

March 29, 2002

Office of the Secretary, Room 159
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Telemarketing Rulemaking -- Comment. FTC File No. R411001

The International Business Machines Corporation is pleased to comment in response to the Commission's notice of proposed rulemaking of January 30, 2002, ("the Notice") setting forth a proposed revision to the Telemarketing Sales Rule (the "Proposed Rule").

We appreciate the Commission's effort to solicit public comments and sponsor a public dialogue on this important topic. IBM respects the wishes of our customers and seeks through our comments to ensure that the Proposed Rule permits us to meet their expectations. We look forward to supporting the Commission's effort in this area as it moves forward

BACKGROUND

IBM is the largest information technology company in the world. We develop and manufacture many of industry's most advanced technologies, including computer systems, software, networking systems, storage devices and microelectronics. We also are the world's largest e-business services company, delivering strategic consulting and helping our clients to use information technology to improve their internal operations and service to customers.

We are particularly suited to comment on the Proposed Rule as IBM is the leading Web-hosting services provider in the US, according to a new report from International Data Corporation (IDC). In addition, IBM is a leading seller of computer hardware, software and services direct to small business and consumer customers both over the Internet and by telephone.

AREAS OF COMMENT

These comments are organized into four areas:

- I. The relationship between a Do Not Call ("DNC") request and the requirement for authorization to contact customers.
- II. Removing or modifying the "Business to Business" exemption involving the sale of Internet services or Web services.
- III. The transfer of customer Billing Information for purposes of telemarketing and payment.
- IV. The interplay between DNC requests and home-based businesses or telecommuters.

I. DO NOT CALL REQUESTS AND THE NEED FOR EXPRESS VERIFIABLE AUTHORIZATION

IBM recognizes the intent of, and strong public support for, this provision of the Proposed Rule. However, we believe that some legitimate interests on the part of both consumers and businesses would be frustrated by the Proposed Rule in its present form.

Under the Proposed Rule, once a customer has placed his telephone number on the DNC registry maintained by the FTC (the "Registry"), a business may only initiate an "outbound telephone call" to that telephone number if the business has previously obtained the "express verifiable authorization" ("EVA") of the customer to receive such calls. Unfortunately, there are many situations in which customers on the Registry will not have provided EVA but will nonetheless want, if not expect, to receive what could be defined as an "outbound telephone call".

As set forth in greater detail below, IBM proposes that the FTC should treat "unsolicited" outbound telemarketing differently than it treats outbound calling in response to a single customer request or single transaction.

A. The Issue

Several scenarios exist in which it is impossible or impractical to require that a business obtain EVA before initiating an "outbound telephone call" to a customer on the Registry, such as

1. A call in response to a direct request by the customer, such as a response to an electronic request (e.g. a Web request or an e-mail asking for a call) or return call in response to a telephone request (e.g. a voice mail).
2. A call transfer in response to a direct request by the customer, such as a call transfer in response to a customer's request to speak with another business entity.
3. A call in relation to a previously placed customer order when there is a problem or significant issue with the order that needs customer clarification or decision to resolve.

1. Calls in response to a customer's direct request

Frequently, customers will call a business, only to receive a business' voice mail or answering machine. The customer will often leave a message including his or her phone number and request a return call.

In addition, there are several ways that customers can make an electronic request to receive a phone call from a business. For example, customers may be browsing a Web site and want to ask the site owner a specific question about a product or service shown. That customer might send an e-mail leaving his or her phone number and requesting a callback from a business representative. Alternatively, the customer could request a callback via a real-time Web "chat" function. IBM was a pioneer in the use of this type of feature, which we named "Call Me Now". With this feature, a customer browsing the IBM Web site can bring up an Internet chat box, enter

his or her phone number while on-line, and receive an almost instantaneous return call from an IBM sales specialist.

