

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

In the Matter of:)	
)	
Notice of Proposed Rulemaking)	
Seeking Public Comment on Proposal)	FTC Matter No: R411001
to Ban Payment Methods Favored in)	
Fraudulent Telemarketing Transactions)	
)	
)	

**Comments of InfoCision Management Corporation, Inc. on the Notice of
Proposing Rulemaking Concerning the Telemarketing Sales Rule**

I. Introduction

The Federal Trade Commission (“FTC”) has solicited comments on a Notice of Proposed Rulemaking regarding proposed amendments to the Telemarketing Sales Rule (“TSR”). *See* <http://www.ftc.gov/opa/2013/05/tsr.shtm> (hereinafter “Notice of Proposed Rulemaking”).

II. Background

For more than 30 years, InfoCision has been a leader in the call center industry providing award-winning direct marketing solutions for Fortune 500 companies and leading nonprofit organizations. InfoCision provides a full spectrum of direct marketing services, including inbound and outbound call center solutions, direct mail and fulfillment, and interactive (web), and data solutions. Employing more than 3,600 individuals in 35 call centers in Ohio, West Virginia, and Pennsylvania, the company has received numerous industry, philanthropic, and corporate awards.

InfoCision is dedicated to the concepts of individual privacy and ethical business practices and focuses on meeting the highest standards of quality and regulatory compliance. It takes great pride in its integrity and customer service. While InfoCision recognizes the importance of protecting consumers from fraudulent and deceptive practices, the proposed regulations vastly exceed genuine interests and are overly burdensome on legitimate businesses’ practices including InfoCision.

III. Comments

A. Prohibition on Sellers from Accepting Novel Payment Methods

The first proposed amendment would prohibit telemarketers and sellers in both inbound and outbound calls from accepting or requesting remotely created checks, remotely created

payment orders, money transfers, and cash reload mechanisms as payment (collectively known as “novel payment methods”). *See Notice of Proposed Rulemaking, p.7.*

The FTC has stated that criminals posing as telemarketers often rely on novel payment methods because they are largely unmonitored and provide consumers with fewer protections against fraud. It further states that novel payment methods are governed primarily by state laws, which do not provide consumers with adequate recourse when unauthorized transactions or telemarketing fraud occurs. *See Notice of Proposed Rulemaking, p. 9.*

However, novel payment methods, and in particular remotely created checks, are extremely important to legitimate companies. As business practices continue to move toward paperless forms of payment, prohibiting remotely created checks will harm legitimate businesses and charities which need to offer customers multiple means of accepting payments or charitable donations.

InfoCision will have to spend more time, money, and resources to collect donations and payments resulting ultimately in increased costs to consumers. Traditional methods are more costly and time consuming, which for telemarketers like InfoCision that fundraise for charity, will increase the cost of fundraising and ultimately reduce the amount charities receive and/or cost consumers more for items they wish to purchase.

Finally, the FTC states that while traditional checks require an authorized signature which must be verified by the bank, remotely created checks only bear a statement indicating that the account holder authorized the check or the signature is on file, which makes remotely created checks more susceptible to fraud. *See Notice of Proposed Rulemaking, p. 11.*

However, in addition to the statement on the remotely created check that indicates the account holder authorized the account, the merchant must also have the consumer’s bank routing number and account number and electronic signature, which is more difficult to fraudulently obtain. Further, anyone can forge a signature on a traditional check, while only those with the proper equipment can forge an authorized statement on a remotely created check.

Additionally, all the practices the FTC intends to prevent in this ban are already illegal in the TSR, FTC Act, and state law. The TSR already prohibits fraud. *See* 16 C.F.R. §§ 310.3(a)(3), (4) and 16 C.F.R. § 310.4(a)(7). The FTC Act imposes a broader ban, applicable to fraud in the use of “novel payment methods”. 15 U.S.C. § 45(a)(1). The proposed ban is redundant to these sections with regard to fraudulent use of “novel payment methods” and will only serve to prevent legitimate transactions.

