

contributions.⁸³⁴ AFP agreed that the proposed Rule struck the appropriate balance, by requiring disclosure of both the identity of the charity and the fact that the purpose of the call was to solicit a charitable contribution, but not requiring disclosure of the mailing address of the charity.⁸³⁵ AFP also noted that the required disclosures are consistent with its own ethics standards and its belief that these disclosures are sufficient to effectuate the purposes of the USA PATRIOT Act.⁸³⁶ AFP recommended against including a required disclosure of the charitable organization's mailing address, arguing that such information would be of little use to consumers in discerning whether a charity was legitimate, and that the time and distraction involved in disclosing an address would be "counterproductive to the charitable contribution process."⁸³⁷

Hudson Bay expressed its view that both of the proposed disclosures are unconstitutional.⁸³⁸ According to Hudson Bay, the requirement that a telefunder promptly disclose that the call is to solicit a charitable contribution runs afoul of the First Amendment because it mandates not only what must be said, but when.⁸³⁹ Hudson Bay further argues that the mandatory disclosure of the name of the charitable organization on behalf of which the solicitation is made strips charitable organizations of their right to anonymity and violates the First Amendment's guarantee of freedom of association.⁸⁴⁰

As previously noted, the USA PATRIOT Act directs the Commission to include these specific disclosures in the TSR.⁸⁴¹ Congress' purpose in the Telemarketing Act, in requiring telemarketers to disclose basic identifying information in unsolicited outbound telemarketing calls, is to ensure that the consumer is given information promptly that will enable the consumer to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion. The Commission believes that the USA PATRIOT Act amendments are consistent with this

purpose. Moreover, the Commission believes there is a tight nexus between this purpose and the statutory and regulatory means employed to achieve this purpose. The Commission also believes that these disclosure requirements are very narrowly tailored to impinge as little as possible on protected speech while still accomplishing the purpose Congress intended. The Commission has exercised restraint in implementing this statutory mandate, keeping the disclosure requirements for charitable solicitation telemarketing to the bare minimum necessary to fulfill the purpose of the USA PATRIOT Act amendments. The Commission notes that the Supreme Court has specifically noted that requiring a professional fundraiser "to disclose unambiguously his or her professional status . . . [is a] narrowly tailored requirement [that] would withstand First Amendment scrutiny."⁸⁴² The Commission believes that if a requirement to disclose one's status as a professional fundraiser would pass First Amendment scrutiny, then so would a requirement to make the disclosures now required by the Rule to fulfill the mandate of the USA PATRIOT Act amendments.

Some commenters recommended that the Commission expand the provision to require additional disclosures in certain circumstances. For example, NAAG recommended that, in the event a paid telefunder is making the charitable solicitation, three additional disclosures be required: "(1) the name of the caller; (2) the name of the telemarketing company; and (3) the fact that the caller is being paid to solicit."⁸⁴³ NCL concurred, suggesting that the Rule require fundraisers to "identify themselves as well as the charities on whose behalf they are operating."⁸⁴⁴ NAAG and NCL argued that this additional set of disclosures would provide three distinct benefits. First, such disclosures would prevent donors from being deceived about the identity of the solicitor. NAAG noted that in many instances, for-profit fundraisers "misrepresent that they are affiliated with, or members of, the charity or public safety organization in whose name they are calling."⁸⁴⁵ Second, the information would serve as an important means of identifying potential Rule violators.⁸⁴⁶ The third benefit from

these suggested disclosure requirements would be the triggering role they would serve, prompting consumers to inquire, of the telefunder or of a state regulatory agency, about the amount of their contribution that will go to charity after the fundraiser takes its share.⁸⁴⁷

The Commission declines to add a mandatory disclosure of the name of the caller in calls to induce charitable contributions. In the initial proposed TSR, the Commission had included such a requirement for all outbound telephone calls;⁸⁴⁸ but it was deleted because commenters noted that "'desk names' are commonly used in the industry to protect the safety and privacy of employees, and to protect against potential prejudice and harassment."⁸⁴⁹ The Commission concluded that the disclosure of the seller's identity is most meaningful to consumers, not the name of the individual with whom they are speaking. The Commission can conceive of no reason why this analysis would not apply with equal force in the context of charitable solicitations. Moreover, the Commission is not persuaded that disclosure of this information is necessary to advance the privacy objectives underlying the Commission's authority to prohibit "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.⁸⁵⁰ Therefore, the Commission declines to include in the amended Rule a requirement that the caller's name be disclosed in charitable telemarketing solicitations.

The Commission also declines to adopt the suggestion that it mandate disclosure of the name of the telemarketing company.⁸⁵¹ In adopting the original Rule, the Commission rejected such a disclosure in the context of the sale of goods or services because it was deemed unnecessary; rather, a requirement to disclose the identity of the seller—which is clearly material to the consumer—was included. In the charitable fundraising context, the Commission believes the identity of the charity is the analogous material item of

⁸³⁴ As noted above in the section discussing amended § 310.3(d), AARP and NCL noted in their comments in response to the NPRM that they supported the goal of expanding the Rule's ambit to cover charitable solicitations.

⁸³⁵ See AFP-NPRM at 3.

⁸³⁶ *Id.*

⁸³⁷ *Id.* (noting, however, that it had no objection to requiring the disclosure of the mailing address, provided the donor asked for such information).

⁸³⁸ See Hudson Bay-Goodman-NPRM at 6-7.

⁸³⁹ *Id.* (citing *Riley*, 441 [sic] U.S. at 791).

⁸⁴⁰ *Id.* at 7 (citing *Talley v. California*, 362 U.S. 60 (1960)).

⁸⁴¹ USA PATRIOT Act, § 1011.

⁸⁴² *Riley*, 487 U.S. at 799, n.11.

⁸⁴³ NAAG-NPRM at 52.

⁸⁴⁴ NCL-NPRM at 11. See also Make-A-Wish-NPRM at 6 (recommending adding a disclosure that the professional fundraiser is being paid for its services); NASCO-NPRM at 6.

⁸⁴⁵ NAAG-NPRM at 52.

⁸⁴⁶ NCL-NPRM at 11.

⁸⁴⁷ NAAG-NPRM at 52; see also NCL at 11.

⁸⁴⁸ See 60 FR at 8331 (§ 310.4(d)(1)(i)).

⁸⁴⁹ 60 FR at 30418.

⁸⁵⁰ See discussion of § 310.4 above, describing the Commission's analysis of its authority to prohibit "abusive" practices.

⁸⁵¹ The Commission notes, however, as discussed by NAAG, that at least 20 states have statutes requiring such a disclosure. NAAG-NPRM at 52. The Commission believes that the states, which have extensive regulatory authority over charities, and extensive experience in such regulation, may continue to require disclosures beyond those mandated by the TSR, and notes that compliance with the TSR will not fulfill telemarketers obligations under any such state laws or regulations.