

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In The Matter Of Telemarketing Rulemaking -

FTC File No. R411001

**COMMENTS BY INFOCISION MANAGEMENT CORPORATION ON
THE PROPOSED REVISION TO THE FTC'S
TELEMARKETING SALES RULE**

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I. INTRODUCTION TO INFOCISION

Headquartered in Akron, Ohio, InfoCision Management Corporation (IMC), is a leading teleservices company that specializes in nonprofit fundraising, direct to consumer sales and business-to-business applications. IMC provides both inbound and outbound call center services to Fortune 1000 companies as well as leading national nonprofit organizations.

IMC is a leader in several highly defined niche markets. This has resulted in distinct, totally separate divisions that do a better job because of their vast depth of experience in handling similar types of phone calls. We have built our success on hiring dedicated communicators for each of our five divisions: religious, nonprofit, political, volunteer recruitment and commercial. Each of these division's activities is, to a greater or lesser extent, speech protected by the First Amendment to the Constitution. In the case of our religious, political and nonprofit divisions, our calling is protected at the highest level as fully protected speech.

IMC raises more money for nonprofit organizations than any other telephone marketing company in the world. We also have an unmatched reputation for quality, integrity and customer service. InfoCision's mission is to be the highest quality teleservices provider of the 21st Century.

The philosophy of InfoCision is to provide the highest quality services, which will produce superior results for our clients and consumers. It is the essence of our mission to facilitate our clients' speech and comply with the highest ideals of business practices.

While InfoCision recognizes the importance of protecting consumers from fraud and deceptive telemarketing practices, several of the proposed revisions exceed the scope of this mission and would damage legitimate businesses such as InfoCision and harm the interests of InfoCision's employees with no perceivable consumer benefit. For this reason, InfoCision urges that the Federal Trade Commission (FTC) change the proposed revisions set forth below.

II. COMMENTS ON SIGNIFICANT PROPOSED CHANGES

IMC recognizes the FTC's mandate to protect the interests of consumers and specifically to combat fraud, abusive practices and deception using the Telemarketing Sales Rule (TSR). Telemarketing and Consumer Fraud Abuse Prevention Act, P.L. 103-297, § 3. Several of the revisions, however, exceed this authority by addressing issues where there has been no showing of need and/or by exceeding the scope of the FTC's jurisdiction by regulating the fully-protected speech of certain nonprofit organizations.

To avoid infringing on the First Amendment, to adhere to the FTC's statutory mandate and to protect real consumer interests without damaging legitimate industry, IMC urges the following four changes in the revision.

A. National "Do-Not-Call" List

1. Proposed Change

The FTC has proposed a national "do-not-call" registry to be maintained by the FTC which "would enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls." Notice of Proposed Rule Making § 310.4(b)(1)(iii), page 66.

This specific change to the Rule defines an abusive practice to include:

initiating any outbound telephone call to a person when that person has previously. . .placed his or her name and/or telephone number on a "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls, unless the seller or charitable organization has obtained the expressed verifiable authorization of such person to place calls to that person."

TSR Rev. § 16. C.F.R. Part 310.4(b)(1)(iii)(B).

Details such as the cost of the list, security measures and general operation of the list, etc., are not set in the Commentary or Proposed Rule and will be subjects appropriate for comment to the Commission. The FTC, further, has specifically solicited comments on these questions. Notice of Proposed Rule Making, Section IX, and page 122.

The FTC proposes a national do-not-call list to regulate "abusive" practices based on the TSR's instruction to prohibit "telemarketers from undertaking a 'pattern of unsolicited telephone calls which the reasonable consumer would consider coercive of such consumer's right to privacy.'" 67 Fed. Reg. 4518, citing 15 U.S.C. § 6102(a)(3)(A). The FTC also

appears to base its proposal on the fact that surveys show that some consumers consider telemarketing calls to be “intrusive,” “inconvenient,” and “annoying.” Id. at 4518.

2. Comment on Proposed National “Do-Not-Call” List

The proposed national “do-not-call” list would have a devastating effect on the nonprofit organizations served by IMC and is unconstitutional for several reasons. IMC already subscribes to all state “do-not-call” lists and the Direct Marketing Association’s Telephone Preference Service and strikes the names contained on these lists from calling campaigns when applicable.

There has been no showing that consumers find calls from nonprofit organizations abusive or any other finding, which would justify this repetitive and destructive requirement on commercial and nonprofit calling. Further, the TSR does not exempt calls to an organization’s own members, thus the list could conceivably prohibit a nonprofit from calling its own past supporters as well as educating consumers who have not supported the organization in the past. Any national list should exempt calls to an organization’s past supporters or a business’ customers.

