and therefore it's
7 necessary for us to hire a third party company to do our
8 fundraising.

9 The programs that we sponsor through our
10 fundraising program are many, and they're various from
11 state to state, and those would include such things as
12 smoke houses that teach family and children how to get
13 out of fire alive, we do fire safety coloring book
14 programs for elementary-aged kids, we do scholarship
15 programs, just to name a few. We also through our
16 programs with the fundraising money, we assist with
17 group homes and underprivileged adults as well.

18 If the firefighters are included on a
19 do-not-call list, none of those programs will be
20 possible. There's approximately about 40-some states
21 that firefighters do fundraising in through
22 telemarketing with a third party company to date. There
23 are millions of customers out there or supporters of
24 ours that don't mind getting a call for firefighters to
25 support our causes and our programs, but if those people

1 sign up on the do-not-call list that includes
2 firefighters associations, we will not be able to
3 contact the people who like to support us in our
4 communities out there. It just won't be possible.

5 Thank you for the time to speak before you
6 today.

7 MS. HARRINGTON: Thank you, Mr. Reed.

8 (Applause.)

9 MR. LEWIS: Excuse me, would it be possible if I
10 made a brief comment as well?

11 MS. HARRINGTON: Sure. Would you introduce
12 yourself.

13 MR. LEWIS: My name is Ryan Lewis and I'm from a
14 company called Celebrity Foods located in California.
15 We're a small business that does 100 percent of our
16 business through appointment setting, follow up by a
17 later, you know, face-to-face sales call.

18 Just to give you a little bit of background, our
19 sales force is -- I'm sorry. Our people actually make
20 it --

21 MS. HARRINGTON: Just lift that mike out of the
22 crate and use it as a hand mike.

23 MR. LEWIS: The people who actually make the
24 telephone calls are about 95 percent of them are
25 part-time appointment setters for us. A lot of them do

1 work out of their home, some do work out of offices that
2 we have. Any given office, there's maybe maximum of ten
3 people working in any of them at one time. And this is
4 predominantly, you know, students, you know, single
5 mothers, people of that nature that are doing this kind
6 of work for us.

7 And I'm really concerned about the do-not-call
8 list, because I think it's going to completely exclude
9 us from having any right to some kind of commercial
10 speech to potential, you know, clients, and we're not in
11 a position to do any material harm to anybody through
12 any kinds of fraud, because there is no avenue as far as
13 costs. They have no information as far as ability to
14 actually, you know, consummate some kind of sale over
15 the telephone.

16 And so I think it's important for companies like
17 ours that can't harm people from those kind of
18 activities to be exempted. You know, if not, because
19 100 percent of our business is predicated upon setting
20 those appointments for a later face-to-face call. We're
21 out of business, we're done.

22 And I just kind of stumbled across this and I
23 just felt it was important to say something. So, thank
24 you very much.

25 (Applause.)

1 MS. HARRINGTON: Thank you.

2 Well, I think we've come to the end of this
3 three-day workshop and I want to thank all of you who
4 have come to participate, those of you who have been
5 here listening.

6 I want to say a particular thank you to all
7 sorts of people from the Federal Trade Commission staff
8 who have worked on this. You know, everyone from the
9 FTC staff who has made this workshop happen has some
10 other job, substantive job. We are not professional
11 meeting planners or I think about my colleague David
12 Torok who was here discussing implementation of
13 do-not-call, David is not a telephone technologist, a
14 database creator, and I am always so proud to work with
15 the staff from the FTC when I see how well my colleagues
16 rise to the challenge to do all of these other things in
17 addition to practicing law and investigating and working
18 as paralegals, and we've just had a whole bunch of
19 people help out here.

20 And I thank you all, particularly our IT people
21 who have done a good job of capturing all of this on
22 videotape, for any of you who have done anything
23 embarrassing that you didn't think anyone saw, hah, we
24 have you on camera.

25 As you know, the record will remain open until

1 June 28th. We don't want piling on. If you've got
2 something new to say, some additional factual evidence,
3 we would appreciate it, but as I said, there will be
4 demerits for those who submit additional statements that
5 simply say what you've already said. We're looking for
6 new.

7 Finally, I want to thank Katie
8 Harrington-McBride and the rule team. These are the
9 guys who -- Carole Danielson, Mike Goodman, Karen
10 Leonard, and Allen Hile -- who are chained to their
11 computers reading these 42,000 comments, analyzing them,
12 and they are doing all of the heavy lifting on this, and
13 I think have done and will do a really wonderful job.

14 So, thank you all.

15 MR. HILE: Let's not forget Voni Eason.

16 MS. HARRINGTON: Well, yeah, and for the record,
17 Voni Eason, I want you to get this down in caps, Voni
18 Eason, Voni Eason, Voni Eason, she is not here today,
19 but she has been the person working really hard on all
20 -- using all of the logistics, everything that went
21 right she had a hand in, anything that went wrong, for
22 example your name tags being stolen from the
23 registration desk, Voni had nothing to do with it, and
24 when she gets back and hears that that happened, boy, is
25 there going to be blank to pay.

1 So, thank you very much and we look forward to
2 continuing to work with you.

3 MS. HARRINGTON-McBRIDE: For the record let's
4 not forget to thank Eileen Harrington for moving this
5 agenda along.

6 (Applause.)

7 (Whereupon, at 4:35 p.m., the workshop was
8 concluded.)

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1 C E R T I F I C A T E O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: R441001

4 CASE TITLE: TELEMARKETING WORKSHOP

5 WORKSHOP DATE: JUNE 7, 2002

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the notes
9 taken by me at the hearing on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: 6/18/02

14

15

16 Sally Jo Bowling

17

18 C E R T I F I C A T E O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the transcript
21 for accuracy in spelling, hyphenation, punctuation and
22 format.

23

24

25 Sara J. Vance