

Some non-profit commenters also argued that the Commission's interpretation of the USA PATRIOT Act produced, in effect, a double standard, regulating charities who outsource their telemarketing, but not those who conduct their own telemarketing campaigns.<sup>53</sup> Others opined that this bifurcated regulatory scheme was not intended by Congress when it passed the USA PATRIOT Act amendments to the Telemarketing Act.<sup>54</sup> These commenters argued that this distinction penalizes charities (by subjecting them to regulation) merely because they choose to outsource an administrative function. Some argued further that the increased costs of regulatory compliance will not be borne by the for-profit telemarketers, but rather by charities themselves, negatively impacting their ability to carry out their primary mission.<sup>55</sup>

Again, the Commission notes that despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible. Nevertheless, reading the amendatory act together with the original language, as it must, the Commission has sought to give full effect to the directive of Congress set forth in the USA PATRIOT Act amendments.

Another argument raised by large numbers of non-profit commenters is that regulating for-profit telemarketers who solicit on behalf of non-profits, and in particular subjecting them to the requirements of the "do-not-call" registry provision, is unfair given the other limitations on the Commission's jurisdiction.<sup>56</sup> These commenters suggested that the result of this scheme would be to allow commercial calls that consumers find intrusive, while banning calls from charities, even those with whom a donor has a past relationship.<sup>57</sup> As explained in greater detail in the discussion of the applicability of the "do-not-call" provisions to charitable solicitation telemarketing, careful consideration of this argument has led the Commission to exempt solicitations to induce charitable contributions via

outbound telephone calls from the "do-not-call" registry provision. Only the less restrictive entity-specific "do-not-call" provision included in the original Rule will apply to charitable solicitation telemarketing. However, both the entity-specific "do-not-call" provisions and the "do-not-call" registry provisions apply to commercial telemarketing to induce purchases of goods or services. This approach fulfills the Commission's intention that the TSR be consistent with First Amendment principles, whereby a higher degree of protection is extended to charitable solicitation than to commercial solicitation. Moreover, as a practical matter, the Commission believes that this approach will enable charities to continue soliciting support and pursuing their missions.

#### *Commenters' Proposals.*

Noting the Commission's jurisdictional limitations with respect to banks, MBNA requested that the Rule explicitly state that it is "inapplicable to entities exempt from coverage under § 5(a)(2) of the [FTC Act]."<sup>58</sup> MBNA also recommended that the Rule extend this exemption to "entities acting on behalf of banks . . . because such entities are regulated by the Bank Service Company Act, 15 U.S.C. § 45(a)(2), concerning services they provide for banks."<sup>59</sup> MasterCard challenged the Commission's statement that it can regulate third-party telemarketers who call on behalf of a bank, and urged that the Commission explicitly exempt "any bank subsidiary or affiliate performing services on behalf of a bank."<sup>60</sup> ABA recommended that the amended Rule clarify that "non-bank operating subsidiaries of banks as defined by the banking agencies" are exempt.<sup>61</sup>

The Commission notes that, from the inception of the Rule, the Commission has asserted that parties acting on behalf of exempt organizations are not thereby exempt from the FTC Act, and thus, for example, "a nonbank company that contracts with a bank to provide telemarketing services on behalf of the bank is covered" by this Rule.<sup>62</sup> This

reading is consistent with the Commission's long-standing interpretation of the scope of its authority under the FTC Act, as well as with judicial precedent.<sup>63</sup> Furthermore, the Commission's authority was clarified in § 133 of the Gramm-Leach-Bliley Act ("GLBA"), which states that "[a]ny person that . . . is controlled directly or indirectly . . . by . . . any bank . . . ([as] defined in section 3 of the Federal Deposit Insurance Act) and is not itself a bank . . . shall not be deemed to be a bank . . . for purposes of any provisions applied by" the FTC under the FTC Act.<sup>64</sup> Most recently, a federal district court held that, under this language, the Rule applies to telemarketing by a mortgage subsidiary of a national bank. As the court stated, "the definition of 'bank' identified by Congress simply does not include the subsidiaries of banks."<sup>65</sup>

The Commission believes it is unnecessary to state in the Rule what is already plain in the Telemarketing Act, *i.e.*, that its jurisdiction for purposes of the TSR is coterminous with its jurisdiction under the FTC Act, and therefore declines to include an express statement of this fact in the Rule. Further, the Commission declines to adopt the interpretation of some commenters that the FTC Act itself exempts non-bank entities based on their affiliation with or provision of services to exempt banks, and the recommendations of those commenters who sought an exemption from the Rule for bank subsidiaries or agents. To do so would be contrary to the Commission's interpretation of its jurisdictional boundaries, and would unnecessarily limit the reach of the Rule.<sup>66</sup>

In a similar argument, SBC asserted that, contrary to the Commission's stated position, the Commission's lack of jurisdiction over common carriers engaged in common carriage activity extends to their affiliates and their agents engaged in telemarketing on their behalf.<sup>67</sup> SBC cites no authority for this proposition, and the Commission is

with the *Telemarketing Sales Rule* (Apr. 1996) ("TSR Compliance Guide") at 7.

<sup>53</sup> See, e.g., *Official Airline Guides*, note 62 above; *FTC v. Saja*, 1997-2 CCH (Trade Cas.) P 71,952 (D. Ariz. 1997); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080 (1994).

<sup>54</sup> GLBA, Pub. L. 106-102, 113 Stat. 1383, Title I, § 133(a), 15 U.S.C. 6801-6810 (2001).

<sup>55</sup> *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (noting that the applicable definition under the Federal Deposit Insurance Act ("FDIA") is "any national bank, State bank, District Bank, and any Federal branch and insured branch" citing FDIA, 12 U.S.C. 1813(a)(1)(A)).

<sup>56</sup> This approach is consistent with that laid out in the SBP of the original Rule. See 60 FR at 43483.

<sup>57</sup> SBC-NPRM at 2, 4-5.

<sup>53</sup> See, e.g., March of Dimes-NPRM at 2.

<sup>54</sup> See IUPA-NPRM at 1.

<sup>55</sup> See Reese-NPRM at 2.

<sup>56</sup> See, e.g., FOP-NPRM at 2; HRC-NPRM at 1; Italian American Police-NPRM at 1; Lautman-NPRM at 2; Leukemia Society-NPRM at 1-2; NCLF-NPRM at 1; Angel Food-NPRM at 1; North Carolina FFA-NPRM at 1; SO-CT-NPRM at 1; SO-NJ-NPRM at 1; SO-WA-NPRM at 1; Reese-NPRM at 2; SHARE-NPRM at 3; Stage Door-NPRM at 1.

<sup>57</sup> See, e.g., PAF-NPRM at 1; AOP-Supp. at 1; Chesapeake-Supp. at 1.

<sup>58</sup> MBNA-NPRM at 2. *Accord* Fleet-NPRM at 2 (arguing that the Office of the Comptroller of the Currency already provides significant guidance to banks on managing risks that may arise from their business relationships with third parties); AFSA-NPRM at 3.

<sup>59</sup> MBNA-NPRM at 2. See also AFSA-NPRM at 3.

<sup>60</sup> MasterCard-NPRM at 13-14. *Accord* Citigroup-NPRM at 11.

<sup>61</sup> ABA-NPRM at 3.

<sup>62</sup> 60 FR at 43843, citing, *inter alia*, *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) (holding that the air carrier exemption from the FTC Act did not apply to a firm publishing schedules and fares for air carriers, which was not itself an air carrier); FTC/Direct Mktg. Ass'n., *Complying*