

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of: |) | |
| |) | |
| American Teleservices Association, Inc. |) | CG Docket No. 02-278 |
| |) | |
| Petition for Declaratory Ruling |) | |
| With Respect to Certain Provisions |) | |
| of the New Jersey Consumer Fraud |) | DA 04-3185 |
| Act and the New Jersey |) | |
| Administrative Code |) | |

COMMENTS IN SUPPORT OF PETITION FOR DECLARATORY RULING

The Consumer Bankers Association (“CBA”) supports, and urges the Commission to grant, the Petition for Declaratory Ruling (“Petition”) of American Teleservices Association, Inc. (“ATA”).¹

The CBA’s member institutions serve customers in every state, including New Jersey, and place interstate telemarketing calls to those customers in order to acquaint them with offers and opportunities that might be of value to them. The CBA’s member institutions, therefore, are directly affected by the conflict between this Commission’s rules and certain provisions of the New Jersey Consumer Fraud Act and New Jersey Administrative Code.

¹ The Consumer Bankers Association was founded in 1919 and is a not-for-profit trade association that provides leadership and representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. The CBA develops policy that affects financial institution retail products and services. CBA members include most of the nation’s largest bank holding companies and hold two-thirds of the industry’s total assets. CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.

As ATA correctly points out, the provisions of the New Jersey Consumer Fraud Act that relate to telemarketing, and the rules implementing those provisions, are substantially more restrictive than the telemarketing rules adopted by this Commission under the authority of the Telephone Consumer Protection Act (“TCPA”).² Specifically, New Jersey does not recognize the Commission’s established business relationship (“EBR”) exception to the prohibition on telephone solicitations to residential subscribers who have placed their telephone numbers on the do-not-call registry, and recognizes only transaction-based exceptions for calls to narrower categories of “existing” or “established” customers. New Jersey’s transaction-based exceptions, unlike the Commission’s EBR category, do not extend to a company’s affiliates. New Jersey also has no counterpart to the Commission’s exemption for telephone solicitations to parties with whom the caller has a personal relationship, and imposes disclosure requirements that are substantially more burdensome than those set out in this Commission’s rules.³

These contradictions between New Jersey law and this Commission’s rules create precisely the sort of “multiple, conflicting regulations” over interstate calling that the TCPA was intended to preclude, and create a “substantial compliance burden” for entities, such as the CBA’s members, that make interstate telemarketing calls to customers in New Jersey.⁴ Specifically, CBA member institutions that place telemarketing calls to New Jersey must, in order to be assured that state enforcement action will not be taken against them, maintain separate lists of New Jersey customers

² 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

³ Petition for Declaratory Ruling of American Teleservices Association, Inc., CG Docket No. 02-278 (filed Aug. 24, 2004) (“Petition”).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 83 (2003) (“TCPA Order”).

and customers in states that conform to this Commission’s rules, and must “scrub” those two lists separately against the national do-not-call registry. The non-New Jersey list may include all customers that have engaged in a transaction (whether complete or ongoing) with the CBA member in the previous 18 months or have inquired about the CBA members’ services within the preceding three months. The non-New Jersey list also may include persons that have an EBR, as defined in the Commission’s rules, with an affiliate of the CBA member if a consumer would reasonably expect that affiliate to be included.⁵ The New Jersey list, however, may include only those customers that fall within one or more of the following categories:

1. [A]n “existing customer,” defined in the New Jersey Rules to include any “[a] person who is obligated to make payments to a seller on merchandise purchased” or “[a] person who has entered into a written contract with a seller where there is an obligation to perform, either by the customer, seller, or both.”
2. [A]n “existing customer” to whom a seller’s sole obligation is the extension of credit, provided such calls are made within 18 months of the date of the customer’s last credit transaction or until the satisfaction of the credit obligation, whichever is later; or
3. [A]n “established customer,” provided the call is “limited to the provision of continuing services and does not relate to expanded services, upgrades, products or other services unless directly related to the particular service or services previously provided.”⁶

Observance of New Jersey’s more restrictive transaction-based exceptions will prevent CBA’s members from making interstate calls that are entirely lawful under the Commission’s rules. Notably, CBA members will not be permitted to call New Jersey

⁵ *TCPA Order* ¶ 117.

⁶ Petition at 6; N.J. Admin. Code tit. 13, § 45D-4.2(a) (2004). New Jersey defines an “established customer” as “a customer for whom a seller has previously provided continuing services where the relationship has not been affirmatively or constructively terminated.” *Id.* § 45D-1.3.

subscribers with whom those members (or their affiliates) have made completed transactions in the 18 months preceding the call, and will not be permitted to offer established customers the opportunity to purchase “expanded services, upgrades, products or other services” not directly related to those previously provided to the customer by the caller. CBA members’ inability to place interstate calls of these kinds is contrary to the Commission’s determination that customers expect, and often benefit from, calls from businesses with which they have an EBR as defined in the Commission’s rules.⁷

Compliance with the New Jersey rules also requires CBA’s member institutions to treat product and service inquiries from New Jersey residents differently from similar inquiries that originate in other states. When an inquiry is received from a state other than New Jersey, the CBA member can respond in the most efficient way, which typically will be by means of a return telephone call. If the inquiry is from New Jersey, however, the CBA member must fail to answer the inquiry or must choose a slower, less direct medium. This inability to provide efficient customer service is contrary to this Commission’s policy and harmful to consumers.⁸

Finally, CBA members that wish to comply fully with the New Jersey requirements must maintain a separate disclosure procedure for interstate calls placed to New Jersey subscribers. Because the disclosure requirements of the New Jersey rules are more burdensome than those of this Commission, CBA members, like other entities that

⁷ *TCPA Order* ¶ 112.

⁸ The CBA also concurs with ATA that New Jersey creates an intolerable burden on telemarketing when it provides that a company-specific do-not-call request applies both to the seller and to the telemarketing service making the call, where the two entities are separate. Petition at 10. The Commission should expressly preempt this rule.

call New Jersey subscribers, must “create separate calling scripts and reprogram automated screen prompt systems, . . . thereby incurring greater compliance expenses and risks.”⁹

As the United States Supreme Court has found, a state law must be preempted where it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰ The Commission’s *TCPA Order* correctly points out that in the case of the TCPA, “it [is] the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.”¹¹ Faced with the stark inconsistencies between New Jersey law and Congress’s intent to create a uniform system of interstate telemarketing regulation, ATA has appropriately acted upon this Commission’s invitation to “seek a declaratory ruling” as to any state law that is “inconsistent with [the TCPA] or our rules”¹² CBA fully supports ATA’s Petition and urges that it be granted.

Respectfully submitted,

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⁹ Petition at 10.

¹⁰ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹¹ *TCPA Order* ¶ 83.

¹² *Id.* ¶ 84.

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 17th day of November, 2004, had copies of the foregoing delivered to the following, via First Class U.S. mail and electronic mail, as indicated:

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