UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMENTS OF INFOCISION MANAGEMENT CORPORATION

WRITTEN COMMENT ON NOTICE OF PROPOSED RULE MAKING "16 CFR PART 310 TELEMARKETING SALES RULE USER FEES"

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InfoCision Management Corporation (IMC) has already filed comment to the revisions to the Telemarketing Sales Rule and will not repeat those comments in this document. These comments solely concern the proposal for user fees for the do-not-call registry which would add a new § 310.9 to the Telemarketing Sales Rule.

I. Introduction to InfoCision

InfoCision is a leading teleservices company headquartered in Akron, Ohio, that specializes in nonprofit fundraising, direct to consumer sales and business-to-business applications. IMC provides fundraising and public education services to Fortune 500 companies as well as other religious, political and nonprofit groups.

All of InfoCision's activities on behalf of these organizations are 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. InfoCision's mission is to be the highest, quality teleservices provider of the 21st Century.

II. The Proposed Fee is Unfair, Exposes the List to Potential Abuse and is Unconstitutional

The Commission's regulation of InfoCision and its clients must be considered in light of the numerous organizations which are exempt or excluded from the application of the do-not-call registry. This fee proposal must be narrowly tailored to further a compelling government purpose in the least restrictive means necessary and cannot be underinclusive. 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). Commercial speech is also protected by the First Amendment. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

A. The Fee Proposal Violates the U.S. Constitution

InfoCision's telephone calls on behalf of its client, nonprofits, churches, political organizations and businesses, are protected speech under the First Amendment. In the case of calls on behalf of nonprofits, the calls are fully-protected speech.

The list proposal is a content-based restriction on speech because when the telephone of a consumer who has placed his or her name on the FTC's list rings, the rule does not consider that the resident's privacy has been violated until the content of the call is disclosed. The list must therefore meet the strict scrutiny test, i.e., it must be narrowly

tailored to further a compelling government goal by the least restrictive means available. This fee cannot meet that test.

Perhaps the most glaring constitutional problem with the proposal is that it assesses fees against some telephone callers only while exempting others based on the content of the call, the identity of the caller and, at times, the decision by the caller to hire a professional representative like InfoCision.

For example, a nonprofit which hired InfoCision would not be allowed to place calls to persons on the list, but the same nonprofit could deliver the same message to any member of the list with impunity. Such a distinction impermissibly discriminates against smaller, newer or unpopular charities which may be forced by economic conditions to hire professional help. Riley, 487 U.S. 781 at 799.

A call from InfoCision required to pay the fee, is covered yet, a call from a long distance company is not. This gap in coverage and therefore the list as a whole has no relation to the espoused purpose of residential privacy, let alone being narrowly tailored and the least restrictive means.

Any court reviewing the list, further, would find that the substantial gaps in coverage make the list impermissibly underinclusive. The list fails application of the scrutiny applicable to regulations of commercial speech, as well. The Supreme Court has examined the effect of exemptions in application of the Central Hudson test, and ruled that the fourth part of the test requires an examination of the scope of the statute. If for no other reason, the granting of exemptions also raises the question of validity. In Greater New Orleans Broad. Ass'n, the Court considered a challenge to a ban on casino advertising. Greater New Orleans Broad. Ass'n, 119 S. Ct.1923 (1999). While applying the fourth prong of Central Hudson to the challenged section, the Court held, "The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." Id. at 1933. The Court held that the exemptions to the ban gave the law "little chance" to actually advance the espoused purpose of the law. Id. at 1934.

This list would exempt at least: Political calls of all kind, calls from religious organizations, calls from employees of charities, calls from banking institutions, calls from credit unions, calls from savings and loans, calls from FCC-regulated common carriers, calls from insurance companies, all calls that are intrastate only; and survey calling. It is likely that any court would find the list fee to be "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." Id.

The list would apply to some of the fully protected non-profit speech conducted by InfoCision but would exempt numerous commercial speakers. This is also forbidden by the First Amendment. Metromedia, Inc. v. City of San Diego, 453 U.S 490, 513 (1981).

InfoCision would obviously have to pass this fee on to its nonprofit clients, further burdening them *vis a vis* charities which conduct solicitations in house, or exempt types of commercial businesses.

B. Charging a Fee to Businesses Only is Unfair

The fee proposal charges businesses, only, to access the list but does not charge consumers to add their names to the list even though the purported benefit of the law is totally the consumers'. If anything, the list constitutes a burden imposed on the privilege of exercising protected speech on certain nonprofit organizations.

InfoCision disputes the veracity of the Notice with regard to the argument that firms forced to implement the list are receiving a benefit but that consumers are not. (Supplementary Information, § I, ¶¶5-7). First, there is no legitimate benefit to a prior restraint on speech. Second, any purported benefit is enjoyed not by firms implementing the list but by the persons on the list.

Requiring that individuals pay for some portion of the purported benefit of this list, further, would ensure the accuracy of the list and reduce the likelihood that it would be used in an anti-competitive fashion. If no fee is charged, there is nothing to prevent a given business from adding its entire customer database to the FTC list to stop the business' competition from even soliciting those consumers.

