

information. The Commission believes there is a limit to the number of distinct items of information that can reasonably be absorbed at the beginning of a solicitation call. This being the case, the Commission believes that the charity's identity is a more meaningful piece of information than the name of the professional fundraising company. In this regard, it is noteworthy that the USA PATRIOT Act did not specifically require such a disclosure.⁸⁵² Arguably, disclosure of the identity of the telemarketer may be beneficial to potential donors because it may prompt them to think and inquire about the portion of a contribution that will be consumed by a professional fundraiser's fee; but the Commission believes the record falls short of showing that the benefits of mandating such a disclosure would outweigh the burdens it would impose upon legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.⁸⁵³ Therefore, the Commission does not believe the current record supports a finding that disclosure of this information is necessary to prevent "abusive" practices pursuant to § 6102(a)(3) of the Telemarketing Act.⁸⁵⁴

For similar reasons, the Commission also declines to require a mandatory disclosure that the telemarketer is a paid fundraiser. The comments on this issue reflect considerable concern about instances where only a minuscule portion of contributions are devoted to the actual support of a charitable

organization's mission, while the telefunder's fee gobbles up the lion's share. This occurs in some instances,⁸⁵⁵ but the record does not support an inference that such a scenario inevitably follows from the use of paid telefundraisers by charitable organizations, and there is evidence on the record tending to show that the opposite is often true: the use of professional telemarketers saves charitable organizations money—as compared with in-house telephone fundraising.⁸⁵⁶

Additionally, the Commission is concerned here, as it is with the other recommended disclosures, about the potential negative consequences that derive from overloading the beginning of a charitable solicitation call. Further, it is notable that the USA PATRIOT Act did not specifically require such a disclosure.⁸⁵⁷ While disclosure of the identity of the telemarketer may, arguably, be beneficial to potential donors because it may prompt them to think and inquire about the proportion of a contribution that will be consumed by a professional fundraiser's fee, the Commission believes the record does not support mandating such a disclosure because of the burden the disclosure would impose on legitimate charities who choose to conduct their fundraising efforts using professional telemarketers.⁸⁵⁸ A showing of these benefits would be necessary to support a requirement for disclosure of this information. Therefore, the Commission declines at this time to add a requirement that the telemarketer disclose that he or she is being paid to solicit charitable contributions.

Other issues regarding abusive practices raised in response to the NPRM.

Commenters responded to the Commission's questions in the NPRM regarding additional issues related to abusive practices that had surfaced during the Rule Review, in particular,

prison-based telemarketing. Commenters also raised other issues: telemarketers' use of courier services to pick up payments from consumers; telemarketers' targeting of vulnerable groups; and the sale of victim lists. Each of these issues, and the reasoning behind the Commission's responses to them, are discussed in detail below.

Prisoner telemarketing: During the Rule Review, the Commission received several comments describing problems that had occurred when sellers or telemarketers used prison inmates to telemarket goods or services. These commenters recommended that the Commission ban the use of prisoners as telemarketers or, in the alternative, tightly regulate it, including requiring that inmates disclose their status as prisoners when they make calls to, or receive calls from, the public.⁸⁵⁹ These commenters cited several graphic incidents in which inmates have abused consumers' information and other resources to which they had access through inmate telemarketing to make improper, invasive, and illegal contact with members of the public.⁸⁶⁰

Specifically, these commenters pointed out that, while working as telemarketers, inmates inevitably gain access to personal information about individuals, including minors, that may endanger the lives and safety of those they call.⁸⁶¹ In the NPRM, the Commission stated that it was extremely concerned about the potential misuse of personal information and abusive telemarketing activity in connection with prison-based telemarketing, but

⁸⁵² See USA PATRIOT Act § 1011(b)(2)(D). The absence of such a requirement from the USA PATRIOT Act is noteworthy because such a disclosure was specifically approved in *Riley*. 487 U.S. at 799, n.11.

⁸⁵³ As noted by Not-for-Profit Coalition, Hudson Bay and others, telefundraisers play a critical role in enabling charitable organizations, particularly smaller ones, to raise funds necessary to fund their missions. Not-for-Profit Coalition-NPRM at 17-20; Hudson Bay-Goodman-NPRM at 2.

⁸⁵⁴ The Commission believes that, as in the case of the required oral disclosures in the sale of goods or services, the failure to make certain material disclosures in the solicitation of a charitable contribution rises to the level of an abusive practice under the Rule. As noted in the NPRM, the Commission believes that the prompt disclosure of certain information in a telemarketing call to induce the sale of goods or services is necessary to enable a consumer "to decide whether to allow the infringement on his or her time and privacy to go beyond the initial invasion." 67 FR at 4511. Similarly, a consumer who receives a telemarketing solicitation to induce a charitable contribution must have certain information to determine if he or she wishes to continue the call. At this time, the Commission believes it prudent to require only the disclosure of the name of the charity on whose behalf the fundraising is occurring and that the call is being made to induce a charitable contribution. However, the Commission will continue to study the issue and will revisit it during the next Rule Review.

⁸⁵⁵ See, e.g., Pennies for Charity, 2001, New York Attorney General, <http://www.oag.state.ny.us/charities/pennies01/penintro.html> (accessed Oct. 8, 2002) (stating that "charities retained an average of 31.5% of the funds raised by telemarketers registered to solicit contributions in New York in 2000. Some of the charities received much less than that and some received nothing at all."); NASCO-NPRM at 2 (citing the New York Attorney General's report as well as a 1999 report by the California Attorney General showing charities received only 48.2 percent of funds raised by telemarketers who solicited on their behalf in California that year). See also Private Citizen-NPRM at 5.

⁸⁵⁶ Hudson Bay-Goodman-NPRM at 2.

⁸⁵⁷ See USA PATRIOT Act § 1011(b)(2)(D). This omission, too, is conspicuous in light of the fact that numerous states have included this mandatory disclosure and that such a disclosure is, at least in dicta, sanctioned by the Court in *Riley*. See NAAG-NPRM at 52; *Riley*, 487 U.S. at 799, n.11.

⁸⁵⁸ See note 856 above.

⁸⁵⁹ See generally Jordan-RR, S. Gardner-RR, Budro-RR, and Warren-RR. In addition, this issue received considerable attention during the Rule Review Forum. See RR Tr. at 220-45, 367-75, 443-47.

⁸⁶⁰ For example, in its 1997 report to Congress on the privacy implications of individual reference services, the FTC cited an example where a prison inmate (and convicted rapist), who was employed as a data processor, used his access to a database containing personal information to compose and send a threatening letter to an Ohio grandmother. See FTC, "Individual Reference Services: A Report to Congress" (Dec. 1997), at 16. Several states, including Wisconsin, Nevada, and Massachusetts, have considered legislation that would require their Departments of Correction to restrict prisoners' access to personal information about individuals who are not prisoners and/or to require prisoners conducting telephone solicitations or answering inbound calls to identify themselves as prisoners. The Utah State Prison stopped using inmates as telemarketers after conceding that they could not ensure that prisoners would not misuse personal information they obtain. See *Prison to End Telemarketing By Inmates*, SALT LAKE TRIB., June 1, 2000, at B1. In addition, DMA noted that it had supported legislation banning the use of inmates in remote sales situations because these sales require the telemarketer to get personal information from the consumer. See RR Tr. at 371-72.

⁸⁶¹ See generally Jordan-RR, Gardner-RR, Warren-RR, and Budro-RR.