UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

TELEMARKETING RULEMAKING – COMMENT

FTC FILE NO. R411001

COMMENTS OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S PROPOSED AMENDMENTS TO THE TELEMARKETING SALES RULE

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Prepared by:

Glenn A. Mitchell, Esq.
Andrew M. Beato, Esq.
Stein, Mitchell & Mezines L.L.P.
1100 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
(202) 737-7777

Counsel for The Not-For Profit and Charitable Coalition

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On behalf of the Not-For-Profit and Charitable Coalition ("Coalition") – a Coalition of 277 not-for-profit ("nonprofit") and charitable organizations – the following comments are submitted in response to the Federal Trade Commission's ("Commission") request for comments on the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* ("TSR"). *See* Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002) ("Notice"). As requested by the Commission, the Coalition has filed with the Office of the Secretary six copies of these comments and a computer disk containing a copy saved in electronic form. By separate submission, the Coalition has filed with the Commission a notification of interest to participate in the June 5-7 public forum in order to ensure that their substantial interest in this proceeding is represented fully. *See* Notice, 67 FED. REG. at 4533.

OVERVIEW OF THE COALITION

The Coalition is composed of 277 national, state, and local nonprofit and charitable organizations with tax-exempt status under the United States Internal Revenue Code, 26 U.S.C. § 501(c), that oppose the Commission's proposed rule. Ex. A (listing members of the Coalition). The Coalition directly represents more than 1,000,000 people who will be irreparably harmed by the proposed rule's prohibitions against professional fundraising firms' communicating with certain donors to solicit charitable contributions and attendant implications on the ability of Coalition members to convey their nonprofit and charitable messages.

The Coalition includes a broad spectrum of organizations in the nonprofit and charitable sector that provide highly diversified program benefits to the public and their members. In addition to traditional and nationally oriented charities, the Coalition consists of over 180 statewide membership organizations representing hundreds of thousands of active and retired law enforcement officers, professional and volunteer fire fighters, Jaycees, and veterans. These groups are organized for nonprofit purposes and engage in numerous program activities for the benefit of their members and the general public.

The public benefits created by the Coalition members are substantial and unparalleled. The various public safety organizations represent police chiefs, sheriffs, highway patrol, state and municipal police, narcotic officers, fire chiefs, professional fire fighters, paramedics and state investigatory personnel. As full time public safety personnel, the organizations are a unique and unrivaled source of knowledge and expertise on law enforcement, the fire service, and emergency medical services. They offer advice and counsel on criminal apprehension, detention, enforcement, fire safety, delivery of fire fighting services, and anti-terrorism expertise. They provide invaluable training and education on topics such as enhancements in law enforcement and fire fighting technology which improve the quality of services realized by the public. And many of the organizations sponsor comprehensive public service and educational programs on issues such as seat belt usage, home fire prevention, alcohol abuse, safe driving, illegal drugs, missing children, and community policing.

Thousands of charitable causes and state and local community programs are sponsored,

supported or funded by these public safety organizations. A few examples illustrate the connection between the Coalition members and community programs. Professional fire fighters represented in the Coalition provide extensive volunteer and financial support for The Muscular Dystrophy Association, and similar national support is provided by law enforcement organizations to the Special Olympics. Other examples include death benefit and benevolent programs for public safety officers killed or injured in the line of duty, scholarship programs for high school students, summer camps for underprivileged youths, hospital visits to children with terminal illnesses, and support of burn camps and burn victims.

The Coalition also includes a significant number of state military veterans organizations affiliated with the American Legion, Veterans of Foreign Wars, Disabled American Veterans, AMVETS, and the Vietnam Veterans of America. Together, these organizations facilitate, support, and fund countless public initiatives such as emergency financial aid; relocation, medical, employment and educational services for veterans; support for orphans and widows of veterans killed in the line of duty; assistance to disabled veterans in securing Veteran's Administration benefits and obtaining medical treatment, coordinating volunteer efforts that provide hundreds of thousands of hours of non-compensated services to hospitals; assisting veterans in obtaining employment; and providing transitional housing for homeless veterans.

Still other major public benefits are derived from state Jaycee organizations represented in the Coalition. The Jaycees are comprised of young people between the ages of

21 and 39 providing services to others including, for example, building hospitals, homes for the elderly, parks and playgrounds, while performing services and support programs in thousands of communities.

INTRODUCTION

The TSR regulates specific deceptive and abusive telemarketing practices as defined by the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq.* ("Telemarketing Act"). Enacted in 1994, the Telemarketing Act represents an effort by Congress to address fraudulent commercial telemarketing conduct harmful to consumers. That mandate, however, does not support a regulatory interpretation that creates a government-imposed prohibition against communicating with certain consumers – upon risk of federal, state or civil liability. Nor does it support a regulatory scheme creating a mandatory fee-based telephone registry[1] that will eliminate or significantly reduce *all* nonprofit and charitable telephone calls regardless of whether they are fraudulent, abusive or deceptive.

Under the Telemarketing Act, the Commission's regulatory authority is limited to deceptive and abusive telemarketing acts and practices intended to induce the purchase of

[1] The Commission's 2003 budget projection to Congress "assumes offsetting collections of $3,000,000 from a new Do-Not-Call fee. The fee would be assessed, collected, and used to cover the costs of developing, implementing, and maintaining a national database of telephone numbers of consumers who choose not to receive telephone solicitations from telemarketers." Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 7.

goods or services, that is, commercial conduct. *See, e.g.*, 15 U.S.C. § 6102(a)(3)(C). As a result, charitable solicitations by or on behalf of nonprofit and charitable organizations are beyond the scope of the TSR due to the jurisdictional limitations in Sections 4 and 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 44 & 45(a)(2), which expressly were incorporated into the Telemarketing Act. 15 U.S.C. § 6105(a) & (b). *Accord* Notice, 67 FED. REG. at 4496-97 (no Commission authority to regulate nonprofit organizations).

The Commission now proposes a fundamental departure from this approach that will compromise substantially the ability of the nonprofit and charitable organizations represented in the Coalition to generate funding necessary to fulfill their vital organizational missions and decimate their ability to deliver their message.[2] Ex. B, Suhrke Decl. ¶¶ 4-6. First, the Commission seeks to increase its jurisdiction by expanding the scope of the TSR to include not only deceptive and abusive commercial telemarketing to induce the purchase of goods or services, but also nondeceptive, nonabusive and inherently noncommercial charitable solicitations by professional fundraisers acting on behalf of, and as an extension of, nonprofit and charitable organizations. And second, the Commission seeks to implement a national

[2] The Telemarketing Act also mandated that the Commission undertake a review of the implementation of the statute and "its effort on deceptive telemarketing acts or practices and report the results of the review to the Congress." 15 U.S.C. § 6108. Although the Commission conducted several TSR forums in 2000, it has not issued a report concerning the implementation and effectiveness of the statute and regulation. Instead, the Commission proposes substantial revisions to the regulatory scheme envisioned by Congress prior to issuing the required report.

"Do-Not-Call" registry applicable equally to commercial telemarketers and charitable solicitations made on behalf of nonprofit and charitable organizations. Combined, the proposed amendments will give the Commission the authority to do indirectly what it acknowledges cannot be done directly under the Telemarketing Act, that is, regulate nonprofit and charitable organizations by asserting jurisdiction over their inextricably linked agents and service providers that perform charitable solicitations on their behalf and function as an extension of these organizations. *See* Notice, 67 FED. REG. at 4497 ("[o]ne type of 'activity which is outside the jurisdiction' of the FTC Act, as interpreted by the Commission and federal court decisions, is that of nonprofit entities"), *id.* ("[t]he jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits").

These proposals, and other TSR amendments flowing from them, are unjustified and patently excessive in their scope and effects. Setting aside temporarily the formidable jurisdictional and constitutional issues presented by the proposals when applied to charitable solicitations on behalf of nonprofit and charitable organizations, the effect of the proposals will be devastating financially to the nonprofit and charitable organizations represented in the Coalition. Ex. B, Suhrke Decl. ¶¶ 4-6. By necessity or choice, these organizations rely on professional fundraisers to solicit charitable donations on their behalf. An estimated 60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations. Jeff Jones, *Do Not Call: Proposed*

FTC Rules Could Hurt, THE NONPROFIT TIMES (Mar. 2002) (citing Paulette Maehara, CEO of the Association of Fundraising Professionals). Many of these organizations are voluntary and have few staff members. They simply do not have the infrastructure, personnel, operational efficiencies, and expertise to impart the fundraising message currently imparted by professional fundraisers. Ex. B, Suhrke Decl. ¶ 7.

The proposals have daunting financial implications for nonprofit and charitable organizations. Ex. B, Suhrke Decl. ¶¶ 4-6. Without funding, the important missions fulfilled by these organizations will be jeopardized. And ultimately, whether intended or an unintended consequence, funding will be affected by the proposed rule's chilling impact on protected speech rights enshrined in the First Amendment.

Although the Commission purportedly justifies the amendments on the grounds that consumers have a heightened interest in residential privacy and need protection against unscrupulous telemarketers that may perpetrate fraudulent charitable solicitations, *see, e.g.*, Notice, 67 FED. REG. at 4497 n.51, there is abundant evidence that these problems are an aberration and insubstantial to justify the broad and indiscriminate approach advocated by the Commission. As noted by J. Howard Beales, III, Director of the Bureau of Consumer Protection, the Commission has found little evidence of charitable solicitation fraud.[3] In fact,

[3] Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) ("To date, the findings of fraud are few and far between, and the Commission continues to monitor this situation as

the vast majority of comments during the TSR review did not even raise fraud as an issue. Notice, 67 FED. REG. at 4495 ("A majority of the comments received during the Rule review focused on issues relating to consumer privacy and consumer sovereignty, rather than on fraudulent telemarketing practices"). Indeed, the Better Business Bureau and other organizations consistently rank charitable solicitation fraud extremely low on complaint lists.[4] Where charitable solicitation fraud has arisen in the past, the Commission has acted aggressively and without jurisdictional impediment to protect the public interest and fulfill its consumer protection mission. *See, e.g.,* Notice, 67 FED. REG. at 4509-4510 & nn.163-69.