Both of these types of calls, which would be initiated by the business at the request of the customer, could end up prohibited by the rule as currently written, if the customer had previously placed his telephone number on the Registry. It is very likely that neither the voice mail request nor the electronic request would provide the information and permission required for the request to qualify as EVA, and as such the business could be prohibited from fulfilling the customer's express request. In the event of an electronic submission (e.g. e-mail or chat function), there would likely be no customer "signature" as contemplated in the Proposed Rule. And in the situation involving a voice mail or answering machine message, a business may not be able to verify that the customer is calling "from the number to which the consumer or donor, as the case may be, is authorizing access". The business might not have caller-ID or some other feature that enables the business to verify that the customer is indeed calling from the number provided. Or, the customer may not be in an area that supports the transmission of caller-ID information, or may have chosen per-call or full-time number blocking. In each of these scenarios, despite the customer's express desire to receive a phone call, her previous DNC request would prevent the business from honoring her request to receive the requested callback.

2. Transferring a call at the customer's direct request

In the process of concluding a telephone sale, even one initiated by the customer, the customer might request to be transferred to another business. Customers might request a product or service that the seller does not itself offer, but which is offered by a separate company. For example, a customer who has placed a call to an airline to purchase an airline ticket may request to be transferred to an agent for a hotel or car-rental agency. With the sale of personal computers or high-end consumer electronics, customers frequently want to finance their purchase. Financing is often offered not by the seller directly, but by a third party (e.g. a bank), and customers who request financing will be transferred over to a telephone representative of the finance company.

Under the Proposed Rule, such a transfer is an "outbound telephone call". If the customer had previously placed his name on the Registry, it appears that such a transfer would be again prohibited absent EVA despite the customer's express request. If the business had no way of verifying the telephone number, then it would appear impossible to obtain EVA.

3. A call in relation to a previously placed customer order

Following a customer order, problems or issues may arise that require customer contact. For example, a customer could have placed an order over the Internet for products that are not compatible (for example, buying a notebook PC but extra memory designed to function in a desktop PC). In such a situation, the seller may want to call the customer to alert him to this potential problem. If the customer's order was by mistake, the seller would want to be able to offer the customer the correct part number. In this situation, one purpose of the call would undoubtedly be to sell the different (albeit correct) part number.

In another situation, the customer might place an order over the Internet or by telephone and provide a credit card number for payment. Alternatively, the customer could place an order and send in a check for payment. If the customer's preferred method of payment is rejected by the bank or credit card company, the seller and buyer would probably both expect that the seller would call the customer back and offer to accept another method of payment before canceling the customer's order. In this instance, while the purpose would not be to make a sale beyond the order the customer had previously placed, the seller would be collecting new customer billing information, which the Proposed Rule seems to consider the essence of "placing an order".

In yet another situation, there could be inventory problems with a product the customer has ordered. The seller might be unable to secure inventory to fulfill the customer's order, or the product might be delayed in shipping. The seller should have the ability to call the customer back and explain the situation, and allow the customer to cancel the order, accept the delay, or possibly change his order and purchase a different product.

However innocuous the scenarios above may seem, if the customer had previously placed his name on the Registry, the seller could be prohibited from calling the customer to resolve these issues, preventing the seller from easily fulfilling the customer's order. The seller would have to contact the customer through e-mail or regular mail, with certain frustration on the part of business and the customer alike.

B. The Proposal

While IBM understands the FTC's goal in requiring EVA, as presently defined, before a business can conclude it has the requisite authority to place unsolicited outbound telephone calls to a customer, we urge the FTC to adopt a different approach to these types of "one time" or single-transaction outbound telephone calls than it does for the general practice of outbound calling.

First, in all of these scenarios, customers will have either expressly requested a call, or will have concluded a sales transaction that is the subject of later calling. Second, it does not seem appropriate to require EVA (at least as presently defined in the Proposed Rule) in these scenarios, because a business may not be able to obtain the required authorization in any of the foregoing circumstances. It is likely that customers will not want to grant permission to receive unsolicited outbound telephone calls in general, but will want to receive the calls described above. Further, it is impractical to require written signature, or to require that the seller can verify that the phone number submitted with an order or phone message is indeed the customer's phone number. To prevent a seller from contacting the customers in these situations would likely frustrate customer intent - the prompt completion of an accurate order.

