

**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20024**

Telemarketing Sales Rule)	16 C.F.R. Part 310
Regulatory Review)	Project No. R411001
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**Comments of InfoCision Regarding the Telemarketing Sales Rule
Regulatory Review, 16 C.F.R. Part 310, Project No. R411001**

I. Introduction

The Federal Trade Commission (“FTC”) has solicited comment on the Telemarketing Sales Rule (“TSR”) as part of the FTC’s systematic review of all current Commission regulations and guides.¹ InfoCision provides comment on Issue No. 5 which poses the questions:

Does the Rule overlap or conflict with other federal, state, or local laws or regulations? If so, how do they overlap or conflict? What evidence supports any such asserted overlap or conflict? If overlaps or conflicts exist, how do telemarketers address them? Should the Rule be modified to address these asserted overlaps or conflicts? If so, why, and how? If not, why not?

79 Fed. Reg. 46732, 46736 (Aug. 11, 2014).

II. Background

InfoCision Management Corporation (“InfoCision”) is the nation’s leading provider of direct marketing solutions for Fortune 100 companies and nonprofit organizations. With 4,000 employees and locations throughout Ohio, Pennsylvania and West Virginia, InfoCision merges comprehensive capabilities with a customized, personal approach to its clients.

For over 30 years, InfoCision has been a leader in the call center industry. It 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.

InfoCision prides itself on providing services meeting the highest standards of ethics, quality, and legal compliance. It submits these comments in an effort to help legitimate companies comply with the Telemarketing Sales Rule and other applicable law.

¹ See http://www.ftc.gov/system/files/documents/federal_register_notices/2014/08/140731tsrrulereviewfrn.pdf.

III. Comments

The following describes how the TSR and the Telephone Consumer Protection Act (“TCPA”) conflict regarding sales calls on behalf of a nonprofit. Further, the record-keeping requirements of 16 C.F.R. § 310.5 and the call abandonment “safe harbor” record retention provision are inconsistent.

We urge the FTC to modify the TSR to match the TCPA on these issues as directed by Congress. See FCC-FTC Memorandum of Understanding: Telemarketing Enforcement (Dec. 2003).

A. The TCPA and the TSR conflict on the applicability of the Do-Not-Call Registry to sales calls on behalf of a nonprofit.

1. The TCPA exempts telephone solicitation calls made on behalf of a nonprofit from the Do-Not-Call Registry.

The TCPA and its accompanying rules prohibit the initiation of any “telephone solicitation” to residential numbers on the national Do-Not-Call Registry. 47 C.F.R. § 64.1200(c)(2).

“Telephone solicitation” is defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

- (i) To any person with that person’s prior express invitation or permission;
- (ii) To any person with whom the caller has an established business relationship; or
- (iii) By or on behalf of a tax-exempt nonprofit organization.

Id. at (f) (emphasis added). Thus, sales calls made by or on behalf of a tax-exempt nonprofit are permitted to residential numbers on the national Do-Not-Call Registry because they are not “telephone solicitations.” An example of these calls would be offers of symphony tickets or ballet tickets to a performance of the Nutcracker.

2. The TSR does not exempt outbound telephone calls made on behalf of a nonprofit from the Do-Not-Call Registry.

The TSR states that “[i]t is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct: ...

- (iii) Initiating any outbound telephone call to a person when: ...

(B) that person’s telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services

16 C.F.R. § 310.4(b)(1)(iii)(B).

“Outbound telephone call” is defined as “a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.” *Id.* at § 310.2(v). The FTC, which enforces the TSR, does not have jurisdiction over outbound telephone calls made by a nonprofit.

While the TSR exempts solicitations to induce charitable contributions via outbound telephone calls, there is no similar exemption for sales calls made on behalf of a nonprofit. *See id.* at § 310.6(a). This directly conflicts with the TCPA, which provides an exemption for telephone solicitation calls made on behalf of a nonprofit. Thus, nonprofit symphonies and ballets are left to wonder which rule applies if they want InfoCision to make calls on their behalf to sell tickets.

The FTC should modify the TSR to align with the TCPA as directed by Congress by modifying 16 C.F.R. § 310.4(b)(1)(iii)(B) to read that it is a violation:

(iii) Initiating any outbound telephone call to a person when: ...

(B) that person’s telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services. However, the restriction shall not apply to outbound telephone calls to induce the purchase of goods or services by or on behalf of a nonprofit organization.