In 2001, Americans gave an estimated $221 billion to 1.23 million nonprofit and charitable organizations. An inevitable consequence of the Commission's proposed rule, however, will be a substantial reduction in nonprofit and charitable donations. Ex. B, Suhrke Decl. ¶ 5. This translates into a reduction, if not elimination, of the main source of revenue

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aggressively as any the Commission has ever pursued"). As noted by Bureau Director Beales, there were 193 September 11 complaints filed by consumers in the Consumer Sentinel database between September 12 and October 25. *Id*. 24 percent of these related to charitable solicitations, however, "[t]he vast majority of complaints has been from consumers alerting the Commission to potential scams, *not complaining about being defrauded*." *Id.* (emphasis added).

[4] *See, e.g.*, Better Business Bureau Annual Complaint Summary – 1999 (ranking complaints against national charities as 524th on its list of complaints by type of business, with complaints against local charities ranking 271st); National Fraud Information Center, Telemarketing Fraud Statistics (charitable solicitation fraud not listed in the "Top 10 Frauds" in 2000 and 2001).

for members of the Coalition. It is estimated that the Do-Not-Call registry, standing alone, will limit the potential donor pool between 40 percent to 50 percent from current levels. *See* Federal Trade Commission, *Fiscal year 2003 Congressional Justification Budget Summary*, at 6 ("The FTC estimates that up to 40 percent of all households in the United States would opt to be included on the Do-Not-Call list"). In reality, that may be a conservative estimate based on reported 70 percent to 80 percent opt out rates in some states. Matt Moore, *State Can Block Some Telemarketers – For a Price*, THE NEWS HERALD, Jan. 22, 1998, *available in* News Herald: Local News (visited Mar. 25, 2002) <http://www.newsherald.com/archive/local/tm012298.htm>; Notice, 67 FED. REG. at 4517 & n.240. Compounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide nonprofit and charitable organizations, as well as new prospective donors. Depriving charities and nonprofits of the ability to contact prior supporters will be financially devastating. Ex. B, Suhrke Decl. ¶ 5. The "express verifiable authorization" procedures in the proposed TSR provide no workable or practical solution to this problem. Ex. B, Suhrke Decl. ¶ 5. Reactivating from the proposed "Do-Not-Call" registry a current donor to a nonprofit and charitable organization would add substantial fundraising costs based on the Commission's proposed standards. For many nonprofit and charitable organizations, it would economically prohibitive and only would further the loss of revenue from charitable contributions.

Equally disturbing is the unfortunate timing of the proposed rule and clear

inconsistency with the message of the federal government and the Executive Office of the President that Americans must stand together as "Armies of Compassion" and increase charitable giving in the wake of September 11. This message of increased support of charities, with the commensurate removal of government-imposed barriers to charitable giving, is reflected in President Bush's call for the federal government to do more, not less, to encourage charitable giving:

> But in order to make sure the home front is secure, in order to make sure that we don't allow the terrorists to achieve any objective, Americans must give generously. . . . Community-based programs that help make their neighborhoods a better place for all. . . . And so, I hope America – I encourage America – that as we head into Thanksgiving, to find a program that needs help. . . . ***There is a role for the federal government in making sure that charitable organizations thrive and flourish. . . . We must also promote more private sector giving, besides just words of encouragement***.

Office of the Press Secretary, *President Urges Support for America's Charities* (Nov. 20, 2001) <http://www.whitehouse.gov/news/releases/2001/11/print/20011120-5.html> (visited Mar. 19, 2002) (emphasis added).[5]

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[5] *See also* Office of the Press Secretary, *President's Letter on "Armies of Compassion" Bill* (Nov. 7, 2001) <http://www.whitehouse.gov/news/releases/2001/11/print/20011108-2.html> (visited Mar. 19, 2002) ("We must pass and sign into law an "Armies of Compassion" bill this year that encourages and supports charitable giving, removes unneeded barriers to government support for community and faith-based groups, and authorizes important initiatives to help those in need"); Office of the Press Secretary, *Rallying the Armies of Compassion* (Jan. 2001) <http://www.whitehouse.gov/news/reports/faithbased.html> (visited Mar. 19, 2002) (discussing the elimination of federal government barriers to faith-based and community-based charitable giving and proposing numerous measures designed to encourage increased private charitable giving"); Office of the Press Secretary, *Executive Order of January 29, 2001: Establishment of White House Office of Faith-Based and Community*

I. Statement of Interest in the Proceeding

The Coalition has a substantial interest in this rulemaking. As a threshold matter, the proposed rule will have an irreparable negative impact that will limit dramatically the ability of nonprofit and charitable organizations to use the services of professional fundraisers. The consequences will be devastating for members of the Coalition and include, but are not limited to, massive reductions in donations, increased difficulties in communicating and fulfilling the mission objectives of the organizations, reduced ability to satisfy important public safety and community functions based on limited resources, and harm to consumers who benefit from, and rely upon, these functions. Ex. B, Suhrke Decl. ¶¶ 4-8.

As nonprofit and charitable organizations, members of the Coalition are exempt from the Commission's jurisdiction under the Federal Trade Commission Act and the Telemarketing Act. *Accord* 67 FED. REG. at 4496-4497 & n.49. They possess a constitutionally right to free speech under the plenary protection of the First Amendment

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Initiatives (Jan. 29, 2001) <http://www.whitehouse.gov/news/releases/2001/01/print/20010129-2.html> (visited Mar. 19, 2002) (creating the White House Office of Faith-Based and Community Initiatives with the principal functions of encouraging private charitable giving to support faith-based and community initiatives and eliminating unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems); Office of the Press Secretary, *The President's Agenda for Tax Relief* <http://www.whitehouse.gov/news/reports/taxplan.html> (visited Mar. 19, 2002) ("Thus, to encourage an outpouring of giving, President Bush's plan will expand the federal charitable deduction to non-itemizers. This change will allow every taxpayer to deduct his or her charitable donations and will generate billions of dollars annually in additional charitable contributions. The President also supports other proposals to increase charitable giving").

which includes the right to solicit charitable contributions unencumbered by unconstitutional governmental restrictions. This protected right has been upheld repeatedly by the Supreme Court. *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988)*; Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

The First Amendment protections apply not only to nonprofit and charitable organizations soliciting donations directly, but also to for-profit professional fundraisers they employ. *Riley*, 487 U.S. at 798 ("Whether one views this as a restriction of the charities' ability to speak . . . or a restriction of the professional fundraisers' ability to speak . . . the restriction is undoubtedly one on speech, and cannot be countenanced here") (internal citations omitted). It is this constitutionally protected speech flowing through professional fundraisers that is under attack. Indeed, the proposed rule represents an unprecedented effort by the federal government to regulate the content, manner and method of protected speech of nonprofit and charitable organizations based on suspect jurisdictional and constitutional interpretations of the Commission's regulatory and quasi-legislative authority.

II. State Regulation of Professional Fundraisers

Solicitations on behalf of nonprofit and charitable organizations are regulated extensively under state law. Ex. B, Suhrke Decl. ¶ 10. Virtually all states impose statutory and regulatory requirements on professional fundraisers soliciting donations on behalf of nonprofit and charitable organizations such as registration and licensing, posting of bonds,

point-of-solicitation disclosures, fraud protection provisions, record keeping provisions, and annual reporting of financial information. Ex. B, Suhrke Decl. ¶ 10. These requirements serve numerous functions. They offer public information on the activities of charities, and they also allow state enforcement authorities to identify violations and prosecute where necessary.

The Commission has no history of regulating professional fundraisers soliciting charitable contributions on behalf of a bona fide nonprofit or charitable organization in the manner now proposed by the Commission. To be sure, the previous consent orders obtained by the Commission mainly were based on alleged fraudulent solicitations under the pretext of charitable fundraising in violation of Section 5 of the Federal Trade Commission Act, not the TSR.[6] *See* Notice, 67 FED. REG. at 4509-4510 & nn.163-164 & 167-169. It also is informative

[6] Although the Commission brought enforcement actions against professional fundraisers acting on behalf of nonprofit and charitable organizations pursuant to Operation False Alarm and Operation Missed Giving, this enforcement frequently involved allegations of aggressive fraudulent and deceptive conduct in violation of Section 5 of the Federal Trade Commission Act authorizing the Commission to regulate unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a). *Accord* Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) ("In the past decade, the Commission has filed over 25 cases in federal district courts challenged deceptive fundraising practices by for-profit solicitors. Many of these cases involved 'badge fraud,' where a telemarketer poses as a law enforcement officer or an affiliate and typically claims that he is raising money to support law enforcement efforts in the donor's local area. In fact, the telemarketer is not a law enforcement officer or affiliate, and the money is not used to support local efforts, as promised"). As noted by staff of the Commission during the TSR "Do-Not-Call" Forum, "[t]here's a difference between misrepresenting who you are and where the money goes and having a contract that permits or contemplates what you might think of as a rather skewed apportionment of the venues from the fundraising activity. The Supreme Court has spoken pretty clearly about the inability of

that the Federal Communication Commission's implementing regulation, 47 C.F.R. § 64.1200 *et seq.*, pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), expressly exempts "a call or message *by, or on behalf of,* a caller . . . [w]hich is a tax-exempt nonprofit organization." 47 C.F.R. § 64.1200(c)(4) (emphasis added).[7]

Equally important is the Direct Marketing Association's Telephone Preference Service. It is yet another means of empowering consumers with the ability to prohibit residential telemarketing calls. In place since 1985, the TPS has many advantages over the Commission's and the FCC's company-specific "Do-Not-Call" approaches because it covers all forms of telemarketing with regulatory exemptions and jurisdictional impediments. In summary, the Commission's regulation of professional fundraisers working on behalf of nonprofit and charitable clients is unnecessary in light of the multitude of state laws that already regulate these solicitations.

