

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

In the Matter of:)
)
CONSUMER BANKERS ASSOCIATION) CG Docket No. 02-278
)
Petition for Expedited Declaratory Ruling with)
Respect to Certain Provisions of the Wisconsin)
Statutes and Wisconsin Administrative Code)

**REPLY COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT
OF PETITION FOR DECLARATORY RULING**

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TABLE OF CONTENTS

I. THIS COMMISSION HAS EXPRESS, PLENARY JURISDICTION TO REGULATE THE INTERSTATE TELEMARKETING CALLS AT ISSUE IN THIS PROCEEDING 2

II. WISCONSIN’S AUTHORITY TO ENFORCE ITS CONSUMER PROTECTION LAWS DOES NOT EXTEND TO ENFORCEMENT OF THE CHALLENGED PROVISIONS OF WISCONSIN’S TELEMARKETING LAWS 5

III. THE CHALLENGED PROVISIONS OF WISCONSIN LAW ARE INCONSISTENT WITH CONGRESSIONAL INTENT AND THE COMMISSION’S POLICIES 6

CONCLUSION 12

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The Consumer Bankers Association (“CBA”) hereby replies to the comments filed in response to its Petition for Declaratory Ruling, which asks the Commission to find that certain sections of the Wisconsin Statutes and Wisconsin Administrative Code are preempted as applied to interstate telemarketing calls (“Petition”).¹

As a review of the comments shows, no party denies that Wisconsin’s telemarketing rules, which prohibit interstate calls to subscribers on the do-not-call list with whom the caller has an established business relationship (“EBR”) of the kind recognized in federal law, are more restrictive than the federal regulatory scheme created by the Telephone Consumer Protection Act (“TCPA”) and this Commission’s regulations.² Accordingly, the record fully supports preemption of Wisconsin’s

¹ Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code, CG Docket No. 02-278, (Nov. 19, 2004). All comments filed in this proceeding on February 2, 2005, unless otherwise noted, will hereinafter be short cited.

² Comments filed concerning the CBA’s Petition include: Attorney General of the State of Wisconsin Comments (Feb. 1, 2005)(“Wisconsin Comments”); Verizon Comments; American Financial Services Association Comments (“AFSA Comments”); American

telemarketing rules on the ground set out in the Commission’s *TCPA Order* – *i.e.*, that those rules subject telemarketers to “multiple, conflicting regulations.”³

In ruling on the CBA’s Petition, however, the Commission is not confined to the “conflict preemption” analysis suggested in the *TCPA Order*. In fact, the Commission can and should take this opportunity to find that regulation of interstate telemarketing is within this Commission’s exclusive authority, and that the states lack jurisdiction to regulate that activity regardless of the consistency, or inconsistency, of specific state regulations with federal law.⁴ In the alternative, the Commission should preempt the Wisconsin rules, to the extent they do not recognize the EBR provisions of federal law for interstate calling, on grounds of conflict preemption.

I. THIS COMMISSION HAS EXPRESS, PLENARY JURISDICTION TO REGULATE THE INTERSTATE TELEMARKETING CALLS AT ISSUE IN THIS PROCEEDING

Wisconsin argues that the law imposes a presumption against preemption of its restrictions on interstate telemarketing, and that this presumption is reinforced by specific jurisdictional provisions of the TCPA. In fact, Wisconsin’s reading of the applicable law is exactly backwards.

Where telecommunications regulation is concerned, Congress has created a presumption -- in fact, a requirement -- that mandates *federal* regulation of interstate

Teleservices Association Comments (“ATA Comments”); MCI Comments; MBNA Comments; Charter Communications Comments; and Comments of The Mortgage Bankers Association.

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14064 (2003) (“*TCPA Order*”).

⁴ *See, e.g.*, In the Matter of American Teleservices Association, Inc., Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code, Comments of Direct Marketing Association and Reply Comments of MBNA America Bank, N.A.

services like the telemarketing calls placed by CBA members to Wisconsin residents. Section 2(a) of the Communications Act empowers the Commission to regulate “all interstate and foreign communication by wire or radio . . .,”⁵ and section 2(b) of the Act reserves to the states only the power to regulate “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier”⁶ In determining whether a communication is interstate for purposes of its “interstate and foreign” jurisdiction, the Commission takes into account the ultimate end-points of the transmission and asserts its jurisdiction over any call that originates in one state and terminates in another.⁷ Accordingly, all of the telemarketing calls that CBA member institutions place to Wisconsin residents, from points outside Wisconsin, are within this Commission’s interstate jurisdiction.

