

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

CONSUMER BANKERS ASSOCIATION)

Petition for Declaratory Ruling with Respect to)
Certain Provisions of the Wisconsin Statutes and)
Wisconsin Administrative Code)

CC Docket No. 02-278

Petition for Expedited Declaratory Ruling with)
Respect to Certain Provisions of the Indiana)
Revised Statutes and Indiana Administrative Code)

**COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT OF ITS
PETITIONS FOR DECLARATORY RULING**

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July 29, 2005

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Pursuant to the Commission’s Public Notice published in the Federal Register on June 29, 2005, the Consumer Bankers Association (“CBA”) hereby submits these additional comments in support of its pending petitions for declaratory ruling concerning the interstate application of certain provisions of the telemarketing laws of Indiana and Wisconsin.¹

SUMMARY AND INTRODUCTION

On November 19, 2004, the CBA filed two petitions that requested this Commission’s aid in preempting certain provisions of the telemarketing statutes and regulations of Indiana and Wisconsin.² As those petitions pointed out, the laws of both states conflict directly with federal

¹ FCC Public Notice, *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission’s Jurisdiction Over Interstate Telemarketing*, DA 05-1346, 70 Fed. Reg. 37317 (June 29, 2005).

² Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004) (“Indiana Petition”); Consumer Bankers Association Petition for

law by prohibiting interstate telemarketing calls to subscribers on those states' do not call lists, even where those subscribers have an established business relationship ("EBR") with those telemarketers of the kind recognized by federal law. The CBA asked the Commission to confirm that those provisions of state law are preempted, pursuant to the Commission's express invitation to interested parties to "seek a declaratory ruling" as to any state law that is "inconsistent with [the TCPA] or our rules."³

In the course of the proceedings prompted by the preemption petitions of the CBA and other parties, the CBA has endorsed the view, advanced most recently in the "Joint Petition for Declaratory Ruling that the FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing," that this Commission's plenary jurisdiction over interstate telecommunications makes state-by-state "conflict preemption" petitions unnecessary.⁴ The CBA also has demonstrated, however, that even under the more limited "conflict" approach, preemption of the Indiana and Wisconsin rules is required.

In these comments, the CBA provides additional information concerning the conflict between federal law and the Indiana and Wisconsin rules. Specifically, as explained further herein, by prohibiting interstate calls to subscribers with whom the callers have an EBR, Indiana and Wisconsin: (1) negate the Commission's express regulatory goal of permitting businesses to make interstate marketing calls to their existing customers; and (2) negate the Congressional and regulatory policy of creating a uniform system of interstate telemarketing regulation. Because

Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code, CG Docket No. 02-278 (Nov. 19, 2004) ("Wisconsin Petition").

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064-65 ¶ 84.

⁴ Alliance Contract Services et al. Joint Petition for Declaratory Ruling that the FCC as Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, CG Docket No. 02-278 (Apr. 29, 2005) ("Joint Petition"). All filings in this proceeding will hereinafter be short cited.

these inconsistencies between state and federal law justify preemption on conflict grounds, the relief requested by the CBA can and should be granted regardless of the outcome of the Joint Petition, and without waiting until the issues presented by the Joint Petition are resolved.

I. THE INDIANA AND WISCONSIN REQUIREMENTS ARE INCONSISTENT WITH THE POLICIES OF CONGRESS AND THIS COMMISSION

State statutes and regulations, like those of Indiana and Wisconsin, that do not recognize the EBR provisions of the Commission's regulations prevent the realization of two important policy decisions of the Congress and the Commission, *i.e.*: (1) the determination that interstate telemarketing calls to existing customers are in the public interest; and (2) the determination that businesses should not be subject to conflicting obligations when they make interstate telemarketing calls.

A. Application Of The Indiana And Wisconsin Rules To Interstate Calls Will Negate The Commission's EBR Policy

The Commission's decision to permit telemarketing calls to persons with whom the caller has an EBR was not casually made. As the Commission pointed out during its initial telemarketing rulemaking, the EBR category is expressly recognized in the TCPA,⁵ which provides that the term "telephone solicitation" does not include a call or message to anyone with whom the caller has an EBR; and the legislative history of the TCPA supports the Commission's decision, in the *1992 TCPA Order*, to permit EBR calls to be placed with the aid of artificial or prerecorded messages. In its more recent telemarketing rulemaking proceedings, the Commission took extensive comments on the EBR exemption and confirmed, based upon a full record, that "an established business relationship exemption is necessary to allow companies to

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8770 (1992) ("*1992 TCPA Order*"); *see also*, 47 C.F.R. § 64.1200(c)(3).

communicate with their existing customers.”⁶ More specifically, the Commission found that the EBR exemption is in the public interest because it: (1) permits companies to make new offers to existing customers, such as mortgage refinancing, insurance updates, and subscription renewals; (2) facilitates communications that callers might have a fiduciary obligation to make; and (3) is consistent with consumers’ expectations.⁷

In order to realize these benefits while balancing the legitimate concerns of both consumers and businesses, the Commission carefully considered each element of the EBR definition and the interplay between the EBR exemption and other elements of the telemarketing rules.