III. Summary of Concerns with the Proposed Amendments

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government to reach the latter problem with regulation. . . .". Federal Trade Commission, Telemarketing Sales Rule "Do-Not-Call" Forum, FTC Matter No. P994414, Tr. at 156 (Jan. 11, 2000) (statement of Eileen Harrington, Esq.). As far as can be ascertained, these cases did not involve alleged violations of the Telemarketing Act and the TSR.

[7] The TCPA protects consumer privacy during telephone solicitations while balancing privacy and free speech rights. Congress expressly found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *See* Section 2(9) of the TCPA, Pub.L. 102-243. The FCC was instructed to consider telemarketing restrictions that are "consistent with the constitutional protections of free speech." *Id.* Section 2(15).

The Coalition has several concerns with the TSR amendments as applied to nonprofit and charitable organizations and professional fundraisers that solicit contributions on their behalf including:

1. The Commission's assertion of jurisdiction over professional fundraisers that solicit contributions on behalf of nonprofit and charitable organizations, when combined with the proposed "Do-Not-Call" registry, will limit dramatically the use of professional fundraisers. The consequences will be devastating for members of the Coalition in terms of funding, fulfillment of their mission objectives, and dissemination of their message.

2. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 (Oct. 25, 2001) ("USA PATRIOT Act") did not confer upon the Commission the jurisdiction to regulate nonprofit and charitable institutions, nor did it confer jurisdiction under the Telemarketing Act and TSR to regulate nondeceptive and nonabusive charitable solicitations by professional fundraisers acting on behalf of bona fide nonprofit and charitable organizations.

3. The "Do-Not-Call" registry is unconstitutional as applied to professional fundraisers engaged in charitable solicitations on behalf of nonprofit and charitable organizations. Solicitation by professional fundraisers is fully protected speech under the First Amendment, and the discriminatory regulatory scheme proposed by Commission produces equal protection violations under the Constitution. Further, the registry is economically unfeasible, cost prohibitive, and will result in substantial costs to consumers.

4. The proposed removal of an exemption applicable to charitable solicitations directed to businesses is unconstitutional and beyond the Commission's jurisdiction. It will have a substantial negative effect on charitable giving in light of the

importance of businesses donations to nonprofit and charitable organizations.

The Coalition believes the only resolution to these flaws is to exclude from the Telemarketing Act and the TSR charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations and to eliminate the proposed national "Do-Not-Call" Registry.

IV. Specific Responses to Request for Comment

A. The Proposed Amendments Will Have a Devastating Impact on Nonprofit and Charitable Organizations

The Commission's alleged jurisdiction over professional fundraisers that solicit contributions on behalf of nonprofit and charitable organizations, when combined with the proposed "Do-Not-Call" registry, will limit dramatically the use of professional fundraisers. The consequences will be devastating for members of the Coalition in terms of funding, fulfillment of their mission objectives, and dissemination of their message.

Many nonprofit and charitable organizations have built constituencies through grass roots support. Telephones are the most practical and cost effective interactive medium for these organizations in recognition of the fact that direct (e.g., face-to-face) solicitation is logistically impossible and direct mail is cost prohibitive. Ex. B, Suhrke Decl. ¶ 5. Telephone solicitation confers obvious benefits. Trained professional fundraisers deliver prepared scripts, often created or approved by the nonprofit and charitable clients, to communicate the clients' messages. Most states require registration, bonds, and point-of-solicitation disclosures. *See supra* Section II. Ultimately nonprofit and charitable organizations reap substantial benefits from this process including (1) donations from consumers to support the needs of the organization, and (2) delivery of the central message of the nonprofit and charitable organization during the telephone solicitation and in subsequent written correspondence. Ex. B, Suhrke Decl. ¶¶ 5-6.

Nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and disseminate their message. Ex. B, Suhrke Decl. ¶¶ 5-6. There are obvious advantages to this approach. Successful and cost-effective fundraising requires basic resources and specialized knowledge that nonprofit and charitable organizations frequently lack. Ex. B, Suhrke Decl. ¶ 5. For example, there must be a substantial investment of capital, a highly trained and supervised work force, and thorough knowledge of the state and federal regulatory requirements. Ex. B, Suhrke Decl. ¶ 5. Such trained professionals offer significant resources, expertise and operational efficiencies that cannot be duplicated by nonprofit and charitable organizations. Ex. B, Suhrke Decl. ¶ 7. Indeed, approximately 60 percent to 70 percent of all nonprofit and charitable organizations rely on professional fundraisers because doing so permits the organization to focus its expertise and limited resources on implementing their program missions. Ex. B, Suhrke Decl. ¶ 5.

The financial implications of the proposed rule are staggering as applied to nonprofit and charitable solicitations and exceed greatly the Commission's "de minimis" estimates pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501-3517. Notice, 67 FED. REG. at 4534-4535. The nature of nonprofit and charitable solicitations would change fundamentally. Nonprofit and charitable organizations would be forced to attempt to solicit these donations on their own because, as the Commission acknowledges, solicitation by their employees or volunteers is not covered by the Telemarketing Act and the TSR. As implicitly

recognized by Commissioner Swindle, this creates Commission-imposed competitive disadvantages on smaller and mid-sized nonprofit and charitable organizations, often of regional nature, that do not have the resources, personnel and constituencies to take up the slack as compared to larger, national nonprofit and charitable organizations that are better funded and more capable of engaging in fundraising. *Cf*. Concurring Statement of Commissioner Orson Swindle, in Telemarketing Sales Rule Review, File No. R411001 ("Covering the entire spectrum of entities also would result in a more equitable regulatory scheme. For example, telephone companies currently are exempt in whole or in part from the Telemarketing Act and the TSR because they are common carriers, yet some vendors that compete with them apparently are not exempt from these regulatory requirements . . . which may confer a competitive advantage in marketing on telephone companies"). Many nonprofit and charitable organizations would, if nothing else, lack the practice and expertise to perform these functions. Ex. B, Suhrke Decl. ¶¶ 5, 7. In this way, the proposed rule is "impermissibly insensitive to the realities faced by small or unpopular charities" who rely on professional fundraising. *Riley*, 487 U.S. at 793.

The compelled shift away from outsourcing solicitations would adversely affect employment and divert the limited resources of the nonprofit and charitable organizations. And reduced resources directly and negatively impacts the community-based and public service functions of these organizations, for example, (1) training and educational programs designed to equip members to better serve the public in their professions, (2) efforts to upgrade

salaries, working conditions, retirement benefits and other aspects of members' employment, (3) programs designed to increase public knowledge and recognition of the members as dedicated, skilled public safety professionals, (4) efforts to support and to lobby legislation in the best interests of members and the public, (5) a wide range of public service and community programs sponsored, supported, or financed by these organizations, and (6) newsletters and other publications providing information on programs and other issues. As noted by the Supreme Court, nonprofit and charitable organizations use professional fundraisers "who 'necessarily combine' the solicitation of financial support with the 'functions of information dissemination, discussion, and advocacy of public issues.'" *Schaumburg*, 444 U.S. at 632 (citation omitted). *See Riley*, 487 U.S. at 798 ("where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself") (citations omitted). Interfering with the solicitation of support likely would end the advocacy of ideas. *Schaumburg*, 444 U.S. at 632. Where the Commission proposes to obstruct such solicitations, so too does it propose to obstruct the advocacy of the message.

B. The Commission Has Exceeded its Authority Under the Telemarketing Act and the USA PATRIOT Act by Expanding its Jurisdiction to Include Professional Fundraisers Acting on Behalf Nonprofit and Charitable Organizations

The Commission requests comment on whether the proposed expansion of the scope of the TSR to cover solicitation of charitable contributions by professional fundraisers, but not by nonprofit and charitable organizations, achieves the Congressional purpose of Section 1011 of the USA PATRIOT Act. *See* Notice, 67 FED. REG. at 4537. The Coalition unqualifiedly believes that the proposed rule misconstrues and does not achieve the Congressional purpose of the USA PATRIOT Act. Although the Commission acknowledges that the USA PATRIOT Act does not authorize the agency to regulate directly nonprofit and charitable organizations, Notice, 67 FED. REG. at 4497,[8] nonetheless the agency employs a strained and flawed statutory construction that the USA PATRIOT Act amended the Telemarketing Act in a manner that "compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations is unaffected." Notice, 67 FED. REG. at 4497 (footnote omitted).

In reaching this conclusion, the Commission attributes three fundamental changes to the Telemarketing Act as a consequence of the USA PATRIOT Act. First, it contends that Section 1011(b)(3) of the USA PATRIOT Act amended and broadened the definition of

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[8] *Accord Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Comm'n,* 405 F.2d 1011, 1015-20 (8th Cir. 1969).