Therefore, even if the FTC believes that the requirements presently set forth for EVA are appropriate before a business could engage in a general campaign of unsolicited outbound telemarketing to individuals on the Registry, IBM believes that the FTC should provide for a limited exception to the "do not call" provisions to enable a business to respond to customer needs. We believe that calls in response to a specific customer request, or calls directly related to fulfilling a previously placed customer order should be exempt from the requirement to obtain EVA.

IBM recognizes that in the Notice, the FTC addressed a comment by the Direct Selling Association ("DSA") requesting a general exemption to the Proposed Rule for calls to customers with whom the caller has a previous business relationship, and we recognize the reluctance to grant such a broad exemption with respect to persons buying for personal, family or household purposes which has been expressed by the Commission.¹

IBM also notes that in the same discussion of the general exemptions to the Proposed Rule the FTC addressed a comment, again by the DSA, requesting an exemption to the TSR where the solicitation is an isolated transaction and not done in the course of pattern or repeated transactions of like nature.² The Notice recognizes that a truly isolated transaction would not constitute "a plan, program, or campaign" and thus would not be subject to the Rule's provisions. IBM agrees with the FTC interpretation with respect to those businesses that do not otherwise engage in telemarketing subject to the Rule. However, for those businesses that do engage in telemarketing, the Proposed Rule offers no transaction-based exemption from the DNC provisions.

IBM believes that the "transaction based" exemption to the DNC rules, proposed by IBM above, balances both customer expectation and legitimate business needs, and should be adopted.

II. THE BUSINESS TO BUSINESS EXEMPTION AND THE SALE OF INTERNET SERVICES AND WEB SERVICES

The Proposed Rule narrows the existing "Business to Business" ("B2B") exemption found in §310.6(g) of the current Telemarketing Sales Rule("TSR") by "removing" from this exemption B2B telemarketing involving the sale of Internet services and Web services. IBM believes that this proposed modification is not warranted and should be removed from the final Rule.

A. The Issue

When the TSR was first promulgated, the Commission appropriately determined that a B2B exemption was warranted, to avoid unduly burdening legitimate business. Commentors such as the Electronic Retailing Association ("ERA") recently reiterated the value this exemption provides to business, noting that businesses are generally sophisticated customers adept at negotiation and deciding between multiple offers.

IBM recognizes that since the TSR was originally adopted, the business community, particularly small business, has been the target of an increasing amount of fraud concerning the sale of Internet access and Web page development services, often coupled with the illegal practice known as "cramming".

¹See 67 Federal Register 4492, at 4532.

²Id.

In a prepared statement before the United States Senate Committee on Small Business, Jodie Bernstein, former Director of the FTC's Bureau of Consumer Protection, recognized that while law enforcement is at the heart of FTC activities against such activities as fraudulent sales of Internet access and Web services, education is also a key component of the FTC's activities.³

As part of the education referenced in this prepared statement, in June, 1999, the FTC produced a Business Alert (the "Alert") in cooperation with the Small Business Administration, American Chamber of Commerce Executives, Better Business Bureau, National Federation of Independent Businesses and Yellow Pages Publishers Association. This Alert, entitled "Website Woes: Avoiding Web Service Scams" was produced to educate the small business community on practices they should implement to deal with Web service sales issues. Featured in the Alert was the following guidance:

You can protect your business from losing money to unordered services. Here's how:

1. Know your rights. If you receive bills for services you didn't order, don't pay. The law allows you to treat unordered services as a gift.
2. Review your phone bills as soon as they arrive. Be on the lookout for charges for services you haven't ordered or authorized. If you find an error on your bill, follow the instructions on your statement.
3. Assign purchasing to designated staff. And document all your purchases.
4. Train your staff in how to respond to telemarketers. Advise employees who are not authorized to order services to say, "I'm not authorized to place orders. If you want to offer or sell us something, you must speak to _____."
5. Buy from people you know and trust. Authorized employees should be skeptical of "cold" or unsolicited calls and feel comfortable saying "no" to high pressure sales tactics.⁴

IBM recognizes and supports the role that consumer protection and law enforcement agencies have in investigating and prosecuting legitimate complaints of fraud, whether such fraud occurs over the telephone, in person or in cyberspace. IBM encourages government agencies to develop creative ways to respond more quickly to complaints about fraud related to the sale of Internet access and Web service. IBM also wholeheartedly supports the ongoing efforts of the FTC, state Attorneys General and groups such as the Small Business Alliance for Fraud Education to educate businesses and consumers alike on these fraudulent practices. We believe that these aggressive enforcement and business education efforts remain the best way to combat this fraud.