Thus, InfoCision opposes the FTC’s proposal to prohibit novel payment methods, and in particular remotely created checks. All technological advances come with potential risks; however, novel payment methods are no riskier than traditional forms of payment and will negatively affect businesses and fundraisers who will have to devote more resources to the actual collection of donations, which will reduce the final amount that charities receive and/or cost consumers more for items they wish to purchase.

B. Supplementary Amendments

i. Proposed Amendment of Oral Verification Recording Requirements in § 310.3(a)(3)(ii)

The FTC has proposed an amendment that would specify that the recording of a consumer's express verifiable authorization must include a description of the goods or services being purchased. The regulation would be amended by adding the following new subsection (A):

(A) An accurate description, clearly and conspicuously stated, of the goods or services or charitable contribution for which payment authorization is sought...

See Notice of Proposed Rulemaking, p. 98.

However, the addition to 16 C.F.R. § 310.3(a)(3)(ii) is unnecessary and redundant. The regulation already provides that the verification recording:

[E]vidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction

Id. The subsection further requires the following information:

- a) The number of debits, charges, or payments (if more than one);
- b) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;
- c) The amount(s) of the debit(s), charge(s), or payment(s);
- d) The customer's or donor's name;
- e) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;
- f) A telephone number for customer or donor inquiry that is answered during normal business hours; and
- g) The date of the customer's or donor's oral authorization;

Id.

The current language provides adequate notice to consumers that they are giving their express verifiable authorization to be charged for the goods or services or charitable contribution. There is no need to include the additional language in the regulation. In fact, the change may needlessly confuse telemarketers. Thus, InfoCision opposes the proposed amendment because it is unnecessary and redundant.

ii. Proposed Amendment of Outbound Call Ban Exception for Express Written Agreements and Established Business Relationships in § 310.4(b)(1)(ii)(B)

The FTC has proposed an amendment that would expressly state that a seller or telemarketer bears the burden of demonstrating that the seller has an existing business relationship with, or has obtained an express written agreement from, a person whose number is listed on the Do Not Call Registry. The regulation would be amended to state that calls are permitted to a person listed on the Registry only if:

(B) ...the seller *or telemarketer*:

(i) *can demonstrate that the seller* has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

(ii) *can demonstrate that the seller* has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section;

See Notice of Proposed Rulemaking, p. 74-75.

However, the proposed amendment is unnecessary because the current language makes it clear that the burden of proof for establishing an express written agreement or existing business relationship falls on the seller or telemarketer relying on it. The FTC has previously stated in the 2008 TSR Amendments and other rulings that the burden of proof of the affirmative defense falls on the seller or telemarketer asserting it. *See Denial of Petition for Proposed Rulemaking*, 71 Fed. Reg. 58716, 58723 & n.89; *see also* 71 Fed. Reg. at 58719; *2008 TSR Amendments*, 73 Fed. Reg. 51164, 51181.

The FTC should not alter an already transparent regulation when the additions could do nothing but potentially confuse sellers, telemarketers, consumers, and regulators. Thus, InfoCision opposes the proposed changes to § 310.4(b)(1)(ii)(B).

iii. Proposed Amendment of Business Exemption in § 310.6(b)(7)

The FTC has proposed an amendment that would clarify that the business-to-business exemption found at § 310.6(b)(7) extends only to calls to induce a sale to or contribution from a business entity, and not to calls to induce sales to or contributions from individuals employed by the business. To emphasize that the exemption is limited to business-to-business solicitations, the FTC would add to the regulation:

(7) Telephone calls between a telemarketer and any business *to induce the purchase of goods or services or a charitable contribution by the business*, except calls to induce the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

See Notice of Proposed Rulemaking, p. 79.

The FTC stated that:

It has never been construed by the Commission to exempt calls to a business to solicit its individual employees to buy products or services for their own use, or to make a personal charitable contribution. Indeed, the Commission has permitted business telephone numbers to be listed in the National Do Not Call Registry, because, among other reasons, telemarketers who seek to circumvent the Registry have solicited employees at their places of business to buy goods or services such as dietary products, auto warranties, and credit assistance.