"telemarketing" in the Telemarketing Act, 15 U.S.C. § 6306(4), by adding the term "charitable contribution," although excluding contributions to political and religious organizations.[9] Notice, 67 FED. REG. at 4496. Second, it asserts that Section 1011(b)(2) added to the "abusive telemarketing acts or practices" listed in the TSR certain disclosures by persons engaged in "telemarketing for the solicitation of charitable contributions." Notice, 67 FED. REG. at 4496.[10]

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[9] Under the proposed rule, "telemarketing" would be defined as "a plan, program, or campaign which is conducted to induce purchases of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(aa) (proposed definition). In turn, "charitable contribution" would be defined as "any donation or gift of money or any other thing of value; provided, however, that such donations or gifts of money or other thing of value solicited *by or on behalf* of the following shall be excluded from the definition of charitable contribution for the purposes of this Rule: (1) Political clubs, committees, or parties; or (2) Constituted religious organizations. . . .". 16 C.F.R. § 310.2(f) (proposed) (emphasis added). Thus, the Commission exempts from the Telemarketing Act and the TSR any solicitation for a contribution to a political party or religious organization, including any such contributions solicited by professional fundraisers. The Commission justifies this disparate treatment because "the risk of actual or perceived infringement on a paramount societal value – free and unfettered religious discourse – likely outweighs the benefits of protection from fraud and abuse that might result from including contributions to such organizations within the scope of the definition." Notice, 67 FED. REG. at 4499. As discussed, *infra* Section IV.C., these facially discriminatory exemptions are unconstitutional.

There also is an apparent inconsistency in the proposed amendment of the "telemarketing" definition under the US PATRIOT Act. The Statutes at Large incorrectly refer to "15 U.S.C. 6016" in marginal notations, not 15 U.S.C. § 6106, which actually contains the "telemarketing" definition. 115 Stat. 396.

[10] Section 1011(b)2(D) of the the USA PATRIOT Act specifically refers to "a requirement that any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts of money or any other thing of value, shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to solicit charitable contributions, donations, or gifts, and make such other disclosures as the

And third, the Commission asserts that the USA PATRIOT Act amended the "deceptive telemarketing acts or practices" in the Telemarketing Act to include "fraudulent charitable solicitations." Notice, 67 FED. REG. at 4496.

The Commission correctly notes a material defect in the USA PATRIOT Act that is relevant to understanding the underlying Congressional intention. That is, Congress expressed no intent to expand upon the Commission's jurisdictional limitations under the Telemarketing Act. Notice, 67 FED. REG. at 4496 ("Notwithstanding its amendment of these provisions of the Telemarketing Act, *neither the text of section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act* – the provision which incorporates the

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Commission considers appropriate, including the name and mailing address of the charitable organization on behalf of which the solicitation is made." The Commission proposes to amend the enumerated "deceptive telemarketing acts or practices" in the TSR to make it "a fraudulent charitable solicitation, a deceptive telemarketing act or practice and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information: (1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested; (2) That any charitable contribution is tax deductible in whole or in part; (3) The purpose for which any charitable contribution will be used; (4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program after any administrative or fundraising expenses are deducted; (5) Any material aspect of a prize promotion including, but not limited to: The odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; (6) In connection with the sale of advertising: The purpose for which the proceeds from the sale of advertising will be used; that a purchase of advertising has been authorized or approved by any donor; that any donor owes payment for advertising; or the geographic area in which the advertising will be distributed; or (7) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity." 16 C.F.R. § 310.3(d) (proposed).

jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR") (emphasis added). One such jurisdictional limitation is the well-established lack of authority by the Commission over nonprofit and charitable organizations. Notice, 67 FED. REG. at 4497 & n.49. And, as Congress unambiguously expressed in the Telemarketing Act, the Commission has no authority under the statute to regulate any activity not committed to the Commission's jurisdiction under the Federal Trade Commission Act. 15 U.S.C. § 6105(a). *Accord* Notice, 67 FED. REG. at 4496-4497.

Citing only in a footnote a basic provision of statutory construction that a statute's original and amendatory language should be read as a whole and interpreted so that they do not conflict, Notice, 67 FED. REG. at 4497 n.50, the Commission claims that the failure of Congress to remove the jurisdictional limitations of the Telemarketing Act, when read in conjunction with the USA PATRIOT Act's mention of fraudulent charitable solicitations, "compels the conclusion" that the Congressional purpose in the USA PATRIOT Act was to regulate professional fundraisers soliciting charitable donations on behalf of nonprofit and charitable organizations.[11] Notice, 67 FED. REG. at 4497. This interpretation is anything but

[11] *See* Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.01[1] (2001) (discussing criteria whether a federal regulation complies with Congressional intent and collecting cases). *See also National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979) ("In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose"). Where, as here, an administrative agency's effort to harmonize a regulation with a statute creates inconsistencies within the regulatory scheme or between the statute and regulation, the regulation cannot stand. *See generally Board of*

compelled. Indeed, it only opens a Pandora's Box of inconsistencies and inequities under the Telemarketing Act and TSR that certainly were not intended by Congress.

For example, though motivated by fraudulent charitable solicitations, there is no basis in the USA PATRIOT Act nor the legislative history to reach the conclusion that Congress believed that consumers are in more need of the Telemarketing Act protections where the charitable solicitation is performed by professional fundraisers on behalf of nonprofit and charitable organizations, as opposed to directly by the employees and volunteers of nonprofit and charitable organizations. And yet, under the proposed rule, this precisely is the outcome. A nonprofit or charitable organization conducting its own fundraising campaign never would trigger the TSR restrictions, but the same organization that hires a professional fundraiser to contact the same consumers with an identical message would be (1) required to filter all telephone communications through the Commission's proposed "Do-Not-Call" registry in order to, in effect, obtain the Commission's pre-approval to solicit a charitable contribution, (2) required to make extensive disclosures not required to be made by the nonprofit or charitable organization that fundraises directly, (3) prohibited from fundraising before 8:00 a.m. and after 9:00 p.m., (4) required to comply with extensive record keeping requirements, and (5) subject to the federal, state and civil liability provisions. Such an outcome inherently is suspect. *See, e.g., Schaumburg*, 444 U.S. at 632 n.13 ("solicitation by organizations

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Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986).

employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers"). Further, there is no basis in the USA PATRIOT Act nor the legislative history that Congress believed that consumers require less protection from alleged fraudulent charitable solicitations – even by professional fundraisers – where political and religious and faith-based donations are sought. However, the proposed rule expressly exempts this type of commercial fundraising, in part based on a "policy" decision, notwithstanding the lack of any record evidence to support this approach.[12]

A more plausible interpretation of the USA PATRIOT Act in amending the Telemarketing Act is that Congress intended only to address bogus charitable solicitations where the nonprofit or charitable cause or organizational scheme itself is of a criminal or fraudulent nature. This is fundamentally different than the Commission's proposal to regulate all professional fundraisers soliciting donations on behalf of bona fide nonprofit and charitable organizations. The most compelling evidence of this Congressional purpose is not even

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[12] The incongruity of the Commission's policy-based exemption for religious-based charitable solicitations while not exempting secular nonprofit and charitable organizations that use professional fundraisers is underscored by the following statement from the President of the American Institute of Philanthropy ("AIP"): "[i]t is far too easy for a dishonest individual to operate a religious charity that steals our money and damages our spirituality." American Institute of Philanthropy, *Separation of Church and State Should Not Separate Donors From Information* (Winter 1998/1999 Watchdog Report) <http://www.chairtywatch.org/church.html > (visited Apr. 2, 2002). AIP argues that religious charitable solicitations – which represented one-half of all charitable donations in 1997 – need more, not less, government monitoring as compared to secular nonprofit and charitable organizations. *Id*. This is because most states do not require the public disclosure of how religious contributions are spent. *Id*.

addressed in the Commission's proposed rulemaking, that is, the legislative history of the USA PATRIOT Act.[13] Indeed, although the Commission repeatedly asserts, without support, that "[n]othing in the text or legislative history of that Act indicates an intention to exclude telemarketers soliciting charitable contributions from" the Telemarketing Act, Notice, 67 FED. REG. at 4514 & 4516, these assertions are unfounded and directly conflict with the legislative history of the USA PATRIOT Act.

S. 1481, titled the "Crimes Against Charitable Americans Act," was introduced by Sen. Mitch McConnell (R-KY) on October 2, 2001. In his explanation of the need for the legislation and its intended purpose, Sen. McConnell consistently stated that S. 1481 was intended to address fraudulent charitable solicitations by "crooks" and "false charities" of a "criminal" nature:

> < "But this largess have proven an irresistible target to **criminals** who prey upon the generous and good-hearted nature of Americans in this time of national emergency." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

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[13] Legislative history, neglected by the Commission here, is the cornerstone to construing a statute. *See United States v. Monia*, 317 U.S. 424, 432 (1943) (dissenting opinion) ("A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment – that to which it gave rise as well as that which gave rise to it – can yield its true meaning").

< "We heard reports of **false charities** exploiting well-intentioned Americans during the Gulf War and after the Oklahoma City bombing and we now hear similar reports that the September 11 attacks have given these unusually **heartless criminals** new opportunities to perpetrate fraud." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

< "Almost daily we hear of American citizens receiving solicitations from **phony charities**." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

< "News reports from more than a dozen States, from New York to Florida to California, reveal that Americans are being asked to contribute to what turn[s] out [sic] to be **bogus victim funds, phony firefighter funds** and **questionable charitable organizations**." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

< "Instead, this money is siphoned into the pockets of **cold-hearted criminals**." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

< "These **crooks** often try to confuse their victims by using names that sound like reputable charities and relief efforts." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

< "Other **crooks** use the name 'firefighter fund' or 'victim's survivors fund' in their **fraudulent appeals**." 147 CONG. REC. S10065 (daily ed.) (Oct. 2, 2001) (emphasis added).

