

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of:)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)

COMMENTS OF INFOCISION MANAGEMENT, INC.

I. INTRODUCTION

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.

IMC is concerned about the duplicative effect of two federal do-not-call laws combined with that of nearly half the states. As these regulations are proposed, IMC estimates that the duplicative effect will cost IMC alone thousands of jobs and millions of dollars in lost revenue with little gain for consumers. As the federal regulator of the interstate telephone network, the FCC should take this opportunity to simplify the regulatory environment while still protecting residential privacy.

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 outbound 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, IMC believes that the FCC has an unprecedented opportunity to coordinate federal "do-not-call" list provisions to further consumer privacy, respect free speech and avoid duplicative and burdensome requirements on legitimate business. The national regulatory scheme should eliminate duplication and inconsistencies between the FCC, FTC and state regulatory schemes.

These comments are aimed at furthering these goals.

II. COMMENTS

The FCC should take advantage of an important opportunity to protect consumer privacy without unnecessarily damaging legitimate business. Based on these goals, the FCC should adopt new rules under the TCPA containing the following provisions.

- A. The FCC should clarify its exclusive jurisdiction over interstate telephone calls by explicitly preempting state law.

The most duplicative burden facing IMC and other legitimate nationwide businesses is compliance with the multitude of conflicting and inconsistent state “do-not-call” lists with application sometimes in direct conflict with federal law. IMC urges the FCC to take the national scope of its regulatory authority seriously and preempt state law with regard to application to interstate telephone calls.

This action would be consistent with the terms of the TCPA and prior opinion letters written by FCC counsel.

Specifically, the TCPA reads:

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. §227(e).

This section is written to allow States to regulate intrastate calls, but is unclear as to its application to interstate calls which should be explicitly preempted by the FCC. This position has been adopted by the FCC in the past, is clear from the legislative history of the TCPA and should be explicitly included in the new

regulation.

The FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the TCPA preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998 letter from Geraldine A. Matisse, Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission Regulations, enacted pursuant to the TCPA, govern interstate commercial telemarketing calls in the United States." Similarly, a January 26, 1998 letter from Ms. Matisse to Delegate Ronald A. Guns of the Maryland House of Delegates specifically addressed the delivery of recordings by telephone and states that: "In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state." The definition of "interstate communication" is clearly defined in the Telecommunications Act of 1934 as "any communication from any state to any state." 47 U.S.C. § 153(22). The Guns letter specifically addresses state law applicable to the delivery of recordings and is attached hereto for your convenience.

The legislative history to the TCPA shows that Congress intended the FCC to have exclusive jurisdiction over interstate calls. "Over forty states have enacted legislation limiting the use of ADRMPs or otherwise restricting unsolicited telemarketing. These measures have had limited affect, however because states do not have jurisdiction over interstate calls." Legislative History, S. Rep. No.102-178, p. 3. Further, Senate Report 102-177 repeats the claim under "the need for legislation" that:

As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telephone calls to supplement their restrictions on intrastate calls.

102 Senate Report 177 (page 3) (emphasis added).

Next, the comments of Senator Hollings concerning the law are set forth in the Congressional Record at 137 Cong. Rec. S. 18781 as:

Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject of §227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.

Id. at page 10 (emphasis added).

The FCC should clarify the language of the TCPA by ruling, in accordance with these two opinion letters and the legislative history, that the TCPA precludes states from regulation interstate commercial telemarketing calls.

- B. The FCC should confirm that the recorded message required by the Telemarketing Sales Rule is not an “unsolicited advertisement” and that call abandonment is a technical issue regarding telephone equipment properly regulated by the FCC through the TCPA.

The FTC’s new Telemarketing Sales Rule also contains restrictions on “call abandonment” and sets forth a “safe harbor” for businesses meeting four criteria. One of the provisions of the safe harbor requires that businesses play a recorded message to any consumer who is “abandoned” as that term is defined in the TSR. 16 CFR §310.4(b)(1)(iv).

Specifically, the TSR safe harbor states that

A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if . . . whenever a sales representative is not available to speak with the person answering the call within two(2) seconds after the person’s completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed . . .

47 CFR §310.4(b)(4).

The safe harbor also sets a 3% abandonment limit measured per “calling campaign” per day. 47 CFR §310.4(b)(4)(i).

The TCPA, however, restricts the use of calls using artificial or prerecorded voices. 47 U.S.C. §227(b)(1)(B) and allows calls to residences for commercial purposes only if the recipient has an established business relationship with the caller or the message does not contain an unsolicited advertisement. 47 CFR

§64.1200(c). The TCPA also sets technical and procedural standards for calls using automatic telephone dialing systems. 47 U.S.C. §227 (d)(1)(A). “Automatic telephone dialing system” is defined as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers.” 47 U.S.C. §227 (a)(1).

“Unsolicited advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.” 47 CFR §64.1200(f)(5).

Thus, in the circumstance where IMC is calling consumers on behalf of commercial entities and those consumers do not have a relationship with those commercial entities, IMC believes that the “safe harbor” message and the prohibition on delivery of unsolicited advertisements using recorded voices may conflict.

