

harm those small businesses because it would increase their costs and hamper their use of Web-based advertising such as online Yellow Pages.<sup>1008</sup> Industry commenters argued that current law enforcement tools, coupled with active industry self-regulation, are sufficient to challenge deceptive and fraudulent telemarketing of Internet or Web services.<sup>1009</sup>

The Commission finds persuasive industry's arguments that the proposal to make the business-to-business exemption unavailable to telemarketing of Internet and Web services is overbroad and likely to produce perverse results for the small businesses it was intended to protect. The Commission believes that, although coverage by the Rule would provide benefits to law enforcement efforts, current federal and state consumer protection statutes have been effective tools in challenging fraudulent practices in this industry.<sup>1010</sup> Furthermore, the Commission believes that it is preferable to move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the Internet marketing revolution. Therefore, the Commission has removed the proposed exception for Internet and Web services sales to businesses by telephone, which will continue to be exempt from the Rule's coverage. The Commission will, however, continue to monitor closely the practices in the telemarketing of Internet and Web services, and may revisit this issue in subsequent Rule Reviews should circumstances warrant.

Consumer groups and state law enforcement officials also supported the Commission's proposal to make the business-to-business exemption unavailable to entities soliciting charitable contributions, citing the

extensive problems with telefundraisers soliciting on behalf of public safety organizations (so-called "badge fraud" operators) who often target small businesses.<sup>1011</sup> DMA-NonProfit and Not-For-Profit Coalition were among the few non-profit organizations that addressed the business-to-business exemption,<sup>1012</sup> arguing that the legislative history of the USA PATRIOT Act does not support extending the Rule's coverage to charitable solicitations directed to businesses, particularly in the absence of substantial evidence of abuse.<sup>1013</sup> As discussed above, the Commission already has determined to exempt telemarketing on behalf of charitable organizations from the national "do-not-call" registry, thus addressing the principal concern of the non-profit organizations.

The Commission notes that "badge fraud" telemarketing directed at businesses has been a particularly pernicious practice that has been attacked on a regular basis by both the Commission and state regulators.<sup>1014</sup> Commenters have made it clear, however, that many legitimate non-profit organizations rely heavily on business contributions as a major portion of their donor base.<sup>1015</sup> The Commission seeks to protect businesses—particularly small

businesses—from fraudulent fundraising, without burdening legitimate non-profit organizations with the cost of complying with unnecessary regulations. As some commenters pointed out, many legitimate non-profit organizations operate on a very narrow margin, and such costs may have a very significant impact on the viability of an organization's fundraising efforts or even the very viability of the organization itself.<sup>1016</sup>

The Commission also notes that law enforcement actions attacking badge fraud under Section 5 and analogous state laws have been effective on a case-by-case basis.<sup>1017</sup> Furthermore, several of the entities that were targets of these law enforcement efforts also telemarketed to individuals, which would bring them within the purview of the amended Rule with respect to those transactions.<sup>1018</sup> In addition, the Commission recognizes that there are many legitimate public safety organizations that solicit funds for their charitable purposes in a non-deceptive manner. Therefore, the Commission believes that the more prudent course is to continue to rely upon its authority under Section 5 and the states' authority under their analogous laws to address fraudulent fundraising, and, at this time, to leave beyond the scope of the TSR legitimate charitable fundraising directed to businesses. This issue could be revisited in subsequent Rule Reviews should evidence develop that the Commission has not struck the correct balance in making this determination.

#### Other recommendations by commenters

Some commenters recommended that the Rule be amended to include more exemptions. For example, several commenters advocated that their industry be exempt from compliance with the national "do-not-call" registry and/or from all of the Rule's provisions.<sup>1019</sup> The Commission notes that many of those who requested

<sup>1008</sup> See, e.g., SBC-NPRM at 15; SIIA-NPRM at 2. See also June 2002 Tr. III at 213-14, 217-18, 224.

<sup>1009</sup> See, e.g., Reed-Elsevier-NPRM at 4-5 (noting, for example, that industry has adopted the Best Billing Practices guidelines set forth by the FCC to address unauthorized billing or "cramming" problems); SBC-NPRM at 14. See also June 2002 Tr. III at 213-14, 217-18, 224.