16 C.F.R. § 310.4(b)(1)(iii)(B) (emphasis added).

This change is important because most people, including the judges who evaluated the constitutionality of the TSR’s Do-Not-Call Registry provisions, did not think the Registry applied to calls on behalf of nonprofits, i.e. “[t]he national do-not-call registry’s telemarketing restrictions apply only to commercial speech.” *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1236 (10th Cir. 2004).

B. The TSR’s record-keeping requirement and the Do-Not-Call and call abandonment “safe harbor” record retention provision are inconsistent.

1. The TSR’s record-keeping requirement, 16 C.F.R. § 310.5, mandates that sellers or telemarketers retain certain records for two years.

The TSR requires that “*any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced*, the following records relating to its telemarketing activities ...” 16 C.F.R. § 310.5(a). Specifically, these records include:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of \$ 25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

Id. (emphasis added).

2. The TSR’s Do-Not-Call and call abandonment “safe harbor” provisions, 16 C.F.R. §§ 310.4(b)(3) and (4), require the retention of certain documents.

The TSR provides that “a seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller’s or telemarketer’s routine business practice ...”

(i) It has established and implemented *written procedures* to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, *has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact*, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the “do-not-call” registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and *maintains records documenting this process*; ...

16 C.F.R. § 310.4(b)(3) (emphasis added). Similarly, § 310.4(b)(4) provides that:

A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

(i) The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues.

(ii) The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) 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; and

(iv) The seller or telemarketer, in accordance with § 310.5(b)-(d), *retains records establishing compliance with § 310.4(b)(4)(i)-(iii)*.

Id. (emphasis added).

3. In a Staff Advisory Opinion, the FTC concluded that the TSR's record-keeping requirement and the Do-Not-Call and call abandonment "safe harbor" provisions do not have the same record-keeping requirements.

On April 15, 2008, the FTC sent a letter to Kristin Marshall, then attorney at Copilevitz & Canter, LLC, in response to her request for clarification on whether the duration of time for which the records mentioned in §§ 310.4(b)(3) and (4) must be maintained ... [is] the same [24 months] as that found in § 310.5.²

The FTC stated:

Section 310.5 sets forth affirmative recordkeeping requirements An entity subject to the TSR must create and maintain the specified records and retain them for 24 months after creation.

By contrast, the elements of the §§ 310.4(b)(3) and (4) safe harbors highlighted above are not recordkeeping requirements, but rather provide an entity subject to the TSR with a means of exculpation in situations where the FTC has reason to believe that the entity is or has been in violation of the Do Not Call provisions of § 310.4(b)(1)(iii) or the Call Abandonment provisions of § 310.4(b)(1)(iv).

...

Entities subject to the TSR may choose to retain the documentation that comprises elements of the two safe harbors for as long as they might be subject to

² See attached Letter from Allen W. Hile, Jr. Assistant Director, Federal Trade Commission, to Kristen Marshall, Attorney, Copilevitz & Canter, LLC (April 15, 2008).

enforcement action for non-compliance with the Do Not Call or Call Abandonment requirements. The statute of limitations for FTC enforcement actions for civil penalties for violation of the TSR and other trade regulation rules is five years. 28 U.S.C. § 2462.

Id. Thus, the FTC found that the 24-month limitation on the record-keeping requirements in § 310.5 does not pertain to the safe harbor record keeping in §§ 310.4(b)(3) and (4).

Because the conclusion of the Staff Advisory Opinion is not binding on the FTC, the FTC should formally clarify whether the TSR's record-keeping requirement and the Do-Not-Call and call abandonment "safe harbor" provisions have different record-keeping requirements.

IV. Conclusion

The TCPA and the TSR conflict on the applicability of the Do-Not-Call Registry. The TCPA exempts telephone solicitation calls made on behalf of a nonprofit from the Do-Not-Call Registry. The TSR does not exempt outbound telephone calls made on behalf of a nonprofit from the Do-Not-Call Registry. The TSR should be modified to be consistent with the current TCPA regulations.

Further, the lack of clarity on whether the record-keeping requirements of 16 C.F.R. § 310.5 and the Do-Not-Call and call abandonment "safe harbor" provisions of 16 C.F.R. §§ 310.4(b)(3) and (4) are different should be confirmed by the FTC especially in light of the Staff Advisory Opinion.

Dated: November 13, 2014

/s/Steve Brubaker

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