< "Not only do they **steal valuable resources** from the most worthy of recipients, but they erode the trust of the American people in **legitimate charitable organizations**." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

The legislative history confirms that Congress sought to authorize the Commission to address

criminal and fraudulent charities, not the legitimate nonprofit and charitable organizations now singled out by the Commission. Equally illuminating is the fact that Sen. McConnell relied on highly controversial information from the Commission when introducing the legislation. Sen. McConnell introduced into the Congressional Record several information sheets relied upon as support of the legislation. One information sheet was an FTC Consumer Alert released in September 2001. 147 CONG. REC. S10059, S10066 (daily ed. Oct. 2, 2001) (information sheet). In it, the Commission inexplicably advises consumers not to donate to professional fundraisers soliciting on behalf of nonprofit and charitable organizations. The Consumer Alert states "***Give directly to the charity, not solicitors for the charity***. That's because solicitors take a portion of the proceeds to cover their costs. That leaves less for the victims." FTC Consumer Alert!, *Helping Victims of the Terrorist Attacks: You Guide to Giving Wisely* (Sept. 2001) (emphasis added).

Also relevant to understanding the intent of the legislature is Sen. McConnell's long history of supporting the free speech rights such as those imperiled by the proposed rule. For example, in zealously opposing campaign finance reform as an unconstitutional infringement on free speech, Sen. McConnell stated:

> Who is to decide whose speech is worthy and whose speech is not? *The Supreme Court made it clear that the government is not going to allow us here to decide whose speech is worthy and whose speech is not*. The First Amendment doesn't allow us the latitude to categorize certain kinds of speech as offensive and other kinds of speech as laudable. . . .

McConnell and Lautenberg on Campaign Finance, WASH. POST, Mar. 1, 1999, at C05

(emphasis added). *See also* Sen. Mitch McConnell, *Campaign Finance "Reform": A View from Capitol Hill*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (1996) (citing the "shameful disregard of the First Amendment" represented by campaign finance reform's unconstitutional violations of free speech).

Finally, there is no basis in the USA PATRIOT Act to conclude that the Congressional failure to amend the jurisdictional limitations of the Commission under the Telemarketing Act evinces a Congressional intention to regulate professional fundraisers as agents of nonprofit and charitable organizations when applied to the Telemarketing Act statutory scheme. Indeed, Supreme Court precedent irrefutably undercuts such a conclusion. In *Riley*, the Court held that speech of professional fundraisers is inextricably intertwined with the fully protected speech of charitable and nonprofit organizations. *Riley*, 487 U.S. at 796 ("Regulation of a solicitation 'must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase"). Applied in this context, *Riley* teaches that speech of the professional fundraiser acting as an agent of the nonprofit and charitable organization cannot be partitioned as the Commission attempts. Consequently, the Commisison's effort to regulate the message of the agent, here, the professional fundraiser, is "artificial and impractical" because it assumes that the message

of the principal is unaffected. *Riley*, 487 U.S. at 796. *See generally Food and Drug Admin. v. Brown & Williamson Tobacco Corp*. 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (rejecting a regulatory scheme by the FDA in which the agency – though conceding no jurisdiction to regulate tobacco products – attempted to regulate the promotion of tobacco to users and use of tobacco based on paternalistic health and safety claims).

In summary, the USA PATRIOT Act does not confer on the Commission the jurisdiction to regulate nonprofit and charitable institutions, nor does it confer jurisdiction under the Telemarketing Act and TSR to regulate nondeceptive and nonabusive charitable solicitations by professional fundraisers on behalf of bona fide nonprofit and charitable organizations.[14]

[14] The Coalition also disputes the Commission's assertion of jurisdiction because charitable fundraising by professional fundraisers on behalf of nonprofit and charitable organizations is not conduct "in or affecting commerce" within the meaning of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2). *See, e.g., Riley*, 487 U.S. 781 (1988) (charitable fundraising is not commercial in nature); *Dedications and Everlasting Love to Animals v. The Humane Soc'y of the United States of Am.*, 50 F.3d 710 (9th Cir. 1995) (charitable solicitations are not trade that can be restrained under the Sherman Antitrust Act). *See generally Del Tufo v. Anational Rep. Senatorial Comm.*, 591 A.2d 1040 (N.J. Super. Ch. 1991) (political fundraising is not commercial activity).

C. The "Do-Not-Call" Registry is Unconstitutional

The Commission also requests comment on its proposed supplementation of the company-specific "Do-Not-Call" registry with a national "Do-Not-Call" list to "enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls."[15] Notice, 67 FED. REG. at 4516. Of course, the proposed national registry does not respond to the piecemeal approach of the current system because the Commission does not propose to preempt the FCC's "Do-Not-Call" registry nor the multitude of states with similar registries.[16] In fact, although the Commission notes that twenty states have passed "Do-Not-Call" statutes of one form or another, it fails to acknowledge that the overwhelming majority of these states exempt or exclude coverage of nonprofit and charitable solicitations including solicitations by professional fundraisers on behalf of these entities.[17]

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[15] Certainly the perceived efficiencies of a national "Do-Not-Call" registry over the current federal, state and private sector requirements do not justify the encroachment on the First Amendment protections of speech that are implicated. *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 795 (1988) ("we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency") (citations omitted).

[16] In addition, the proposed national registry would not affect purely intrastate telephone calls because the Telemarketing Act applies only to "more than one interstate telephone call."

[17] At least twenty states have some form of a "Do-Not-Call" registry. *See* Ala. Code § 8-19C; Ark. Code Ann. § 4-99-401; California (S.B. 771, *to be codified* at Cal. Bus. & Prof. Code § 17590); Colorado (H.B. 1405, *to be codified* at Col. Rev. Stat. § 6-1-901); Conn. Gen Stat. Ann. § 42-288a; Fla. Stat. Ann. § 501.059; Ga. Code Ann. § 46-5-17; Idaho Code § 48-1003; Indiana (H.B. 1222, *to be codified* at Ind. Cod Ann. § 24.4.7); Ky. Rev. Stat. Ann. § 367.46955(15); Louisiana (H.B. 175, *to be codified* at La. Rev. Stat. § 45:844.11); Me. Rev. Stat. § 4690-A; Mo. Rev. Stat. § 407.1098; NY Gen. Bus. Law § 399-z; Or. Rev. Stat. §

Thus, the proposed centralization of the "Do-Not-Call" registry has profound implications for nonprofit and charitable organizations because not only are solicitations by or on behalf of these entities currently unregulated under the Telemarketing Act and the TSR, Notice, 67 FED. REG. at 4516, but the Commission's approach substantially departs from the experience of individual states in exempting these calls.

1. Freedom of Speech Violations

As applied to professional fundraisers soliciting contributions on behalf of nonprofit and charitable organizations, the proposed "Do-Not Call" registry is unconstitutional because it violates the First Amendment right to freedom of speech.[18] The Commission acknowledges that the First Amendment protections for nonprofit and charitable organizations "extend to their for-profit solicitors." Notice, 67 FED. REG. at 4497 n.51 (citation omitted).[19] The

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464.567; Tenn. Code Ann. § 65-4-40; Texas (H.B. 472, *to be codified* at Tex. Bus. & Com. Code Ann. § 43.001); Wisconsin (2001 S.B. 55, *to be codified* at Wis. Stat. § 100.52); Wyo. Stat. Ann. § 40-12-301. All but five of these states exempt solicitations by or on behalf of nonprofit and charitable organizations.

[18] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

[19] *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud"); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("Prior authorities, therefore, clearly establish that charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of

Commission concedes a "strong First Amendment protection of charitable fundraising." Notice, 67 FED. REG. at 4522 n.286. And it agrees that solicitations by professional fundraisers on behalf of nonprofit and charitable organizations is fully protected speech, as opposed to commercial speech.[20] Thus, the issue is not whether charitable solicitations by professional fundraisers are protected, but instead whether the Commission's proposed rule to the TSR "unduly intrude[s] upon the rights of free speech." *Schaumburg*, 444 U.S. at 633.

Even assuming, *arguendo*, that solicitation by professional fundraisers is commercial speech entitled to less First Amendment protection under intermediate level scrutiny analysis (an assertion not made by the Commission and rejected by the Supreme Court), it is clear that the proposed rule is unconstitutional. In *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), the

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the First Amendment").

[20] *See* Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) ("*The Supreme Court has held that fundraising for charities is fully protected speech under the First Amendment* and that state statutes may not require a charity to prove the reasonableness of using more than 35 percent of its collected donations for fundraising expenses") (emphasis added); *T.E.M.M. Marketing, Inc.*, FTC File No. X990002 (1999) (Statement of Commissioner Orson Swindle Concurring in Part and Dissenting in Part) ("Moreover, soliciting for charities, including making representations as part of the business of soliciting donations on behalf of charities, is fully-protected speech under the First Amendment to the United States Constitution") (citing *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 796 (1988)). *See also* Federal Trade Commission, Telemarketing Sales Rule "Do-Not-Call" Forum, FTC Matter No. P994414, Tr. at 156 (Jan. 11, 2000) (statement of Eileen Harrington, Esq.) ("The Supreme Court has spoken pretty clearly about the inability of government to reach" the apportionment of the revenues from the fundraising activity).