See Notice of Proposed Rulemaking, p. 78-79.

InfoCision opposes this change because it is inconsistent with the objectives of the TSR. One of the specific goals of the law is to provide consumers with added privacy protections and defenses, particularly in the context of private personal and home settings. The TSR has always been less restrictive in the business setting because of the distinction between the intrusiveness of a call received during normal business hours at a place of work versus a call received at a private home, perhaps during dinner with the family.

In *Nat'l Fed'n of the Blind v. FTC*, plaintiff nonprofit organizations sued the FTC alleging that the FTC's amendments to the TSR exceeded the FTC's statutory authority and violated their freedom of speech and equal protection rights. Summary judgment was granted to the FTC, but the court made it clear that, "[t]he Telemarketing Sales Rule has two basic purposes: to prevent fraud and to protect privacy in the home." 303 F. Supp. 2d 707, 720 (D. Md. 2004); *see also* 67 Fed. Reg. 4492, 4497. The court also stated:

For purposes of a regulation that directly and substantially limits protected speech, courts have repeatedly held that the prevention of fraud in charitable solicitation is a substantial interest that the government is entitled to protect, and that protection of privacy in the home from unwanted speech is also a strong, subordinating interest that justifies government regulation.

Id. In an appeal that affirmed the previous ruling, the court further emphasized that:

the TSR embodies a proper compromise between the important speech interests of charities and the equally important need to protect the public from excessive intrusions into the home.

Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 351 (4th Cir. 2005).

Furthermore, there is no protectable privacy interest in business activities. In *Rowan v. United States Post Office Dep't*, the court upheld the right of a homeowner to prohibit unsolicited mailings in his mailbox. *See* 397 U.S. 728 (1970). There was no similar ruling in the case for businesses to prohibit unsolicited mailings. *Id.*

In *Mainstream Mktg. Servs. v. FTC*, the court upheld the national do-not-call registry as a valid commercial speech regulation because it directly advanced the government's important interest in protecting personal privacy, particularly within the home. *See* 358 F.3d 1228 (10th Cir. 2004). The court was less concerned with privacy interests in business activities and merely stated:

The challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call.

Id. at 1233.

The above cases focus on the FTC's need to protect the public from excessive privacy intrusions into the home. The FTC should not impose excessive restrictions intended to protect privacy during calls made to businesses because preventing those calls is not the intent or purpose of the TSR.

Legitimate telemarketing calls made to individuals at work are less likely to be intrusive and bothersome. Further, the calls may interest the called parties and relate to their business practices, although the calls may not be directed specifically to induce the purchase of goods or services or a charitable contribution by the business. Thus, the proposed change to prohibit calls to induce sales to or contributions from individuals employed by the business is inconsistent with the objectives of the TSR and should not be prohibited.

IV. Conclusion

InfoCision opposes the proposed bar on sellers and telemarketers from accepting novel payment methods because they are no riskier than traditional forms of payment and will negatively affect telemarketers and professional fundraisers who will have to devote more resources to the actual collection of donations, which will reduce the final amount the charities receive and/or cost consumers more for items they wish to purchase. In addition, the practices the FTC intends to prohibit are already made illegal by the TSR, the FTC Act, and state law.

Additionally, InfoCision opposes the proposed amendment of the oral verification recording requirements because the current language provides adequate notice to consumers that

they are giving their express verifiable authorization to be charged for the goods or services or charitable contribution.

Further, InfoCision opposes the proposed amendment of the outbound call ban exception for express written agreements and established business relationships because the current language is clear that the burden of proof for establishing an express written agreement or existing business relationship falls on the seller or telemarketer relying on it.

Finally, InfoCision opposes the proposed amendment to prohibit calls to induce sales to or contributions from individuals employed by the business because it is inconsistent with the objectives of the TSR. Case law and the FTC's orders show the TSR was intended to prevent privacy intrusions caused by calls to homes. Calls to businesses do not cause a privacy intrusion to the home and are unnecessary for consumer privacy protections.

/s/ Steve Brubaker

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