In addition to being largely duplicative of the DMA’s existing database and state do-not-call lists, the proposal ignores the in-house do-not-call lists which protect consumers on a more targeted and less prophylactic basis and are already required by the TSR and the TCPA.

A national do-not-call list would create substantial consumer confusion due to the lack of jurisdiction by the FTC over banks and telecommunications companies, as well as political calls, commercial surveys and several other types of calls, which may make the majority of telemarketing calls. By subjecting IMC’s nonprofit clients to the list, but exempting commercial banks, the rule also potentially violates the First Amendment, which prohibits laws, which favor commercial speech over fully protected speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1980).

Finally, the cost of the list should not be assessed against nonprofit organizations or their representatives, which are already becoming more hard-pressed with regard to assets to fund program services to the public. Because of the substantial costs involved, the public and industry should share costs for implementing the list. An annual renewal fee would serve the added purpose of verifying a consumer’s continued authority over a given telephone number.

B. Call Abandonment

1. Proposed Change

The FTC's proposed revision to the TSR addresses call abandonment at some length but declines to make any change in the TSR to address "dropped" calls. Instead, the FTC proposes that "dropped" calls violate the general prohibition on abusive practices found at 16 C.F.R. § 310.4(d) to wit:

in this regard moreover, one fact is clear: telemarketers who have abandoned calls are violating § 310.4(d) of the Telemarketing Sales Rule. Section 310.4(d) requires that telemarketers promptly and clearly disclose specified information to the person receiving the call. The Commission intends for the phrase "receiving a call" to mean when the consumer answers the telephone. Once the consumer answers the telephone, the consumer has "received the call" for purposes of rule; the required disclosures must then be made once the consumer has answered the telephone, the telemarketer violates § 310.4(d) if the telemarketer disconnects the call without the required disclosures.

Notice of Proposed Rule Making, § 310.4, Page 84.

This interpretation is cast as an interpretation of the existing rule, rather than a new opinion or a new regulation. Thus, an industry practice which is more than a decade old and not prosecuted by the FTC may now be illegal, whether these rules are adopted in their present format or not.

In response to the industry claim that predictive dialers have improved efficiency immeasurably, the FTC states: "the Commission in no way condones a practice that enables industry to shift some of its operational costs to consumers, who receive and return little, if any, benefit." Notice of Proposed Rule § 310.4, Page 84.

2. Comment on Total Ban on Call Abandonment

The Commission should consider the fact that a total ban on call abandonment is not an existing interpretation and is in fact a new proposal, which would affect every teleservices business. The Commission should hear testimony regarding setting a reasonable standard to account for technological error and consumer misinterpretation of calls, which are not intentionally abandoned by the caller. The argument that this is the TSR as it is presently written, despite the actions and interpretations of the FTC in the past, also potentially creates a

constitutional problem with the TSR, which would be vulnerable to a charge of vagueness.

InfoCision requests a hearing to present facts regarding efficiency as opposed to allegorical rebuttals regarding crime, etc., and the fact that predictive dialing is critical in efficiency and productivity for telemarketers and across the board for their clients, e.g., banks, newspapers, bill collectors, etc.

Predictive dialers are a legitimate technology and not invasive or fraudulent. Treating predictive dialing that results in an abandoned call as illegal will not eliminate abandoned calls. Abandoned calls will occur whether or not predictive dialers are used. More may occur by hand dialing due to wrong numbers and other human error.

Further, the legitimacy and efficacy of the technology contrasts starkly with allegory and rhetoric used to support a total ban. There is no evidence supporting a claim that legitimate businesses misuse this technology.

The proposed ban, will also cause consumer injury by preventing businesses from taking advantage of the benefits of predictive dialing, i.e., that predictive dialing allows businesses to focus on who will receive a given message. If this technology is prohibited or effectively prohibited through an overly narrow restriction, consumers would receive less-focused messages costing them time and costing industry money.

Finally, the Rule will result in consumer confusion caused by no fault of a legitimate business. For example, if IMC places a telephone call, lets the phone ring three times, then disconnects assuming no consumer is home, the consumer answering the phone a split second after the third ring may think that a call has been abandoned when it has not nor has IMC engaged in any untoward behavior. The exact same situation could occur if IMC was prohibited from using this technology and had to dial all calls by hand.

The Commission should set a meaningful standard in consultation with industry and consumer groups on this issue.