<sup>1010</sup> See *E-Commerce Fraud Targeted at Small Business: Hearings on Web Site Cramming Before the Senate Committee on Small Business* (Oct. 25, 1999) (statement of Jodie Bernstein, Director of the Bureau of Consumer Protection, FTC); FTC Press Release: "FTC Cracks Down on Small Business Scams: Internet Cramming is Costing Companies Millions," June 17, 1999, <http://www.ftc.gov/opa/1999/small9.htm>. See also, e.g., *FTC v. Shared Network Servs., LLC*, No. S-99-1087-WBS JFM (E.D. Cal. filed June 12, 2000); *FTC v. U.S. Republic Communications, Inc.*, No. H-99-3657 (S.D. Tex. filed Oct. 21, 1999) (Stipulated Final Order for Permanent Injunction and Other Equitable Relief entered Oct. 25, 1999); *FTC v. WebViper LLC*, No. 99-T-589-N, (M.D. Ala. June 9, 1999); *FTC v. Wazzu Corp.*, No. SA CV-99-762 AHS (ANx) (C.D. Cal. filed June 7, 1999).

<sup>1011</sup> See, e.g., NAAG-NPRM at 60-61; NCL-NPRM at 11. See also June 2002 Tr. III at 224-25.

<sup>1012</sup> Most non-profit organizations commented on the application of the national "do-not-call" registry to their solicitation efforts, not on whether they should be otherwise excepted from the business-to-business exemption. See, e.g., *Childhood Leukemia-NPRM* at 1; *Community Safety-NPRM* at 1-2; *California FFA-NPRM* at 1-2; *FPIR-NPRM* at 1-2; *HRC-NPRM* at 1-2; *OSU-NPRM* at 1; *SO-AZ-NPRM* at 1-2.

<sup>1013</sup> See *DMA-NonProfit-NPRM* at 14-15; *Not-for-Profit Coalition-NPRM* at 46-48. There is scant legislative history on the USA PATRIOT Act with regard to this issue.

<sup>1014</sup> See, e.g., *FTC v. Southwest Mktg. Concepts, Inc.*, No. H-97-1070 (S.D. Tex. filed 1999) (Stipulated Final Judgment and Order for Permanent Injunction and Monetary Relief entered May 28, 1999); *FTC v. Saja*, No. CIV-97-0666 PHX SMM (D. Ariz. filed Apr. 1997); *FTC v. Dean Thomas Corp., Inc.*, No. 1:97CV0129 (N.D. Ind. 1997) (Stipulated Final Judgment entered Jan. 19, 1998); *FTC v. Century Corp.*, No. 1:97CV0130 (N.D. Ind. filed Apr. 7, 1998) (Stipulated Final Judgment and Order entered April 8, 1998); *FTC v. Image Sales & Consultants, Inc.*, No. 1:97CV0131, (N.D. Ind.) (Stipulated Final Judgment and Order entered June 9, 1998); *FTC v. Omni Adver., Inc.*, No. 1:98CV0301 (N.D. Ind. filed Oct. 9, 1998); *FTC v. T.E.M.M. Mktg., Inc.*, No. 1:98CV0300, (N.D. Ind. filed Oct. 5, 1998); *FTC v. Tristate Adver. Unlimited, Inc.*, No. 1:98CV0302 (N.D. Ind. filed Oct 5, 1998); *FTC v. Gold*, No. CV 99-99-2895-WDK (Aljx) (C.D. Calif. filed 1998); *FTC v. Eight Point Communications, Inc.*, No. 98-74855 (E.D. Mich. filed Nov. 10, 1998). See also Pa. Stat. Ann. tit. 10 § 162.15(A)(11) (West 2000).

<sup>1015</sup> See, e.g., *DMA-NonProfit-NPRM passim*; *Not-for-Profit Coalition-NPRM passim*. See also June 2002 Tr. III at 110, 205-10, 220-21.

<sup>1016</sup> *Id.*

<sup>1017</sup> See note 1015 above.

<sup>1018</sup> See, e.g., *Saja*, No. CIV-97-0666 PHX SMM; and *Eight Point Communications*, No. 98-74855.

<sup>1019</sup> See, e.g., *Tribune-NPRM* at 2-3 (exempt newspapers because of their "unique position and mission in our society"); *Herald Bulletin-NPRM* at 1 (exempt newspapers); *CNHI-NPRM* at 1-2 (exempt newspapers); *AFSA-NPRM* at 10 (exempt debt collection calls); *ACA-NPRM* at 2-4 (expressly exempt debt collection activities from the Rule); *DBA-NPRM* at 5 (expressly exempt debt collectors from the "do-not-call" registry provision); *AFSA-NPRM* at 14 (exempt financial services companies with an established business relationship); *CASE-NPRM* at 3 (exempt educational institutions from "do-not-call" registry provision); *ANA-NPRM* at 7 (explicitly exempt market researchers); *Green Mountain-NPRM passim* (exempt energy marketers).