Seventh Circuit held unconstitutional a "Do-Not-Call" registry applicable to real estate solicitations because there was no "reasonable fit" between the state's interest of protecting residential privacy and the restriction on commercial speech. Applying the less deferential test for restrictions on commercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Seventh Circuit concluded that the statutory exemptions from the "Do-Not-Call" registry – similar to those proposed by the Commission – rendered the statutory scheme underinclusive. *Pearson*, 153 F.3d at 404. The court stated that "[w]e can no longer . . . place the interest in residential privacy above the interest in logical distinctions in speech restrictions absent some showing that the restriction reasonably fits the justification." *Pearson*, 153 F.3d at 404. *Cf. Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) (holding unconstitutional the complete suppression of speech, even commercial speech, based on government's asserted consumer fraud justification and stating that "when the government chooses a policy of suppression over disclosure . . . government disregards a 'far less restrictive' means") (cititation omitted); *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2nd Cir. 1994) (banning solicitation not narrowly tailored); *State of Missouri v. American Blast Fax, Inc.*, Civ. Act. No. 4:00CV933 (SNL) (E.D. Mo. March 13, 2002) (mem. op.) (holding unconstitutional the Telephone Consumer Protection Act's prohibition against unsolicited facsimile advertisements due to a violation of the First Amendment right to freedom of speech).

As fully protected free speech, the proposed regulation of charitable solicitations by

professional fundraisers on behalf of nonprofit and charitable organizations does not survive strict scrutiny. *Memorial Hosp. v. Maricopa County,* 415 U.S. 250 n.21 (1974). The proposed rule is not narrowly tailored to further a strong interest that the Commission is entitled to protect without interfering with the First Amendment protections of members of the Coalition. *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959-61 (1984); *Schaumburg*, 444 U.S. at 636-37. Where, as here, the Commission attempts to regulate the content of protected speech, it must employ the least restrictive means to advance the articulated interest. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989).

The Commission claims that the regulation of professional fundraisers under the TSR and the national "Do-Not-Call" registry are "narrowly tailored" and that they further the "government interests that justify the regulation." Notice, 67 FED. REG. at 4497 n.51. Only two government interests are identified: the prevention of fraud and the protection of home privacy. Notice, 67 FED. REG. at 4497 n.51 (citations omitted).

Other than the unsubstantiated claim that the "Do-Not-Call" registry is narrowly tailored within the meaning of *Schaumburg* and its progeny, the Commission makes no effort to explain how the proposed rule is narrowly tailored to warrant the infringement upon protected free speech. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) ("[t]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction"). Nor does it attempt to justify the assertion that the "Do-

Not-Call" registry is narrowly tailored to prevent fraud. Indeed, creating the registry as a prophylactic measure to prevent fraudulent charitable solicitations is tantamount to issuing a death sentence for a parking violation. *See Riley*, 487 U.S. at 803 ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made") (citation omitted). It also conflicts directly with the record evidence developed by the Commission during the review of the TSR. *See* Notice, 67 FED. REG. at 4495 ("A majority of the comments received during the Rule review focused on issues relating to consumer privacy and consumer sovereignty, *rather than on fraudulent telemarketing practices*") (emphasis added); *see also* Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) ("[t]he vast majority of complaints [about charitable solicitations] has been from consumers alerting the Commission to potential scams, *not complaining about being defrauded*") (emphasis added).

As to the other government interest asserted by the Commission, residential privacy, there is little support that Congress intended the Telemarketing Act to address this interest in the sweeping manner proposed by the Commission, that is, by creating a national "Do-Not-Call" registry. To be sure, the five Congressional findings supporting the Telemarketing Act focus on fraud and deceptive and abusive telemarketing. 15 U.S.C. § 6101. There is no mention of privacy in the Congressional findings, and the Commission's TSR final rule in 1995 has only one reference to privacy.[21] *See* Statement of Basis and Purpose and Final Rule, 60 FED. REG. 43843 (Aug. 16, 1995).

Even assuming, *arguendo*, that the privacy protection and fraud prevention interests cited by the Commission warrant some change in the current regulatory scheme, it does not follow that the "Do-Not-Call" registry is narrowly tailored to accomplish this objective constitutionally. Time and again, the Supreme Court has held unconstitutional any effort by government to impinge upon free speech rights by imposing unreasonable restrictions on

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[21] The only express mention of a privacy interest in the statute is that the Commission should include in the TSR "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. § 6102(a)(3)(A). From this statement, and other general direction given by Congress in 15 U.S.C. § 6102(a), the Commission inexplicably concludes that "Congress recognized that telemarketers' right to free speech is in tension with and encroaches upon consumers' right to privacy within the sanctity of their homes. . . .This *recognition by Congress that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse and its directive to the Commission to reign in these tactics, lie at the heart of § 310.4* of the TSR." Notice, 67 FED. REG. at 4511 (emphasis added). Under such reasoning, there is no limit to the type of conduct that triggers a privacy interest favored over fully protected speech.

professional fundraisers acting on behalf of nonprofit and charitable organizations. In *Riley*, as in *Munson and Schaumburg*, the government imposed restrictions focused on unconstitutional economic regulations. Here, the Commission proposes an equally infirm national "Do-Not-Call" registry (1) to which all professional fundraisers acting on behalf of nonprofit and charitable organizations must subscribe, (2) through which all communications with prospective donors must be filtered monthly, and (3) by which the Commission will prohibit certain solicitations or face federal, state or civil penalties.

Under any fair reading of *Riley*, *Munson* and *Schaumburg*, the Commission's approach does not withstand strict scrutiny – indeed, it is more invasive and burdening than the economic regulations in those cases. This especially is true where there are less restrictive measures available to the Commission that uphold the fully protected free speech rights of members of the Coalition, while avoiding the inconsistencies and discriminatory results of the proposed registry. Indeed, the effort to protect privacy and prevent fraud by implementing the "Do-Not-Call" registry would lead to outcomes inconsistent with these interests based on the jurisdictional limitations under the Telemarketing Act and the decision to exempt certain types of charitable conduct such as political and religious solicitations. Thus, for example, the Commission proposes to subject professional fundraisers to the full breadth and extent of the TSR where they solicit charitable contributions on behalf of bona fide nonprofit and charitable organizations, while leaving unregulated by the TSR deceptive, abusive and fraudulent nonprofit organizations that use their own employees to solicit donations. We respectfully

submit that Congress did not intend the USA PATRIOT to result in such a distorted and facially discriminatory result when it sought to address "fraudulent charitable solicitations."

2. Equal Protection

Other constitutional problems are created by exempting specific industries that engage in inherently commercial telemarketing (for example, airlines, insurance companies, credit unions, telephone companies, banks) and specific types of conduct (for example, religious and political telemarketing and solicitations directly by nonprofit and charitable organizations).

This facially discriminatory approach raises grave equal protection issues.[22] By exempting certain commercial telemarketing from the TSR[23] but not excluding professional fundraising on behalf of nonprofit and charitable organizations, the Commission favors commercial speech over protected speech. The Supreme Court has held unconstitutional a government ordinance that accorded a greater degree of protection under the First Amendment to commercial speech

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[22] Because a federal statute and regulation are implicated, the equal protections of the Fourteenth Amendment are not triggered directly. However, a violation of the basic equal protections of the Fourteenth Amendment also violates due process under the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process").

[23] *See* Notice, 67 FED. REG. at 4493 n.17 ("In addition to these exemptions, certain entities including banks, credit unions, savings and loans, companies engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance are not covered by the Rule because they are specifically exempt from coverage under the FTC Act").

than noncommercial protected speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980). This is exactly what is accomplished by the proposed rule – the commercial speech freedoms of banks, insurance companies and other exempt industries would be unregulated by the Telemarketing Act, while the fully protected speech of the nonprofit and charitable organizations in the Coalition would be burdened.[24]

No less of a concern is the proposal to exclude political and religious contributions from the TSR based on a policy decision that religious discourse is a "paramount societal value" and a legal conclusion that political contributions are neither commercial nor charitable within the meaning of the USA PATRIOT Act. Notice, 67 FED. REG. at 4499. The exclusions only reinforce the discriminatory effects and unconstitutionality of the proposed rule. Under the proposed rule, contributions for "political parties and candidates" are not covered by the TSR because "they involve neither purchases of goods or services nor solicitations of charitable contributions, donations or gifts. . . ." Notice, 67 FED. REG. at 4499. And, purely "as a matter of policy," the Commission proposes to exclude religious contributions because "the risk of actual or perceived infringement on a *paramount societal value* – free and unfettered

[24] Favoring commercial speech by banks, insurance companies and common carriers inherently is suspect based on record evidence in this proceeding in which commenters "urged the expansion of the Rule's scope beyond its current boundaries . . . to provide additional protection for consumers in light of the convergence of the banking insurance, and securities industries. . . .". Notice, 67 FED. REG. at 4497. The answer by the Commission in response is that it "has no authority to expand the Rule beyond" the statutory limits set by the Telemarketing Act. Notice, 67 FED. REG. at 4497.

religious discourse – likely outweighs the benefits of protection from fraud and abuse that might result from including contributions to such organizations. . . ." (emphasis added).[25] In doing so, the Commission favors political and religious speech over fully protected free speech and discriminates against nonprofit and charitable organizations. As the Supreme Court has explained, however, appeals for charitable contributions are inextricably intertwined with the underlying conveyance of information and ideas – that is, speech. *Schaumburg*, 444 U.S. at 632 ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease"). These protections are fully vested even where a professional fundraiser is the conduit of the nonprofit and charitable organization's speech. These speech rights are entitled to the full protection of the First Amendment, and must receive no less protection than political speech or religious discourse.

3. Prior Restriant

The "Do-Not-Call" registry also is an unconstitutional prior restraint because it would silence the protected speech rights of nonprofit and charitable organizations prior to publication by enabling "consumers through one phone call to remove their name from telemarketing lists nationwide." Federal Trade Commission, *Fiscal Year 2003 Congressional*

[25] Indeed, this asserted justification for excluding religious contributions approaches, but falls woefully short of, a "narrowly tailored" analysis.