C. Caller ID

1. Proposed Change

The Proposed Rule would also make intentional blocking of caller ID services an abusive practice. FTC's TSR Rev. § 16 C.F.R. Part 310.4(a)(6). The FTC has recognized, however, that there is data showing that it is often technically impossible for telemarketers to transmit caller ID based on the types of telephone systems they use. Notice of Proposed Rule Making § 310.4(a)(6), Page 61. The FTC recognizes that the current state of technology may limit the ability of some telemarketers to transmit this information. Notice of Proposed Rule Making § 310.4(a)(6), Page 63. The FTC has requested comments regarding these technological issues and specifically states that it is only an abuse of practice to deliberately block caller ID. Notice of Proposed Rule Making § 310.4(a)(6), Page 63.

2. Comment on FTC's Caller ID Analysis

IMC believes that all consumers have the right to know which organization is contacting them. There is no room for deception with regard to the prompt disclosure of this identity. There are two potential problems, however, which the FTC should consider in drafting its final rule on this subject.

a. *IMC Delivers Its Clients' Message*

First, the FTC should ensure that the final Rule allows IMC, and other teleservices companies, to disclose the name and inbound telephone number ("Caller ID information") of its clients. As a matter of constitutional law, the telephone calls placed by IMC are not IMC's speech but that of its nonprofit clients. The Supreme Court has held that any commercial aspect of such solicitation is "inextricably intertwined" with the fully protected speech and that, therefore, courts should "apply [the] test for fully-protected expression." Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988). From a consumer's standpoint, further, it makes sense that the final Rule should allow a service bureau to transmit the client's Caller ID information as this is the number and name of the seller of any merchandise or the spender of any donation and the more likely source of timely accurate information about the nonprofit or business.

The FTC's final provision, if applicable to nonprofit organizations at all, should allow a service bureau's client to transmit their Caller ID information during calls placed on their behalf by a service.

b. *Consumer Caller ID Technology Does Not Work With All Calls*

Second, the FTC should carefully consider the various technologies involved in the transmission of Caller ID information. If the technology used by the consumer, the caller, the local telephone company and/or the long distance telephone company do not properly work together, information may not be transmitted through no fault or intention of the caller. The final Rule should specify that “intentional blocking” does not include instances where the technology used by the consumer, the caller, or the telecommunications companies does not project Caller ID information. The final Rule should also specify that “intentional” applies to the act of blocking Caller ID, not the act of placing a telephone call.

D. Application of TSR to Calls Made on Behalf on Nonprofits

1. Proposed Change

The USA Patriot Act adds the following language to the definition of “telemarketing” as found in the Telemarketing and Consumer Fraud and Abuse Prevention Act to add the underscored language:

the term ‘telemarketing’ means a plan, program, or campaign which is conducted to induce purchases of goods, services or a charitable contribution, donation or gift of money or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call . . .

Patriot Act, § 1011(b)(3).

The Patriot Act also requires the FTC to require a prompt disclosure of the purpose of the call (the solicitation of a charitable donation), § 1011(b)(2), and to include fraudulent solicitation of donations within the definition of deceptive practices found in the Rule, §1011(b)(1).

2. Comments on Application of the TSR to Nonprofit Fundraising and Advocacy

As set forth above, any restriction applicable to nonprofit fundraising is subject to strict scrutiny as a regulation of fully protected speech. This is true whether the nonprofit chooses to solicit using an in-house employee or volunteer or a professional representative like IMC. Riley v. National Fed’n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); Secretary of 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).

By applying restrictions only to nonprofits which choose to use professional representatives, the FTC has proposed an under-inclusive rule which necessarily discriminates against smaller, newer or unpopular organizations. Riley, 487 U.S. at 799. It is extremely likely that this regulatory scheme is unconstitutional due to the large gaps in the jurisdiction of the FTC over nonprofits. In the case of the application of the national do-not-call list, for example, there is no showing that the speech involved is unprotected, e.g. fraudulent, and therefore the under-inclusiveness of the application of the list is fatal to the scheme.

The FTC should not adopt a discriminatory and facially unconstitutional regulation. Further, there has been no showing of need for the TSR to apply to nonprofit fundraising. Without a showing of consumer need, and with the First Amendment concerns involved, the FTC should limit its revisions of the TSR to solely fraudulent, that is unprotected, fundraising activity.

III. CONCLUSION

For the foregoing reasons, InfoCision urges that the Commission reconsider the above-detailed changes with the goal of protecting consumer rights and not infringing upon the speech rights of legitimate businesses and nonprofit organizations.

This potential loss is real: IMC currently employs 2500 people, in excess of 40% whose jobs may be eliminated if the rule is passed in current form. These are entry-level jobs and may not be easily replaced by other industries.

Please contact Steve Brubaker if further information is desired concerning these comments.

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