In the specific case of interstate telemarketing, Congress did not restrict but in fact confirmed this Commission’s interstate jurisdiction. In an amendment to section 2(b) of the Act, Congress gave the Commission authority over both interstate and intrastate telemarketing calls; and in section 227(e) of the Act, Congress provided that “nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits” certain telemarketing practices.⁸

⁵ Communications Act § 2(a), 47 U.S.C. § 152(a).

⁶ *Id.* Sec. 2(b), 47 U.S.C. § 152(b). The phrase “of any carrier” in section 2(b) suggests that the states can regulate only intrastate communications of common carriers, rather than non-carrier entities such as the CBA members.

⁷ *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *General Telephone v. FCC*, 413 F.2d 390, (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969).

⁸ 47 U.S.C. § 227(e)(emphasis added).

Wisconsin’s analysis of the Act ignores the general grant of interstate authority to the FCC in section 2(a) of the Act. Wisconsin also misreads section 227(e), which expressly confines the states’ authority to *intrastate* telemarketing, as somehow endorsing Wisconsin’s decision to exceed that authority by regulating interstate telemarketing.⁹

Wisconsin’s expansive assertion of state jurisdiction underscores the need for an unambiguous declaration of this Commission’s ability to regulate interstate telemarketing. Such a declaration would require no additional inquiry into the consistency, or lack thereof, between the Wisconsin rules and federal law. As the FCC pointed out in another context, “[w]here Congress has given this Commission exclusive authority over interstate and foreign communications, we need not demonstrate that ‘state regulation of interstate communications would impose some burden upon interstate commerce or would frustrate some particular policy goal of the Congress or of this Commission in order to preclude a state commission from regulating the rates for an interstate communications service.’”¹⁰ Similarly, where a state purports to define the terms and circumstances under which interstate telemarketing calls may be made, the Commission can declare its exclusive jurisdiction over those calls with no further inquiry

⁹ Wisconsin Comments at 4. The decision cited by Wisconsin in apparent support of its interpretation, *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995) involved only intrastate calls on behalf of a candidate for governor and does not stand for the proposition that section 227(e) grants the states jurisdiction to regulate interstate telemarketing. (“The savings clause [of section 227(e)] . . . does not state that all less restrictive [state] requirements are preempted; it merely states that more restrictive *intrastate* requirements are not preempted. The TCPA, therefore, does not expressly preempt the Minnesota statute.” *Id.* at 1547-48 (emphasis added).)

¹⁰ *Operator Services Providers of America Petition for Expedited Declaratory Ruling*, 6 FCC Rcd 4475, 4477 n.19 (1991) (“*Operator Services*”), citing *Chesapeake and Potomac Telephone Company of Maryland*, 2 FCC Rcd 3528 (1997); *State Corp. Comm’n of Kansas v. FCC*, 787 F.2d 1421 (10th Cir. 1986).

into the impact of those regulations on interstate commerce, or on the goals of Congress or the Commission.

II. WISCONSIN'S AUTHORITY TO ENFORCE ITS CONSUMER PROTECTION LAWS DOES NOT EXTEND TO ENFORCEMENT OF THE CHALLENGED PROVISIONS OF WISCONSIN'S TELEMARKETING LAWS

Wisconsin also argues that its telemarketing rules are protected from preemption by their status as laws “concerning consumer protection, including laws prohibiting false advertising and unfair business practices, [which] are included within the states’ police power, and thus are subject to [a] heightened presumption against preemption.”¹¹

In fact, the Communications Act expressly takes the police power of the states into account, and provides that the Act shall not “abridge or alter the remedies now existing at common law or by statute”¹² The Commission has made clear, however, that this provision of the Act only “preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud and misrepresentation -- remedies generally applicable to all corporations acting in the state”¹³ Section 414 “does not alter the grant of plenary authority to the Commission over interstate communications,”¹⁴ and does not extend to regulations, such as Wisconsin’s rules aimed specifically at telemarketers, that “touch upon matters the Congress intended in the Communications Act to leave to the Commission”¹⁵

¹¹ Wisconsin Comments at 2.

¹² 47 U.S.C. § 414.

¹³ *Operator Services*, 6 FCC Rcd at 4477.

¹⁴ *Id.*

¹⁵ *Id.* at 4477 n. 22. *See also Kellerman v. MCI*, 493 N.E.2d 1045 (Ill. 1986), upholding a common-law fraud action against an interstate common carrier.

Accordingly, Wisconsin's characterization of its telemarketing rules as consumer protection laws does not insulate those rules from the interstate jurisdiction of the FCC.