So, for example, the Commission found that telemarketing calls might reasonably be made, on the basis of an EBR, within 18 months of a subscriber’s purchase or transaction involving the calling entity. Other suggested time limits were considered and rejected, as was the proposal that no time limits be imposed. Based upon an extensive record, the Commission concluded that the 18-month rule would strike “an appropriate balance between industry practices and consumers’ privacy interests.”⁸

Similarly, the Commission found support in the TCPA’s legislative history for basing EBRs upon consumers’ past inquiries to the calling party. The Commission considered a number of commenters’ proposals, including EBR definitions that would permit only responsive calls that complete a purchase or transaction.⁹ The Commission found that the public interest is served by permitting EBR calls to be made in response to any inquiry that a consumer reasonably

⁶ *2003 TCPA Order*, 18 FCC Rcd at 14078-79 ¶ 112.

⁷ *Id.*

⁸ *Id.* at 14079 ¶ 113.

⁹ *Id.* at 14080-81 ¶ 114.

would expect to result in such a call; that such calls should not be limited to those intended to complete a purchase or transaction; and that an inquiry-based EBR should be good for three months from the date of the consumers' inquiry or application.¹⁰

The Commission also was asked, in its 2002-2003 TCPA proceedings, to restrict EBR-based calls only to those involving the same product or service that was the subject of the earlier purchase, transaction, inquiry or application. Based upon an extensive record, the Commission found that such a restriction would foreclose a number of communications that are helpful to consumers, and therefore held that an EBR-based communication may involve any product or service the calling entity offers.¹¹

Finally, the Commission was asked in the 2002-2003 rulemaking to withdraw its finding, made in the *1992 TCPA Order*, that a customer's EBR with one company may extend to that company's affiliates and subsidiaries. The Commission considered and rejected this request, finding that an EBR extends to affiliates or subsidiaries if "the consumer would reasonably expect them to be included given the nature and type of goods or services offered and the identity of the affiliate."¹²

In reaching these and other conclusions concerning the EBR exemption, the Commission expressly noted that other provisions of the telemarketing rules would prevent excessive intrusions upon the privacy of consumers by companies with which they had transacted business or to which they had made inquires. Notably, the Commission emphasized that any consumer

¹⁰ *Id.*

¹¹ *Id.* at 14081-82 ¶ 116.

¹² *Id.* at 14082-14083 ¶ 117.

desiring not be called by a company with which the consumer has an EBR can avoid further calls by asking to be placed on the caller's company-specific do-not-call list.¹³

Indiana and Wisconsin ignore the FCC's public interest findings and decisions concerning the EBR exemption. Neither state recognizes an EBR based simply upon a customer's inquiry or application concerning a product or service: Indiana permits calls to persons on the state DNC list to be made only in connection with "a specific grant of authority made by a residential telephone subscriber at a verifiable date and time . . .";¹⁴ Wisconsin permits calls to be made only in response to a recipient's request for a telephone solicitation.¹⁵ Neither state recognizes, as this Commission does, that consumers often expect calls in response to inquiries that do not include a specific request that a call be made.

Similarly, neither Indiana nor Wisconsin permits an EBR based upon completed purchases or transactions.¹⁶ This restriction, which was expressly considered and rejected by the FCC, ignores the Commission's finding that calls made within 18 months of a completed transaction are within the reasonable range of consumer expectations and permit companies to make contacts that are in the consumers' interests.

Also, Wisconsin does not permit EBR-based calls for the purpose of promoting products or services that are different from those the called party has a current agreement to receive from the caller.¹⁷ This restriction is directly contrary to the Commission's finding that products or services often are sold as packages, and that consumers expect to receive offers of other goods or

¹³ *Id.* at 14081-82 ¶ 116.

¹⁴ Indiana Petition at 3-4; Ind. Admin Code § 11 IAC 1-1-4 (2004).

¹⁵ Wisconsin Petition at 3.

¹⁶ Indiana Petition at 4; Wisconsin Petition at 3.

¹⁷ Wisconsin Petition at 5-6.

services from companies with whom they have done business or to which they have directed a recent inquiry.

Finally, neither state permits EBRs to be based upon transactions with, or inquiries made to, affiliates of the calling party.¹⁸ This limitation directly conflicts with the Commission's finding that affiliates are within the range of an EBR when consumers reasonably would expect that result.