IMC urges the FCC to specifically rule that the “safe harbor” message required by the TSR, i.e., “a recorded message that states the name and telephone number of the seller on whose behalf the call was placed,” only, is not an “unsolicited advertisement” as defined by FCC rules.

If the FCC does not specifically define “unsolicited advertisement” to allow the TSR safe harbor message, numerous suits will be brought against legitimate businesses under 47 U.S.C. 227 (b)(3) against businesses which would have no choice but to follow the TSR, and thereby subject themselves to suit under the TCPA, or vice versa.

IMC also urges the FCC to promulgate a reasonable regulation regarding call abandonment. The 3% standard advanced by the FTC is unreasonable and not technologically feasible nor was it supported as feasible using objective facts. Congress has directed the FCC to regulate “automatic telephone dialing systems” clearly leaving any decision on abandonment to the FCC, not the FTC. This issue is a technical one dealing with telecommunications equipment.

IMC urges that the FCC follow Congress’ direction and clarify its exclusive jurisdiction over “automatic telephone dialing systems” and call abandonment.

- C. The FCC should clarify that in-house “do-not-call” lists are required to be maintained by sellers, and that third party marketers are required to implement the lists maintained by sellers on whose behalf they place calls.

As set forth in the current TCPA regulations, a person or entity making a telephone solicitation is required to maintain a “do-not-call” list of consumers

who have requested not to receive calls on behalf of that seller in the future. 47 CFR §64.1200(e)(2).

As a third party service provider, IMC does not place calls to sell its own goods or services, only those of its clients. Thus, when a “do-not-call” request is made to an IMC representative, the consumer logically is requesting to not receive further calls on behalf of that seller.

IMC believes that the national “do-not-call” lists proposed by the FTC and FCC are alternatives to the internal “do-not-call” list required in the regulations. The FCC should not require duplicative internal lists in addition to state and federal lists.

Further, the FCC should explicitly clarify that “do-not-call” requests made to third party service providers apply to the particular seller on whose behalf the call was made, and not to any other unrelated sellers who may also be clients of that service provider.

This clarification would prevent an anticompetitive incentive from applying to IMC, in relations to in-house calling or calling by newer third party agencies and prevent needless and harassing litigation brought under 47 U.S.C. §227(c)(5). This clarification would also satisfy the privacy concerns of individuals making “do-not-call” requests who would be able to make a seller-specific “do-not-call” request applicable to calls on behalf of that seller by any other third party service provider.

D. The FCC should set a national calling Curfew.

As set forth above, the FCC should preempt conflicting state law with regard to application to interstate telephone calls. One area of this application would enhance consumer privacy by allowing a uniform calling window for IMC’s business, i.e., 8 a.m. to 9 p.m. local time of the person called. 47 CFR §64.1200(e)(1).

At the time of this comment, more than 13 states have laws which contribute to consumer confusion by setting a differing curfew.

E. The FCC should structure its fees and penalties to operate the list in a fair manner that protects the integrity of the list.

As written, the Telemarketing Sales Rule, 16 CFR §310.8, does not provide for any payment to operate the list by the persons for whom it supposedly is to benefit.

IMC proposes the FCC adopt 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 TSR 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 language:

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.

List integrity and fair competition, as well as residential privacy, would be furthered by this proposal.

The FCC should also clarify penalties applicable for violators of the list. The FTC currently claims that it can assess penalties of up to \$11,000 per violation of the list. <http://www.ftc.gov/bcp/conline/pubs/buspubs/calling.htm>. IMC feels this penalty is excessive and entirely unrelated to any actual damage caused by a call which may have been made in error. The TCPA sets penalties of \$500 or actual damages. 47 U.S. §227 (f)(1).

The FCC should clarify that violators of the list are subject to an appropriate penalty, but that legitimate businesses which may have made an unintentional calling error are not subject to draconian penalties. The FCC should adopt a penalty of up to \$500 per violations with the same safe harbor provision that currently protects legitimate businesses from errors if they attempt to comply with the list's requirements, i.e. the "affirmative defense" set forth at 47 U.S.C. 227(c)(5).

F. The TCPA should not apply to calls placed on behalf of nonprofit organizations.

The TCPA and the rules implementing it define "telephone call" and "telephone solicitation" to exclude calls by or on behalf of tax-exempt nonprofit organizations. 47 U.S. §227(a)(3), 47 CFR §64.1200(c) (4) and (f)(3).

IMC believes it is important for the FCC to continue to recognize that calls placed for political purposes or on behalf of other nonprofit organizations are fully protected speech and not subject to regulation by the TCPA.

III. CONCLUSION

IMC has always structured its activities to honor the privacy requests of individuals. IMC urges the FCC to adopt revisions to its rules to protect privacy, free speech and legitimate business. Duplicative and burdensome rules should be avoided to prevent consumer confusion and unnecessary burdens on business.

Steve Brubaker
Senior Vice President of Corporate Affairs

4/30/03