III. THE CHALLENGED PROVISIONS OF WISCONSIN LAW ARE INCONSISTENT WITH CONGRESSIONAL INTENT AND THE COMMISSION'S POLICIES

Even if Congress had not declared its intention to occupy the field of interstate telemarketing regulation, Wisconsin's refusal to acknowledge the EBR provisions of the Commission's rules, when applied to interstate telemarketing, would provide a clear basis for implied or conflict preemption of the Wisconsin rules.

As the CBA pointed out in its Petition, and as the Commission made clear in the *TCPA Order*, the EBR provisions of the Commission's rules are intended to strike a careful balance between the needs of consumers and the legitimate interests of business. Specifically, telemarketers are permitted to call persons with whom they have an EBR, but are required to honor consumers' requests to be placed on company-specific do-not-call lists. In this way, as the Commission pointed out in the *TCPA Order*, businesses can market different products and services to their existing customers while giving customers ultimate control of the relationship.¹⁶

By refusing to recognize the EBR provisions for interstate calls placed to Wisconsin residents, Wisconsin obviates the balance that the Commission, carrying out the intent of Congress, has attempted to achieve. As the CBA's Petition points out, Wisconsin's rules prohibit companies from responding to customer inquiries in the most efficient way, which often will be a telephone call, unless the customer expressly

¹⁶ *TCPA Order*, 18 FCC Rcd at 14067.

requested such a call.¹⁷ Similarly, the Wisconsin rules forbid calls to a customer on the basis of a recent, completed transaction;¹⁸ permit calls only to “current clients” that have “a current agreement to receive . . . property, goods or services of the type promoted by the telephone call;”¹⁹ and do not permit an EBR to extend to affiliates of the entity with whom the customer has the original relationship.²⁰ As more fully explained in the CBA Petition, these provisions of Wisconsin’s rules directly contradict the Commission’s regulations and subject the CBA’s member institutions to multiple, conflicting regulations.

The commenters generally agree with the CBA that enforcement of Wisconsin’s rules would frustrate the achievement of the Commission’s goals. Notably, as Verizon points out, Wisconsin’s refusal to permit interstate telemarketing calls to consumers with whom the caller has an EBR will “essentially prohibit companies . . . from marketing bundled services . . . in a manner that would be more cost-effective for consumers.”²¹ Similarly, Charter Communications notes that Wisconsin’s rules are directly contrary to the Commission’s policy of permitting companies, including telecommunications and cable companies, to “market products and services in packages.”²² And the American Financial Services Association’s comments correctly point out that in the world of financial services, “different lines of business often must be carried on through separate

¹⁷ CBA Petition at 4.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.* at 3.

²¹ Verizon Comments at 2. *See also* AFSA Comments at 4, pointed out that diversified financial institutions offer their customers “an array of financial products and services.”

²² Charter Comments at 3, citing TCPA Order ¶ 116.

legal entities, housed within the larger family of affiliated companies,” and the Wisconsin rules “restrict the ability to offer products and services of affiliates of the legal entity having the original relationship with the customer.”²³

In response to CBA’s conflict preemption argument, Wisconsin makes two claims: first, that Congress did not intend to preempt conflicting state regulation of interstate telemarketing; and second, that even if Congress did have such a purpose, the differences between the federal requirements and Wisconsin’s rules are insubstantial and do not undermine the federal scheme and its goals.

In support of the first claim, Wisconsin insists that the TCPA was intended only to protect the privacy interests of consumers and does not mandate uniformity in the regulation of interstate telemarketing. This argument, however, ignores the evidence of section 227(e) of the Act. If Congress was not trying to achieve uniformity of regulation of interstate telemarketing, it could easily have provided, in section 227(e), that more restrictive *interstate* requirements under state law would not be preempted. Instead, the Congress expressly confined the states’ ability to impose more restrictive regulation to *intrastate* calls. This clear congressional decision, along with the legislative history cited by the Commission in the TCPA Order, show that uniformity of interstate telemarketing regulation was as much a congressional goal as consumer privacy.²⁴

²³ AFSA Comments at 4.