Justification Budget Summary, at 3. Under the proposed rule, charitable solicitations on behalf of nonprofit and charitable organizations made by professional fundraisers would be prohibited unless cleared first with the Commission's registry. In summary, the objective of the registry is to stop the telephone from ringing without the explicit pre-approval of a consumer as evidenced by "express verifiable authorization" or implicit pre-approval by failing to add his or her name to the Commission's registry.

There is a heavy presumption against the constitutionality of a prior restraint on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The Commission does not assert that there are sufficient procedural safeguards in the "Do-Not-Call" registry, as required by the Supreme Court, so as not to violate the First Amendment. *See Freedman v. Maryland*, 380 U.S. 51 (1965). While fraud prevention and privacy protection are important interests, a prior restraint that preemptively forbids all protected speech in order to prevent the occasional annoying telephone call is abhorrent to the First Amendment. *See Near v. Minnesota*, 283 U.S. 697 (1931). In this way, the "Do-Not-Call" registry is "the most serious and least tolerable infringement on First Amendment Rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

4. Content Based Regulation

Finally, because the "Do-Not-Call" registry only applies to professional fundraisers acting on behalf of nonprofit and charitable organizations (and not solicitations directly by nonprofit and charitable organizations) and requires specific TSR disclosures where a charitable contribution is sought, it is a content-based restriction on fully protected free speech. *Riley*, 487 U.S. at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech"). And where a government regulation regulates speech based on its content, the regulation must satisfy strict scrutiny and must be narrowly tailored to promote a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (citations omitted). As a content based restriction of speech, the "Do-Not-Call" registry is presumed constitutionally invalid unless the Commission rebuts that presumption. *Playboy*, 529 U.S. at 817 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)). Here, the Commission makes no effort to substantiate the constitutionality of the proposed registry other than a broad but undefined assertion that the registry is narrowly tailored.

D. The National "Do-Not-Call" Registry is Economically Unfeasible and Will Pass Substantial Costs to Consumers

The Commission requests comment on the regulatory and economic impact of the proposed "Do-Not-Call" registry. As the Coalition has discussed previously the regulatory burdens of the proposed rule, we focus here on the economic implications. For several

reasons, the Coalition believes that the Commission's economic projections are flawed. There is substantial evidence available to the Commission as compiled by the FCC using notice and comment procedures that a national "Do-Not-Call" registry would involve massive implementation and administrative costs that in all likelihood will be passed to consumers.

The Commission has asked Congress for $5,000,000 in funding in 2003 to implement the national "Do-Not-Call" registry based on a projected 40 percent sign-up rate of all households. Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 6. In reality, the estimated costs in 2003 associated with the "Do-Not-Call" Registry are $8,000,000 because, based on the Commission's budget justification to Congress, it proposes to collect at least $3,000,000 in fees based on the mandatory scrubbing required under the proposed TSR.[26] Regardless, it is clear that Commission's cost projections for the implementation and administration of the registry are based on fuzzy math. The FCC undertook a virtually identical analysis in 1992 based on its contemplation of a national "Do-Not-Call" registry and estimated that starting and operating a national database in the first year alone ranged from $20 million to $80 million, with $20 million annually in succeeding years.

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[26] The Commission's budget justification assumed offsetting collections of $3,000,000 from a new Do-Not-Call fee to be "assessed, collected, and used to cover the costs of developing, implementing, and maintaining a national database of telephone numbers of consumers who choose not to receive telephone solicitations from telemarketers." Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 7. The imposition of this mandatory fee obviously creates financial incentives for the Commission to require frequent "scrubbing" by covered entities such as the monthly requirement now proposed. 16 C.F.R. § 310.4(b)(2)(iii) (proposed).

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 1992 WL 690928 (F.C.C. Oct. 16, 1992). Ultimately, the FCC concluded that a national registry "is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations." *Id*. It reached this conclusion, in part, based on the finding that "consumers, as well as telemarketers, would ultimately bear the costs of a national database, either through higher prices charged by telemarketers or through costs incurred by a national database administrator and not recovered through fees on telemarketers." *Id*. And while there have been enhancements in technology, there is no basis to conclude based on the record in this proceeding that technological advancements will reduce costs between one-half to one-eighth of the FCC's projections.

E. Elimination of the Businesses to Businesses Charitable Solicitation Exemption is Unconstitutional, Beyond the Commission's Jurisdiction, and Will Harm Substantially Nonprofit and Charitable Organizations

The Coalition also disagrees with the proposed removal of the TSR exemption applicable to business-to-business ("B2B") charitable solicitations. The Commission proposes to remove the B2B exemption because "charity fraud targeting businesses is a widespread problem"[27] and the "plain language and the legislative history of the USA PATRIOT Act

[27] Although the Commission alleges "widespread" problems with B2B charitable fraud, it cites only a few instances of this type of conduct. Moreover, the prevalence of charitable fraud in B2B transactions, in fact, is immaterial to the question whether Congress intended to make the exemption unavailable.

amendments" authorize this result. Notice, 67 FED. REG. at 4532. For the reasons discussed previously, *supra* Section IV.B. & C., it is not within the Commission's jurisdiction under the USA PATRIOT Act to regulate B2B charitable solicitations, nor would such regulation be constitutional under the First Amendment.

By the express language of the Commission's proposed exemption, the proposed amendment would regulate under the TSR the fully protected speech of these organizations soliciting charitable contributions, while not regulating purely commercial telemarketing calls between a commercial telemarketer and a business. *See* 16 C.F.R. § 310.6(g) (proposed) ("The following acts or practices are exempt from this Rule: (g) Telephone calls between a telemarketer and any business, except calls to induce a charitable contribution. . . ."). The government constitutionally cannot accord more protection under the First Amendment to commercial speech than noncommercial speech as the Commission here proposes. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980). Nor can the removal of the exemption be justified as a narrowly tailored measure to address the alleged sweeping nature of this type of fraud as applied to small businesses. In fact, the frequency and harm resulting from fraudulent practices between businesses in a commercial context exceed greatly the frequency and harm associated with charitable solicitations of businesses. Yet, the Commission inexplicably preserves the exemption for commercial telemarketing communications between businesses unfettered by the TSR, but proposes to regulate only those communications where a business is contacted for a charitable contribution.

Finally, there is nothing in the plain language nor legislative history of the USA PATRIOT Act that even remotely suggests that Congress intended to empower the Commission to regulate purely B2B charitable contributions under the Telemarketing Act because of concerns of fraudulent charitable solicitations. The Commission's unsupported assertion that its authority derives from, and effectuates the intent of, the USA PATRIOT Act does not alter this result.[28]

CONCLUSION

Driven by a desire to protect privacy and prevent fraud, the Commission proposes to stop the phone from ever ringing for charitable solicitations when the call is placed by professional fundraisers acting on behalf of nonprofit and charitable organizations. It seeks to accomplish this goal based on a flawed interpretation of its jurisdictional authority and the unsupported assertion that the proposed rule is narrowly tailored to the task. As shown by these comments, the USA PATRIOT Act was not intended by Congress to authorize the Commission to regulate under the Telermarketing Act and the TSR nonfraudulent solicitations by professional fundraisers on behalf of nonprofit and charitable organizations. And no regulation can be narrowly tailored where it empowers the government to eliminate *all*

[28] The proposed rule also violates the Administrative Procedures Act, 5 U.S.C. § 706, because it is (1) unconstitutional, (2) not a reasonable and permissible construction of Telemarketing Act and the USA PATRIOT Act, including the jurisdictional limitations imposed by Congress on Commission, and (3) arbitrary and capricious and an abuse of discretion. *See* generally Stein, Mitchell & Mezines, ADMINISTRATIVE LAW § 51.01 (2001).

nonprofit and charitable telephone calls, including calls that are not fraudulent, abusive or deceptive.

What is at stake is not simply the detrimental impact on nonprofit and charitable organizations and the bad policy advanced by the proposed rule. The proposed rule affronts highly treasured constitutional guarantees to speech under the First Amendment. In the words of the Supreme Court, "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791 (citation omitted).

Glenn A. Mitchell, Esq.
Andrew M. Beato, Esq.
Stein, Mitchell & Mezines L.L.P.
1100 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
(202) 737-7777

Counsel for The Not-For Profit and Charitable Coalition

April 15, 2002

EXHIBIT A

MEMBERS OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION

Alabama Association of Firefighters and Paramedics

Alabama Fire Fighters Association

Alabama Jaycees

Alabama Peace Officers Association

Alabama Police Olympics

Alabama Sheriffs Association

Alabama Sports Festival

Alabama State Police Association

American Ex-Prisoners of War Service Foundation, Inc.

American Foundation for Disabled Children

American Legion, Department of Alabama

American Legion, Department of Arizona

American Legion, Department of Georgia

AMVETS American Veterans

AMVETS Department of Florida

AMVETS Department of Iowa

AMVETS Department of Massachusetts

AMVETS Department of Michigan

AMVETS Department of New Jersey Service Foundation

AMVETS Department of New York

AMVETS Department of Wisconsin

AMVETS National Service Foundation, Inc.

Anne Arundal County (MD) Fire Fighters Local 1563

Arizona Department of AMVETS, Inc.

Arkansas Association of Chiefs of Police

Arkansas Law Enforcement Union

Arkansas Municipal Police Association

Arkansas State Police Association

Asheville (NC) Fire Fighters Association

Associated Fire Fighters of Arizona

Associated Fire Fighters of Illinois

Baltimore County (MD) Professional Fire Fighters Association

Broward County (FL) Police Benevolent Association

California Narcotics Officers Association

California Organization of Police and Sheriffs

California Police Activities League

Cancer Federation Inc.

Central Alabama Fire Fighters

Central Ohio Police Officers Training

Chatham County (GA) Police Association, Inc.

