

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

Telemarketing Rulemaking Revised Fee NPRM Comment

FTC File No. R411001

**COMMENTS BY INFOCISION MANAGEMENT CORPORATION ON
THE PROPOSED DO NOT CALL LIST
TELEMARKETING SALES RULE FEES**

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I. INTRODUCTION TO INFOCISION

InfoCision Management Corporation (IMC), is a leading teleservices company that specializes in nonprofit fundraising, direct to consumer and business-to-business applications. IMC provides sales and customer support, fundraising and public education services to many national charities and Fortune 1000 corporations. As proposed, IMC estimates that the TSR will cost more than 2500 jobs based on loss of \$120 million in revenue with little benefit for consumers. The FTC should reconsider this proposal in light of this tremendous human effect.

IMC is a leader in several highly defined niche markets and operates with the highest level of corporate ethics. Its activities are 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. IMC's mission is to be the highest, quality teleservices provider of the 21st Century.

As set forth below, some portions of the FTC's fee proposal should be revised to more equitably distribute the burden of implementing a list ostensibly aimed at protecting consumers and provide businesses assurance that they will not be prosecuted if they make reasonable attempts to meet the laws' requirements. People who now use commercially available blocking services (e.g. "privacy manager" etc.) would save money under the plan proposed below for a nominal fee to add a number to the registry.

Finally, IMC believes that a potential \$11,000 penalty per call is excessive and unreasonable.

II. PROPER GOALS OF REGULATION

IMC agrees that the proper goal of this fee regulation should be to properly balance legitimate businesses' speech rights with consumers' privacy interests and to avoid unnecessary and/or redundant burdens on business. The fee provision must also be considered for its effect on speech, protected by the First Amendment to the United States Constitution.

IMC believes that two minor changes in the proposed rule would better affect these goals. First, IMC proposes that the rule be modified to allow third party marketers a safe harbor if their clients provide them access to the list and the marketer implements that list accordingly. Second, as written, the Rule could allow prosecution of a marketer even if that marketer did not call a number on the list. As this prosecution would have no relation to residential privacy, it would be unconstitutional. IMC proposes a second revision to correct this error.

IMC also urges the FTC to consider a more equitable distribution of the fees. If this Rule is intended to protect consumers' privacy rights, consumers should pay some portion of its expense. A nominal fee for a consumer to add his or her name to the registry would have the added effect of preventing it from being abused in an anti-competitive manner and improve its accuracy. Based on the current fee structure, nothing would prevent a business from adding its customer list to the registry to prevent its competitors from ever calling those consumers.

III. SPECIFIC FTC QUESTIONS

(IMC responses in bold type.)

2. In estimating the number of firms that will access the national do-not-call registry, the Commission made a number of assumptions, including the following:

...

c. Sellers that use third-party telemarketers on average employ three different telemarketers to make outbound calls to consumers over the course of a year;

IMC believes this number is generally accurate in the commercial outbound calling business.

d. Sellers using their own resources to make telemarketing calls spend, on average, five times as much on telemarketing as do firms that use third-party telemarketers;

IMC believes that a more accurate gauge is return on investment and that third party telemarketers can provide a much greater return on investment in some situations.

e. Approximately 40 percent of sellers that use third-party telemarketers and 25 percent of sellers that engage in their own telemarketing will not be required to access the national do-not-call registry, either because they are engaged in charitable solicitations, are making only intrastate calls, or are calling on behalf of an industry that is exempt from FTC jurisdiction.

IMC believes that this lack of coverage will contribute to consumer confusion and annoyance resulting in economic impact on our employees with no beneficial effect on consumers.

...

3. How many area codes of data will the average firm accessing the national do-not-call registry purchase? How many firms will require access to 250 or more area codes of data? How many will need access to 5 or fewer area codes?

Most of IMC's clients call nationwide.

4. Is it appropriate to require each separate corporate division, subsidiary, and affiliate that engages in outbound telemarketing to pay a separate fee to access the national registry? Why or why not? If a separate fee is not appropriate, what is a better way to differentiate between large and small enterprises? Would that alternative method maintain the fairness of the fee collection system while not significantly decreasing the number of entities that will pay for access to the national registry?