³Prepared Statement of the Federal Trade Commission on "Web Site Cramming" Before the Committee on Small Business, United States Senate. Washington D.C. October 25, 1999, Section II C.

⁴Archived on the FTC Web site at <http://www.ftc.gov/bcp/online/pubs/alerts/webalrt.htm>

IBM recognizes the legitimate concern the Commission is attempting to address by limiting the B2B exemption. However, we do not believe that this limitation is appropriate. The legitimate reasons warranting the original B2B exemption remain valid today. And, the aggressive enforcement and ongoing business education efforts serve as a notice to both telemarketers and business customers alike of the need to understand their rights and obligations with respect to all B2B transactions, and the sale of Web service and Internet access in specific. Therefore, IBM recommends against adopting the modification set forth in §310.6(g).

B. The Proposal

If the FTC determines that some modifications must be made to the TSR to address fraud related to the sale of Internet access or Web services, we believe that the proposal goes far beyond those provisions necessary to protect business customers, and will unduly restrict legitimate business transactions. In today's Web-based world, almost every business in every industry needs services that might be interpreted as Web services or Internet services, as presently defined. As a result, almost every business is a customer of these services, and the number of suppliers (and varying types of suppliers) will continue to grow substantially. These changes will impact virtually the entire IT industry.

While many companies may not normally engage in telephone sales, it is a common practice in business that sales representatives develop a personal relationship with their customers' procurement representatives, and discuss possible transactions in person and in telephone calls both before and after in-person meetings. Therefore, to the extent the seller otherwise engages in telemarketing subject to the rule, even the typical customer call could conceivably be covered by the rule, especially if there is a "pattern" of calls. Such a "pattern" could likely be found in the proposal and bid stage for any project, impacting both small business and large enterprise alike. The presale stage for these projects can involve weeks, months or even years of presale customer interaction.

The Proposed Rule could even extend to something as large as a Fortune 500 company outsourcing its entire IT operations. This modification could require the CEO of one company to provide the disclosures required by §310.4(d) if she called the CEO of another company to discuss a possible billion-dollar e-business services effort! Most, if not all, of this large-scale B2B interaction would not seem to be the type of behavior that has been the source of the Commission's fraud concerns.

While IBM believes that the B2B exemption does not need to be modified at all, to the extent the Commission believes that the final TSR must include a modification of the B2B exemption to combat fraud, IBM proposes both modifications to the definitions of Internet service and Web service, and modifications to the exemption limitation, allowing certain business activities, even those involving the sale of Internet service and Web service, to continue to enjoy the exemption.

The definitions of Internet service and Web service should be revised. As presently written, these definitions could extend to virtually any service that involves the Internet. In addition, these definitions could also possibly extend to a sale of hardware that will be used to access the Internet. These definitions should be narrowed so that both business customers and telemarketers

will understand what services are included and ideally what is not included. And, they should be limited to the specific types of services (or perhaps even the types of offers) that the FTC has found to be the target of fraud.

In addition to revising the definitions, IBM proposes that at a minimum, the following transactions involving the sale of Internet services and Web services should still be exempt from the final Rule:

1. Activities where the telemarketer and the customer have a preexisting commercial relationship.
2. Activities where any resulting sale is evidenced in a written contract that is provided to the customer either before payment is collected or before the provision of any services and which sets forth at a minimum the same information as the disclosures required under §310.3(a)(1)(i-iii) of the TSR⁵.

Exempting these two types of Internet service/Web service transactions will further the goals the FTC has expressed in combating fraud, even to a greater degree than by removing the B2B exemption.

