

(presumably non-profit) political club or constituted religious organization were to engage in a “plan, program, or campaign” involving more than one interstate telephone call to induce a purchase of goods or services or a charitable contribution, that activity would be within the scope of the TSR. But if such a for-profit telemarketer on behalf of the same client made calls that were not for the purpose of inducing a purchase of goods or services or a charitable contribution, those calls would not be within the scope of the TSR.

Commenters also addressed the scope of the term “or any thing of value” in the definition of “charitable contribution” in the proposed Rule, suggesting exemptions to limit this definition. Red Cross urged the Commission to exempt blood from the definition of “charitable contribution” because, it argued, “blood donations are not ‘a thing of value’ in a fiduciary sense.”¹⁰⁷ Blood Centers agreed with this position, arguing that while “the donor’s blood is of great value to the recipient of the blood donation . . . the donor is not being asked to part with anything other than his or her time.”¹⁰⁸ Blood Centers also argued that donations of blood are of grave importance to save lives, and so are distinguishable from typical commercial and even charitable telemarketing calls.¹⁰⁹ Another argument raised by Blood Centers in support of its position that a blood donation should be excluded from the definition of “charitable contribution” is that blood donation programs are highly regulated by the Food and Drug Administration (“FDA”).¹¹⁰ March of Dimes also requested that volunteers’ time not be considered a “thing of value” under the Rule, noting that their organization often uses the telephone to contact volunteers who then solicit contributions from their friends and neighbors.¹¹¹

The Commission believes that the text of the USA PATRIOT Act provision expanding the definition of telemarketing to include calls to induce “a charitable contribution, donation, or gift of money or any other thing of value” is broad in scope and plain in meaning. The USA PATRIOT Act specifically uses the term “or any other thing of value” in addition to the terms “charitable contribution, donation, or

gift of money,” ensuring that it will encompass non-money contributions. The Commission believes that, while blood donors are asked for blood and not money, the blood they donate is clearly a “thing of value.”¹¹² Similarly, although volunteers are asked to give time rather than money, the Commission believes that a donation of time is a “thing of value.”¹¹³ Therefore, the Commission cannot exempt from the definition of “charitable contribution” either blood or time volunteered. The Commission believes, however, that legitimate concern about inclusion of blood in the definition should be alleviated by the exemption of charitable solicitation telemarketing from the “do-not-call” registry provisions. The remaining provisions that will apply to telemarketing to solicit blood donations are neither burdensome nor likely to impede the mission of the non-profit organizations that seek such donations.

NAAG and NASCO suggested that the Commission “state that the word ‘charitable’ does not limit the character of the recipient of the contribution.”¹¹⁴ According to these commenters, it is important to ensure that donations solicited by or on behalf of public safety organizations are considered “charitable contributions” for regulatory purposes, and that those contributions solicited by sham charities are still “charitable contributions” under the amended Rule.¹¹⁵ The Commission believes that the current definition, which closely tracks the USA PATRIOT Act definition, is clear as to what is covered.¹¹⁶ Its focus is on the donation, rather than the solicitor, and it is sufficiently broad in scope to encompass donations solicited on behalf of any organization.

NAAG and NASCO also requested that the Commission explicitly address the situation where a call involves “‘percent of purchase’ situations, where contributions are sought in the form of the purchase of goods or services, [and] where a portion of the price will, according to the solicitor, be dedicated to a charitable cause.”¹¹⁷ These

commenters urged the Commission to ensure that such hybrid transactions are covered, either as sales of goods or services or as charitable contributions, or both, under the Rule.¹¹⁸ The Commission believes that when the transaction predominantly is an inducement to make a charitable contribution, such as when an incentive of nominal value is offered in return for a donation, the telemarketer should proceed as if the call were exclusively to induce a charitable contribution. Similarly, if the call is predominantly to induce the purchase of goods or services, but, for example, some portion of the proceeds from this sale will benefit a charitable organization, the telemarketer should adhere to the portions of the Rule relevant to sellers of goods or services. The Commission believes that further elaboration on the differences between these scenarios is unnecessary because, in either case, the requirements are similar, consisting primarily of avoiding misrepresentations, and promptly disclosing information that would likely be disclosed in the ordinary course of a telemarketing call.

§ 310.2(m) — Donor

The proposed Rule contained a definition of “donor” in order to effectuate the goals of the USA PATRIOT Act amendments. Under that definition, a “donor” is “any person solicited to make a charitable contribution.”¹¹⁹ Throughout the proposed Rule, wherever the word “customer” was used, the Commission added the word “or donor” where appropriate, to indicate that the provision was also applicable to the solicitation of charitable contributions. The Commission received very few comments on this definition. The March of Dimes expressed the concern that “[t]he definition of a ‘donor’ does not accurately reflect the nomenclature used by the industry.”¹²⁰ Rather, the March of Dimes suggested, the term “donor,” as used in philanthropic circles, “connotes an established relationship with the non-profit charitable organization.”¹²¹ The March of Dimes recommended replacing the terms “customer” and “donor” in the Rule with the term “consumer.”

The Commission believes that the term “consumer” is too broad and non-specific to substitute for the terms

¹⁰⁷ Red Cross-NPRM at 3.

¹⁰⁸ Blood Centers-NPRM at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2-3.

¹¹¹ March of Dimes-NPRM at 2. *See also* AFP-NPRM at 5.

¹¹² *See* Maryland Health Care, Fall 2000 at 4, http://www.mdhospitals.org/MarylandPubs/MDHlthCr_1100.pdf (noting the blood shortages had driven up the price of blood from \$145.24 per unit to \$174.10 per unit in a single year).

¹¹³ Presumably, organizations that rely on volunteers would, absent their donations of time, be forced to pay labor costs associated with the work done by volunteers. Therefore, the time donated is a “thing of value,” equivalent to the labor cost saved.

¹¹⁴ NAAG-NPRM at 52; NASCO-NPRM at 5-6.

¹¹⁵ *Id.*

¹¹⁶ 15 Am. Jur. 2d *Charities* § 60 (2002).

¹¹⁷ NAAG-NPRM at 52. *See also* NASCO-NPRM at 5-6.

¹¹⁸ *Id.*

¹¹⁹ Proposed Rule § 310.2(m), 67 FR at 4540.

¹²⁰ March of Dimes-NPRM at 3.

¹²¹ *Id.* (noting that the term “prospect” is used to mean a potential donor).