

Before the
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

In the Matter of)
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Rules and Regulations Implementing the) CH Docket No. 02-278; DA 04-3835
Telephone Consumer Protection Act of 1991)
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The Heritage Company, located at 2402 Wildwood Avenue, Suite 500, Sherwood, Arkansas 72120, hereby submits comments to the Federal Communications Commission (FCC) regarding the Petition for Declaratory Ruling filed by the Consumer Bankers Association (CBA). We support CBA's petition of the Commission to preempt certain sections of the Indiana Revised Statutes and Indiana Administrative Code as applied to interstate telephone calls for the reasons described below:

1. In the 2003 TCPA Order, the Commission held that any state regulation of interstate telemarketing calls that differed from the Commission's rules under section 227 almost certainly would conflict with and frustrate the federal scheme and would be preempted. The law in question is strikingly different from the Commission's rules in a number of ways, as described below, and is thus deserving of preemption:
 - a. The Indiana statute makes no safe harbor exemption to its do not call list for business and entities with whom a residential telephone subscriber has had an established business relationship (EBR) in the last eighteen months, an exemption clearly established by the 2003 TCPA Order.
 - b. The Indiana exceptions to its do not call list fail to include relationships based on a residential telephone subscriber's past inquiry to a business or an application during the three months preceding an interstate telemarketing call. The Commission's rules allow such an exemption.
 - c. The exceptions to the Indiana do not call law do not specifically permit an EBR to be extended from a business to its affiliated entities that a residential telephone subscriber would reasonably expect to be in that category. Again, the Commission's rules allow such an exemption.

2. The Attorney General's page on the State of Indiana website makes plain its intention for the state's do not call law to be different (more restrictive) than the federal rules as the following quotations illustrate:

"Does the Telephone Privacy law apply to both in-state (intrastate) and out-of-state (interstate) calls?"

"Yes."

"The National list will NOT provide Hoosiers with the same amount of protection that you currently receive under Indiana's law. You can register for both lists, but the Attorney General's Office encourages Indiana residents who want to reduce telemarketing calls to their homes to register on Indiana's list first and foremost [emphasis not added]."

"Are there more exemptions allowed on the National Do Not Call list?"

"Yes, the National list allows more telemarketers to call you than the Indiana Telephone Privacy List. Therefore, Hoosiers receive more protection from being registered on the Indiana list."

3. Petitioner CBA does not address this point specifically, though it does support their position: The State of Indiana's statute in question does not protect the rights of nonprofit organizations.

a. IC 24-4.7-4-1 holds that "A telephone solicitor may not make or cause to be made a telephone sales call to a telephone number if that telephone number appears in the most current quarterly listing published by the division."

i. The statute allows an exemption to the do not call rules for charitable organizations only under the following conditions under IC 24-4.7-1-1(3):

"(3) A telephone call made on behalf of a charitable organization that is exempt from federal income taxation under Section 501 of the Internal Revenue Code, but only if all of the following apply:

"(A) The telephone call is made by a volunteer or an employee of the charitable organization. [emphasis added]

"(B) The telephone solicitor who makes the telephone call immediately discloses all of the following information upon making contact with the consumer:

"(i) The solicitor's true first and last name.

"(ii) The name, address, and telephone number of the charitable organization."

- ii. The Supreme Court has held repeatedly over the last 25 years that charitable organizations enjoy protected free speech rights in their fundraising campaigns. These cases, beginning with the *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) decision, clearly indicate that charities have a right to free speech.
 - iii. The free speech rights of charities are not limited to simply employees and volunteers of the organization, as the Indiana statute dictates. To the contrary, there are numerous Supreme Court decisions in which the Court has held that charities' free speech rights include their third party fundraisers (see *Secretary of State of Maryland v. J.H. Munson Company, Inc.*, 467 U.S. 947 (1984); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988), and *Illinois ex rel. Madigan, Attorney General of Illinois v. Telemarketing Associates, Inc. et al.* (2003)).
 - iv. North Dakota's do not call law closely resembles Indiana's in terms of allowing an exemption only for the employees and volunteers of charities and failing to extend that exemption to third party fundraisers as well. The North Dakota chapters of the Fraternal Order of Police and the veterans of Foreign Wars challenged the state's law on these grounds. The district court in North Dakota held that, "Since the law is not narrowly tailored to protect privacy or to protect against consumer fraud, it is an unconstitutional regulation of speech." (*Fraternal Order of Police, North Dakota State Lodge and Veterans of Foreign Wars – Department of North Dakota v. Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota*, Civil File A3-03-74, October 17, 2003). The North Dakota attorney general is appealing this decision, and oral arguments in that case were held in the 10th Circuit in December 2004. In short, a federal court has recognized in a case involving a very similar law to the statute in question in Indiana, that charities' free speech rights extend to their third party fundraisers as well. This omission is another clear reason why the Commission should preempt this statute.
4. The statute specifically exempts some commercial calls, regarding real estate and newspaper subscriptions, which demonstrates that the state has chosen a select few types of commercial entities from whose calls Indiana consumers fail to "receive more protection from being on the Indiana list" (see section 2 above). By making these commercial exemptions to the state's do not call law while restricting the protected free speech of charities (via their third party fundraisers) the state is clearly placing commercial speech at a higher level of protected speech than charities' speech. Since the 2003 TCPA Order clearly exempted charities and their third party fundraisers from the National Do Not Call Registry (NDNCR), the Indiana statute is egregiously in conflict with the Commission's rules on this point.

5. Based upon the Supremacy Clause of Article VI of the US Constitution, federal laws shall supersede state laws. Numerous precedents extend that authority of the federal government beyond statutes to include regulators' rules that implement federal legislation. The Commission is clearly within its authority to preempt Indiana's statute. The 2003 TCPA Order clearly stated that the Commission would almost certainly preempt state laws that frustrated the federal system created by the Commission's rules. For these reasons described above, Indiana's statute clearly conflicts with the Commission's rules, and thus we encourage the Commission to exercise its right to preempt the Indiana statute.

We appreciate the opportunity to publicly submit comments on these important rules affecting the teleservices industry.

For the company,

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