1. Preexisting Commercial Relationship

The cases of Internet service/Web service fraud prosecuted by the FTC share some basic characteristics. One of the most common is that the fraud is perpetrated by a business entity with whom the victim has never dealt. This is why the FTC has encouraged customers to purchase from persons known to and trusted by the customer. Once a business has established a bona fide commercial relationship with a customer, this risk is minimized. It is in the telemarketer's interest to treat its customer fairly and respect the customer's business needs so as not to lose the customer's trust.

Again, IBM notes that the FTC was reluctant to adopt a general "preexisting relationship" exemption to the TSR. However, for this limited purpose (preserving the previously recognized exemption), the reasons for this reluctance would seem to be outweighed by the business benefit.

2. Internet Service/Web Service Contracts

Even if a telemarketer has not established a preexisting commercial relationship with the customer, it is still possible to support the Commission's interests and protect the customer

⁵In the sale of Internet service or Web service, these disclosures would include (i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer; (ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer; (iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy.

without removing the B2B exemption. IBM proposes that the B2B exemption should also remain where the telemarketer evidences any resulting sale with a written contract that is provided to the customer either before payment is collected or before the provision of any services and which sets forth the same information as the disclosures required under §310.3(a)(1) of the TSR. The recommendations of the FTC which were highlighted in the Alert are also furthered, indeed enhanced, by IBM's proposal. A written contract which contains the required disclosures will enable the customer to ensure the appropriate personnel have an opportunity to review the sale and that the sale is appropriately documented. Indeed, by presenting all of this information in writing, the customer is arguably in a better position to protect itself than if these requirements were only recited over the telephone.

C. Suggested Revisions

For the reasons set forth above, to the extent the Commission believes that a modification to the B2B exemption is warranted, then in addition to the clarification we believe is necessary to the definition and scope of Web services and Internet services, IBM proposes that §310.6(g) be modified to read as set forth below:

§310.6(g) Telephone calls between a telemarketer and any business, except

- (1) calls to induce a charitable contribution;
- (2) those involving the sale of Internet services or Web services where:
 - (i) the seller or telemarketer does not have an preexisting commercial relationship with the customer, or
 - (ii) the seller does not, in any resulting sale, provide a written contract to the customer, either before payment is collected or before the provision of any services, which sets forth the same information as the disclosures required under §310.3(a)(1) of this Rule; or
- (3) those involving the retail sale of nondurable office or cleaning supplies;

provided, however, that §310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies, Internet services, or Web services (to the extent such Internet services or Web services were otherwise subject to this Rule).

III. THE TRANSFER OF CUSTOMER BILLING INFORMATION

IBM believes that the restrictions on receipt or disclosure of a customer's billing information must be clarified, with respect to both the sharing of customer information for the purposes of telemarketing, and the processing of a customer billing transaction.

Issues and Requests for Clarification

1. The disclosure/receipt of customer billing information for telemarketing

Several businesses participate in "affinity marketing". Under these types of programs, entities such as credit card companies may provide a seller or a seller's representative (e.g. mailing house) with a list of account holders, to whom the seller may send direct mail for the purposes of inducing telephone sales. This exchange (sending direct mail and receiving inbound calls to IBM would fall under the definition of telemarketing. While the calls placed by the customers in response to direct mail solicitations based on this advertising would likely be exempt from the rule (pursuant to §310.6), the initial receipt of this information by a seller could be prohibited (pursuant to §310.4(a)(5)) based on the definition of "billing information" in the Proposed Rule.

IBM recognizes the FTC's interest in this matter. As the commentary in the Proposed Rule and the discussion in the July, 2000, forum illustrates, the practice that is most concerning is "preacquired account telemarketing" (those instances when a telemarketer already possesses information necessary to bill charges to a consumer at the time the telemarketing call is initiated).⁶ This practice is potentially injurious to the consumer, according to the Commission, because customers are often are unaware that the telemarketer does not need any additional information from them in order to effect transactions.

However, the definition of "billing information" is so broad as to possibly encompass a much wider range of activities. The definition could arguably extend to sharing even just (1) the customer name, (2) the billing address and (3) the fact that the customer is an account holder. While this limited information is not sufficient to effect a charge against the customer account, it could still be considered billing information under the present definition. Therefore, we believe that the definition of billing information in the Proposed Rule should be clarified to encompass information only when that information, in and of itself, is sufficient to effect a transaction prior to telemarketing.