This is not an appropriate action as it would punish corporate entities which choose one structure over another with no relation to improving protection of consumer privacy. If the fee is based on each entity accessing the list, and not on volume or some other measure of actual use, it is inconsistent and illogical for the FTC to treat some corporate entities different than others. Given that the nondeceptive and nonmisleading telemarketing activity is protected commercial speech, the decision to charge some persons, corporate or individual, more than others with no relation to furtherance of residential privacy is unconstitutional.

Further, the lack of a workable definition for separate corporate divisions would create an administrative burden on the FTC. A more workable proposal would be to require each calling entity, third party or seller using in house callers, to purchase and implement the list. Thus, IMC could purchase access to the registry once and call on behalf of all its clients.

IV. PROPOSED REVISIONS TO FEE SECTION TO FURTHER THESE GOALS

A. REVISION TO ENSURE THAT A VIOLATION CAN ONLY OCCUR IF A SELLER OR MARKETER CALLS A NUMBER ON THE LIST

As written, the proposed rule states that it is a violation of the Rule for any seller or telemarketer to place an outbound telephone call into a given area code without the seller paying the annual fee required by §310.8(c). §310.8(a) and (b).

As written, then, a telemarketer could be prosecuted for calling specific consumers residing in a given area code even though those specific consumers had not placed their numbers on the list. Because no request had been made, this prosecution would have no relation to any consumer privacy interest and would be unconstitutional.

The rule also is written to allow prosecution of a seller who solely called businesses or some other exempt calling in a given area code but did not buy the list. The possibility of prosecution against a seller, engaged in exempt business-to-business calling, for failure to purchase the list would have no relation to residential privacy and would cause the Rule to be unconstitutional.

IMC proposes revising these two sections as follows (added language in bold type):

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code **and included in the do-not-call registry** unless such seller first has paid the annual fee, required by § 310.8(c), for access to telephone numbers within that area code that are included in the national do-not-call registry maintained by the Commission under § 310.4(b)(1)(iii)(B).

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code **and included in the do-not-call registry** unless that seller first has paid the annual fee, required by § 310.8(c), for access to the telephone numbers within that area code that are included in the national do-not-call registry.

This revision would prevent the TSR from defining as a violation a call to a welcoming consumer whose name is not on the registry.

**B. REVISION TO CREATE A SAFE HARBOR FOR MARKETERS
INSTITUTING PROCEDURES REASONABLY AIMED AT COMPLYING
WITH RULE**

As written, the Rule also places an undue responsibility on telemarketers to guarantee that any Seller who hires them purchase the list. IMC proposes revising §310.8(b) to allow a telemarketer to legally rely on a Seller providing a working access number as conclusive proof that the Seller has properly purchased access to the registry.

The FTC would not lose any ability to protect the consumer's privacy interests as all sellers would still be required to purchase the list. The sole effect of this revision would be to allow telemarketers to legally rely on representations of sellers as true without forcing telemarketers to make intrusive inquiries into every potential client's legal compliance efforts.

IMC proposes an additional revision to this section as follows (added language in bold type):

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code **and included in the do-not-call registry** unless that seller first has **provided the telemarketer a working unique account number** for access to the telephone numbers within that area code that are included in the national do-not-call registry.

This revision would not affect consumer privacy rights as the seller would still be required to purchase the list pursuant to §310.8(a).

C. REVISION TO IMPROVE INTEGRITY OF REGISTRY AND TO PREVENT UNFAIR PRACTICES AND COMPETITION

As written, the Rule does not provide for any payment to operate the list by the persons for whom it supposedly is to benefit. IMC proposes a nominal charge be assessed for persons to subscribe their name to the list to ensure the lists integrity and prevent it from being used in an anticompetitive manner. As written, the rule would easily allow any business to add its entire customer file to the registry at no cost and prevent any competitor from calling those numbers. IMC believes a \$5 fee for each number added to the list would not constitute a financial hardship but would ensure that the list could not be abused by commercial entities or persons without authority to add a given number to the list through the following section:

f) Any person whose telephone number is within a given area code may add his or her name to the registry for a fee of \$5. Upon verification that the person has legal authority to add this number to the registry, the number shall be added.

V. CONCLUSION

IMC has always structured its activities to honor the privacy requests of individuals. IMC urges the FTC to adopt revisions to the fee structure to equitably protect privacy, legitimate business and free speech.

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