If the FTC does not charge a fee to the consumer for the benefit of signing on to the list, there is a substantial opportunity for abuse both by competing businesses and other third parties who may sign numbers on to the list without proper authority. For example, the Missouri Attorney General recently solicited residents to sign their fathers onto the list as a "gift." "Remember Dads and grads by putting their phone numbers on the No Call list; milestone of 1 million nears." http://www.ago.state.mo.us/060602.htm.

Such a third party action is clearly a violation of speech rights with no indication from the consumer themselves that suppressing speech is desired.

The FCC has recognized the danger of "do-not-solicit" lists in the past with regard to potential anti-competitive users. Letter, Geraldine Matise, Chief of the Network Services Division of the Federal Communications Commission, to James T. Bruce, August 19, 1998.

The list, further, should be available for a nominal fee because its intended goal is to alleviate consumers' need to purchase caller ID, "Privacy Detector" and other services designed to protect privacy. A noted consumer group has estimated these services cost consumers $1.4B per year[1]. A $10 nominal fee to the consumer would save the

[1] Comments of the Electronic Privacy Information Center, et al., In the Matter of Telemarketing Rulemaking-Comment, p.9.

consumer substantially more in unneeded services and protect the accuracy and security of the list.

The FTC has specifically asked if the NPR's estimate of 3,000 "telemarketers" or "sellers" is accurate. This estimate is substantially low and differs from the FTC's initial estimate of 40,000 businesses subject to the law. (Notice of Proposed Rulemaking, §VII Paperwork Reduction Act, p.111) There has been no statement from the FTC as to why this number has been reduced ten-fold. Using the larger number of businesses would substantially lower the fees for both businesses and consumers.

In addition the FTC has asked whether it is appropriate to require the telemarketer that gains access to the national registry on behalf of other sellers or telemarketers to pay the required user fee for those other entities. This is not appropriate as requiring an entity to purchase the same list more than once is unrelated to any legitimate interest in residential privacy and appears solely designed to genrate revenue on the privilege of protected speech.

C. Equal Protection

The fee proposal violates the Equal Protection Clause of the Fourteenth Amendment by discriminating among and between nonprofit organizations based on the fact that some organizations are economically forced to use professional representatives, and between plaintiff and some commercial callers based on the exemptions to the list's coverage.

The discrimination between nonprofits, then, is based on how they choose to exercise the fundamental right of free speech, a right guaranteed by the First and Fourteenth Amendments to the United States Constitution. Differential treatment of persons by government with regard to how they choose to exercise the fundamental right to free speech has been examined repeatedly by the Supreme Court using equal protection analysis.

In Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972), the Supreme Court examined the constitutionality of a city ordinance prohibiting picketing near schools. The ordinance applied universally with the exception of allowing peaceful labor picketing. Id. at 93. The Supreme Court held that:

> [b]ecause Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests . . .

Mosley, 408 U.S. at 94-95.

The Court went on to hold that the Chicago ordinance regulated picketing based on its subject matter. Id. at 95.

The Court held this discrimination impermissible:

> [n]ecessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of the forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . There is an 'equality of status in the field of ideas, ' and government must afford all points of view an equal opportunity to be heard. . . .

Id. at 96.

The Supreme Court also considered differential burdens applied to some speakers in Riley, 87 U.S. at 799. In that case, the Court evaluated a North Carolina statute which applied certain disclosures to solicitations made on behalf of nonprofit organizations by professional solicitors. The disclosures were not applicable to solicitations made by charities which did not use professional solicitors. The Court held: "this provision necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." Id. The plaintiff in the case at bar has had to rely on professional assistance to conduct its telemarketing campaigns.

This list makes the same distinction: it applies to calls made by charities through professionals, but exempts calls placed by charities using volunteers or employees.

In City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) the Supreme Court examined the constitutional significance of exemptions to laws regulating speech and noted that:

> . . . an exemption from an otherwise permissible regulation of speech may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785-786, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the Government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth." Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530, 538.

The FTC list imposes a similar exemption-riddled scheme and discriminates based on whether charities engage professionals to assist in their solicitations for support. This is discrimination against some nonprofits, which bears no relation to the stated government goal of residential privacy.

Second, the list discriminates against these charitable organizations in relation to some commercial telephone solicitors. Commercial telephone solicitors for several types

of exempt entities are not required to purchase the list and strike the names on it from their lists of prior customers or supporters.

The fee for this list is similar in that it exempts many, if not most, telephone calls. If privacy was the purpose of the law, why are long distance companies, etc., allowed to solicit the sale of their services without paying a fee for the privilege of speech? Why can a charity call its supporters when a paid employee places the call but not through a third-party professional? Government may not choose which types of protected speech to regulate. Both charitable solicitations and commercial speech are protected speech and the Act is therefore subject to strict scrutiny.

Such discrimination is impermissible unless the Act can survive strict scrutiny. Memorial Hospital v. Maricopa County, 415 U.S. 250, n.21 (1974).

The fee structure for this list is therefore unconstitutional because it violates plaintiff's rights to Equal Protection.

III. Conclusion

For the foregoing reasons, InfoCision urges that the Commission reconsider the fee proposal with the goal of protecting consumer rights, ensuring the accuracy of the list and not infringing upon the speech rights of legitimate businesses and nonprofit organizations.