2. The transfer of customer billing information for billing purposes

In addition, IBM recommends that the FTC clarify the Proposed Rule with respect to the transfer of billing information to process a payment for goods or services. It would benefit both business and consumers to clarify when and to whom the customer must authorize this transfer.

Many sellers today have teamed with organizations that offer consumer or business financing or leasing services. Under this process, the seller will take an order from the customer, and at the payment stage the customer will request financing. Often, the business concludes the order by gathering all necessary information to process the order (but not the payment information), and then concludes its involvement on the call by transferring the customer (at the customer's request) to the financing agency to apply for financing. The financing agency will take the customer application and either approve or deny financing. To the extent the customer has been approved for credit in an amount that will cover the cost of the customer's previous order, there

⁶67 Federal Register at 4512.

are two possibilities. First, the finance company could provide the account information to the customer, and it would be the customer's responsibility to call the seller back and provide the billing information to the seller to complete the previously placed order. Far more efficient and "customer friendly", however, is to allow the finance agency to transfer this information directly to the seller's billing unit, so the seller can officially submit the order for payment processing.

IBM recognizes that efficiency notwithstanding, the customer must approve the transfer of billing information in such a transaction. However, it would benefit businesses and consumers alike if the Commission would provide clarification and guidance, either in the final Rule itself, or in the Commission's official comments or guidance released in support of the final Rule, on the following related questions:

1. To whom must the customer authorize the transfer of billing information?

In the situation posited above, the billing information that will eventually be submitted for payment does not even exist when the customer places the order from the seller. Is it sufficient for the customer to authorize the billing information owner (e.g. the finance company) to transfer the billing information to the seller?

2. Is it acceptable for the customer to authorize the billing information owner to disclose the billing information directly to a seller?

The transfer of information to process a transaction, even one for an order previously placed by the customer, could arguably be prohibited even if such transfer is intended and approved by the customer, because it will not be "a transaction in which the **consumer or donor has disclosed** his or her billing information and has authorized the use of such billing information..."⁷ (emphasis added) In the situation above, the consumer would not have disclosed any billing information. It would be provided by the billing information owner directly to the seller, at the customer's explicit instruction.

IV. DO NOT CALL REQUESTS AND THE HOME OFFICE

IBM respects the strong reaction of consumers who have to date submitted comments in support of the DNC provision. However, IBM believes that the Proposed Rule should be clarified to recognize the increasing number of home based businesses and the number of "telecommuters".

A consumer may place his telephone number in the Registry. With the increasing number of persons who operate home based businesses, or who work out of the home as well as an office, it is possible if not likely that several numbers that will eventually be placed in the Registry will also be lines through which those same consumers conduct business from their home.

It is also likely that many of the telephone numbers used by persons to conduct business from their home will appear at some point in the databases of one of more telemarketers. Because

⁷310.4(a)(5)

most calls made for the purpose of selling to a business are subject to the B2B exemption and therefore not subject to the DNC provisions, it is likely that a business will place telemarketing calls to one or more of these telephone numbers despite the fact that these numbers have been placed on the Registry by the consumer.

IBM believes that to the extent the calls placed to numbers on the Registry are within the B2B exemption, no violation of the Proposed Rule would have occurred. We ask that the Commission, in formulating its final rule, officially recognize the propriety of these types of phone calls. We believe that this could be accomplished in the final Rule itself, or in the Commission's official comments or guidance released in support of the final Rule. We also believe that this possibility should be included in any consumer education that will be generated to explain the final rule, to lessen potential consumer dissatisfaction with the Registry.

CONCLUSION

Again, IBM welcomes the opportunity to submit these comments to the Commission on this issue and looks forward to working with the Commission in the future. If you have any questions regarding these comments please contact Christopher J. Mustain, Senior Program Manager, Public Affairs, IBM Corporation, via e-mail at mustainc@us.ibm.com or by phone at (202) 515-5062.