Chattanooga (TN) Firefighters Association, Local 820

Childhood Leukemia Foundation

Clarksville (TN) Fire Fighters Association

Colorado Jaycees

Colorado Law Enforcement Officers Association

Colorado Police Protective Association

Colorado Vietnam Veterans, Inc.

Committee for Missing Children

Concord (NC) Professional Fire Fighters Association

Connecticut Police Chiefs Association

Crime Stoppers, Inc.

D.A.R.E. Indiana, Inc.

Dade County (FL) Fire Fighters

Dade County (FL) PBA

Delaware-Maryland Paralyzed Veterans

Department of Iowa, Veterans of Foreign Wars

Department of Kansas, Veterans of Foreign Wars

Department of Kentucky, Veterans of Foreign Wars

Department of Michigan, Veterans of Foreign Wars

Department of Montana, Veterans of Foreign Wars

Department of Nebraska, Veterans of Foreign Wars

Department of Nevada, Veterans of Foreign Wars

Department of New York, Veterans of Foreign Wars

Department of South Dakota, Veterans of Foreign Wars

Department of Washington Veterans of Foreign Wars

Deputy Sheriffs Association of Michigan

Disabled American Veterans Department of Wisconsin

EMS Association of Texas Inc.

Enlisted Association of the National Guard of the United States (EANGUS)

Fairfax (VA) Coalition of Police

Find the Children

Fire Fighters Council of Central Florida (FL)

Florida American Legion

Florida Association of Professional EMTs and Paramedics

Florida Law Enforcement Games

Florida Professional Fire Fighters

Florida Sheriffs Deputies Association

Foundation of Iowa Jaycees Charities

Georgia State Fire Fighters Association

Georgia Association of EMT's Inc.

Hawaii State Fire Fighters Association

Idaho Jaycees

Idaho Sheriffs Association

Illinois Association of Chiefs of Police

Illinois Drug Enforcement Officers Association

Illinois Jaycees

Illinois Police Association

Illinois State Troopers, Lodge 41

Illinois Vietnam Veterans, Inc.

Indiana Association of Chiefs of Police

Indiana Association of Chiefs of Police Foundation

Indiana Jaycees

Indiana Troopers Association

International Law Enforcement Games

International Union of Police Associations (IUPA) (AFL-CIO)

Iowa Professional Fire Fighters

Iowa State Peace Officers Council

Iowa State Police Association

Italian American Police Society of New Jersey

Jersey City (NJ) Police Athletic League

Kansas Association of Chiefs of Police

Kansas Jaycees

Kansas Narcotics Officers Association

Kansas Peace Officers Association

Kansas Sheriffs Association

Kansas State Council of Fire Fighters

Kentucky Association of Chiefs of Police

Kentucky Professional Fire Fighters

Kentucky State Police Professional Association

Kids Wish Network

Lexington (NC) Fire Fighters Association Local 3064

Lisle-Woodridge Fire Fighters Union (IL)

Lombard (IL) Fire Fighters Union

Louisiana Union of Police Associations (AFL-CIO)

Maryland and District of Columbia Professional Fire Fighters Association

Maryland Coalition of Police and Deputy Sheriffs (AFL-CIO)

Maryland Law Enforcement Officers, Inc.

Maryland Sheriffs Association

Maryland Troopers Association, Inc.

Massachusetts Call Volunteer Firefighters Association

Massachusetts Reserve Police Federation

Mecca Temple Shrine of New York City (NY)

Michigan Association of Fire Fighters

Michigan Jaycees

Michigan Paralyzed Veterans of America

Michigan Professional Fire Fighters Union

Military Order of the Purple Heart Service Foundation

Minnesota Chiefs of Police Association

Minnesota Police and Peace Officers Association

Minnesota Professional Fire Fighters

Minnesota State Patrol Troopers Association

Miracle Flights for Children

Mississippi Association of Chiefs of Police

Missouri Federation of Police Chiefs

Missouri Jaycees Inc.

Missouri Peace Officers Association

Missouri State Council of Fire Fighters

Missouri Union of Law Enforcement Local 57-AFLCIO

Missouri Vietnam Veterans Foundation

Mobile (AL) Fire Fighters Association

Monroe County (FL) PBA

Montana Association of Chiefs of Police

Montana Jaycees

Montana Police Protective Association

Montana Vietnam Veterans, Inc.

Mothers Against Drunk Driving (MADD)

Multiple Sclerosis Association of America

National Association of Police Organizations (NAPO)

National Children's Cancer Society, Inc.

National Federation of the Blind

National Narcotics Officers Association Coalition (NNOAC)

Nebraska Jaycees

Nebraska Professional Fire Fighters

Nebraska Sheriffs Association

Nevada State Firefighters' Association

New Hampshire Jaycees

New Hampshire Association of Chiefs of Police

New Jersey Superior Officers Association

New Mexico Police Athletic League

New Mexico Public Safety Officers (AFL-CIO)

New Mexico Sheriffs & Police Association

New York Association PBA Inc.

New York State Union of Police Associations (AFL-CIO)

New York Vietnam Veterans Foundation

North Bergen (NJ) Police Athletic League

North Carolina Coalition of Police

North Carolina Troopers Association

North Dakota Jaycees

North Dakota Troopers Association

North Dakota Vietnam Veterans of America

Ohio Association of Chiefs of Police

Ohio Council of Police Safety Associations

Ohio Fire Chiefs Association

Ohio Jaycees

Ohio State Troopers Association, Inc.

Ohio Troopers Coalition, Inc.

Oklahoma Association of Chiefs of Police

Oklahoma Sheriffs and Peace Officers Association

Oklahoma Vietnam Veterans Charitable Foundation, Inc.

Oregon Association of Chiefs of Police

Palm Beach County (FL) Council of Fire Fighters and Paramedics

Paterson (NJ) Police Athletic League

Patrolman's Benevolent and Police Association of Illinois

Peace Officers Association of Georgia, Inc.

Pennsylvania Professional Fire Fighters Association

Phillipsburg (NJ) Police Athletic League

Plainfield (NJ) Police Athletic League

Police Athletic League of New Jersey

Police Athletic League of Parsippany-Troy Hills (NJ)

Police Conference of New York

Police Officers Association of Michigan

Police Officers Defense Fund of New York State, Inc.

Police Officers Labor Council

Professional Fire Fighters of Alabama

Professional Fire Fighters of Georgia

Professional Fire Fighters of Greensboro (NC)

Professional Fire Fighters of Oklahoma

Professional Fire Fighters & Paramedics of North Carolina

Professional Fire Fighters of North Dakota

Professional Fire Fighters of South Dakota

Professional Fire Fighters of Utah

Professional Fire Fighters of Vermont

Professional Fire Fighters of West Virginia

Professional Fire Fighters of Wisconsin

Professional Fire Fighters Union of Indiana

Raleigh (NC) Professional Fire Fighters Local 548

Retired Police Association of the State of New York

Rhode Island Vietnam Veterans of America, Inc.

Roanoke (VA) Fire Fighters Association

Rock Hill (SC) Fire Fighters Association

Rockford City (IL) Fire Fighters Union IAFF Local #413

Salem (VA) Professional Fire Fighters Association Local #3478

South Carolina Troopers Association

South Dakota Peace Officers Association

South Florida Council of Fire Fighters

Southwest Florida Professional Fire Fighters & Paramedics

Southwest Florida Professional Fire Fighters and Paramedics

Special Olympics Arizona

Special Olympics Arkansas

Special Olympics of New Hampshire

Special Olympics Indiana

Special Olympics Florida

Special Olympics Massachusetts

Special Olympics Maryland Inc.

Special Olympics Missouri

Special Olympics New Hampshire

Special Olympics North Carolina, Inc.

Special Olympics Ohio

Special Olympics Rhode Island

Special Olympics South Dakota

Special Olympics Southern California

Special Olympics Tennessee

State of Florida Association of Police Athletic/Activities Leagues

State Peace Officers Council

Tennessee Jaycees

Tennessee Law Enforcement Officers Association

Tennessee Police Federation

Tennessee Vietnam Veterans

Texas Department of Public Safety Officers Association

Texas Police Chiefs Association

Texas State Association of Fire Fighters

Texas State Troopers Association

The Leukemia and Lymphoma Society

The Trust for Maryland Vietnam Veterans

Tulsa (OK) Fire Fighters Local 176

Uniformed Fire Fighters of Connecticut

United Professional Fire Fighters Association of Connecticut

United States Junior Chamber

Veterans Assistance Foundation, Inc.

Veterans of Foreign Wars, Department of Massachusetts

Veterans of Foreign Wars, Department of New Mexico

Vietnam Veterans Foundation of Georgia

Vietnam Veterans Foundation of Iowa

Vietnam Veterans of Iowa, Inc.

Vietnam Veterans Foundation of Texas, Inc.

Vietnam Veterans of America – Connecticut State Council

Vietnam Veterans of America, Ohio State Council

Vietnam Veterans of Kentucky, Inc.

Vietnam Veterans of Nebraska

Vietnam Veterans of Virginia, Inc.

Virginia Coalition of Police and Deputy Sheriffs (AFL-CIO)

Virginia Police Chiefs Foundation

Virginia Professional Fire Fighters

Washington Jaycees

Washington State Fire Fighters Association

Washington State Law Enforcement Association

West Virginia Chiefs of Police Association

West Virginia Troopers Association

West Virginia Vietnam Veterans Foundation

Wisconsin Jaycees

Wisconsin Law Enforcement Officers Association

Wisconsin Professional Police Association

Wisconsin Sheriffs & Deputy Sheriffs Association

Wisconsin Troopers Association, Inc.

Wisconsin Veterans Assistance Foundation

Wish Upon a Star Foundation (IL)

Wyoming Highway Patrol Association