²⁴ Wisconsin also insists that the CBA has misread the *TCPA Order*, and that the Commission’s contention that Congress intended to create a uniform regulatory scheme for interstate telemarketing referred only to consistency between the FCC’s rules and those of the Federal Trade Commission. Wisconsin Comments at 9. This is a strange reading of the *TCPA Order*, given that the Commission’s discussion of regulatory uniformity is followed almost immediately by the observation that “any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict

Finally, Wisconsin does not deny that its telemarketing laws are more restrictive than the TCPA and the Commission's rules, but insists that the inconsistencies are minimal and do not "upset[] the balance established by the TCPA."²⁵

Wisconsin argues, for example, that the CBA's Petition overstates Wisconsin's prohibition on any call to a recipient that may have made an inquiry concerning the caller's product or service but did not make a "request for the telephone solicitation."²⁶ As the CBA pointed out, this provision is substantially more restrictive than the federal rules, which permit a call in response to an inquiry even if the customer did not specifically ask for a return telephone call.²⁷ Wisconsin argues, however, that its rules require only that the consumer have "made an inquiry that a person could reasonably expect would generate a telephone response"²⁸ Wisconsin cites no authority for this "reasonable expectation" interpretation of its statute; and even if a Wisconsin agency or court accepted that interpretation, telemarketers responding to consumer inquiries still would risk a finding that the caller's belief in the customer's expectations was unfounded. Whichever interpretation of the statute is accepted, therefore, its provisions are substantially more restrictive than the applicable federal law and should not be applied to interstate calls.

Wisconsin also minimizes the impact of its prohibition on calls to customers on the basis of completed transactions. As the CBA's Petition points out, the federal rules

with and frustrate the federal scheme and almost certainly would be preempted." *TCPA Order*, 18 FCC Rcd at 14064.

²⁵ Wisconsin Comments at 10.

²⁶ CBA Petition at 3.

²⁷ *Id.*

²⁸ Wisconsin Comments at 13.

extend the EBR relationship to 18 months after the most recent transaction with a customer. Wisconsin argues that the difference between the federal law and Wisconsin law is more apparent than real, because, for example, “[o]nly customers who have absolutely no remaining relationship with [a] bank, *i.e.*, no remaining accounts, would be entitled to the benefit of No-Call.”²⁹ Wisconsin’s interpretation of its statute, however, only confirms the CBA’s concern. Under federal law, even a customer that no longer has an account with a CBA member can receive a call for up to 18 months from the last account transaction. The difference between Wisconsin law and federal law on this point is substantial.

Wisconsin also disputes the CBA’s claim that Wisconsin prevents telemarketers from offering “new or additional” products and services to their current clients.³⁰ In Wisconsin’s view, the CBA has misstated Wisconsin’s rules because, in fact, the “Wisconsin program allows telemarketing calls to current clients for different or additional services that are reasonably related to the current agreement.”³¹

Here, as with its discussion of inquiry-based calling, Wisconsin is placing a “reasonableness” gloss on its rules that cannot be found in the rules themselves. The Wisconsin regulations define a “current client” as “a person who has a current agreement to receive, from the caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call.”³² The Wisconsin rules say nothing about “products or services that are reasonably related to the current agreement.”

²⁹ *Id.*

³⁰ CBA Comments at 5-6.

³¹ Wisconsin Comments at 14.

³² CBA Petition at 5.

Even if the rules did include such language, the need to prove that two products or services are “reasonably related” presents the same enforcement and liability risk as having to prove that the two products or services are of the same “type.” The risk is unacceptable, and does not arise under the FCC’s rules.

Finally, Wisconsin argues that under its statute, telemarketers may call customers that are current clients of the telemarketers’ affiliates if the customers have consented to such calls. Under this interpretation of the statute, even if correct, telemarketers are substantially worse off under Wisconsin law than under federal law, which does not require a customer’s consent to a call from an affiliate that the customer would reasonably believe to be included within the EBR exception.

Accordingly, Wisconsin’s characterizations of its statute and rules notwithstanding, the differences between Wisconsin law and federal law are substantial and impose the very costs and risks, from inconsistent and conflicting requirements, that Congress intended to avoid when it enacted the TCPA.³³

³³ Wisconsin’s efforts to minimize the conflict between its rules and federal law are especially ironic in light of the Wisconsin Governor’s claim, in a recent press release, that Wisconsin’s law “is the strongest in the nation” and an assertion of FCC jurisdiction would result in “harassment” of Wisconsin consumers. Press Release, Office of Wisconsin Governor Jim Doyle, *Governor Doyle Urges Federal Communications Commission to Leave No Call List Alone* (Jan. 28, 2005) available at <http://www.wisgov.state.wi.us/mediaroom.asp>.

CONCLUSION

The CBA's Petition plainly demonstrates that Wisconsin's telemarketing regulations are preempted by federal law. The comments in this proceeding provide no basis for a contrary finding, and the CBA's petition should be granted without further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 17th day of February 2005, had copies of the foregoing **REPLY COMMENTS** delivered to the following via electronic mail or U.S. First Class mail, as indicated:

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