Neither the Communications Act, the TCPA, nor the grant of the pending petitions can or will prevent the states from reaching and enforcing policy conclusions different from those of the Congress and this Commission, so long as those state policies are enforced as to intrastate calls. But the Commission cannot have intended, when it took the trouble to craft and refine the EBR exemption, that the states simply could nullify those decisions by refusing to permit interstate calls to residents with whom the caller has a federally-recognized EBR. If the Commission fails to assert its jurisdiction in this matter, other states (at least 12 of which already prohibit EBR-based calls or define the EBR relationship more restrictively than the Commission does) will be encouraged to pass similar laws and enforce those restrictions against interstate telemarketers. The potential absurdity of the resulting situation is demonstrated by the fact that if all states followed the same course, *not a single telemarketing call in the United States would be governed by this Commission's EBR exemption and the careful policy decisions that that exemption represents.*

Only by granting the CBA's pending petitions can the Commission send the needed signal to the states and prevent the piecemeal repudiation of federal telemarketing law.

¹⁸ Indiana Petition at 4; Wisconsin Petition at 6.

B. Indiana And Wisconsin Are Imposing Conflicting, Inconsistent And Burdensome Obligations

As the Commission made clear in its *2003 TCPA Order*, Congress's intent is to create a consistent, uniform system of interstate telemarketing regulations.¹⁹ Accordingly, the states must avoid burdening telemarketers with conflicting obligations, which the Commission found "almost certainly" are unenforceable when applied to interstate telemarketing calls.²⁰

The CBA petitions amply demonstrate that the Indiana and Wisconsin requirements create "inconsistent, conflicting obligations" for telemarketers that make interstate calls to residents of those states. It is simply impossible, given those states' present jurisdictional claims, for a telemarketer to make calls to all of the Indiana and Wisconsin residents with whom it has a federally-recognized EBR without running afoul of Indiana and Wisconsin law.

Having established the fact of these conflicting obligations, the CBA is conclusively entitled to the relief it seeks. Contrary to the claims of some commenters, the CBA is not required to prove that compliance with more restrictive state requirements would be difficult or impossible to achieve. It is sufficient that those requirements are inconsistent with Congress's intention to create a single, uniform set of rules for interstate telemarketing.²¹

¹⁹ *2003 TCPA Order*, 18 FCC Rcd at 14064 ¶ 83.

²⁰ *Id.* at 14064-65 ¶ 84.

²¹ The Commission never has accepted the notion that its jurisdiction over interstate telemarketing is ousted if telemarketers can find a way to comply with more restrictive state rules. Notably, in comments filed in the 2002-2003 rulemaking proceedings, the National Association of Attorneys General ("NAAG") argued that states should continue to enforce more restrictive statutes against interstate callers because some telemarketers had managed to comply with those restrictions in the past. NAAG Comments at 12 (Dec. 9, 2002). The Commission's *2003 TCPA Order* noted these arguments but did not endorse them -- finding, instead, that more restrictive state requirements are invalid, not simply because they are burdensome, but because they violate the congressional goal of interstate regulatory uniformity. *2003 TCPA Order*, 18 FCC Rcd at 14065 ¶ 85. For a variant of the NAAG argument, *see* letter from Thomas M. Fisher, Special Counsel, Office of Indiana Attorney General, to Marlene Dortch, Secretary, Federal Communications Commission, at 1 (Apr. 1, 2005). ("[C]onforming to the Indiana

Nonetheless, in the interest of a complete record, the CBA notes that the burden of compliance with Indiana and Wisconsin law is in fact substantial. The compliance burden imposed by these laws includes the cost of systems and training, the risk of legal liability, and the losses that would result if CBA members elected to avoid the compliance costs and risks simply by making no calls to Indiana and Wisconsin residents with which those members have a federally-recognized EBR.

In order to make interstate telemarketing calls to Indiana and Wisconsin residents with whom they have a federally-recognized EBR, CBA members must ensure that they call only those Indiana and Wisconsin residents that are not on those states' do-not-call lists, or that have expressly requested such a call, or with whom the CBA member is engaged in a current transaction. CBA members also must avoid calls to Indiana and Wisconsin residents that are on those states' do-not-call lists and that have requested a call from, or are engaged in a current transaction with, affiliates of those members; and in Wisconsin, those members must avoid calling consumers about services that are not the subject of current transactions.

These tasks might be accomplished in a number of ways, all of which are costly and complex and all of which involve substantial risks of error and resulting liability under Indiana and Wisconsin law.

One approach a member institution might take is to create a list of telephone numbers that meet the Indiana and Wisconsin criteria, and permit employees and telemarketers acting on the institution's behalf to call only numbers that appear on that "scrubbed" list. This process might include the following steps:

statute works a negligible burden on the telemarketers' business practices, and that minimal burden on their practices [does] not justify [their] invasion of personal privacy.")

For calls to Indiana residents:

1. From the residential telephone numbers that the institution is permitted to call under federal law, identify the telephone numbers of residential subscribers that are on the Indiana do-not-call list. Delete from the calling list all telephone numbers that are on the Indiana do-not-call list except the following:
 - a. telephone numbers of subscribers on the Indiana do-not-call list that have given the caller a “specific grant of authority” to call as required by Indiana law; and
 - b. telephone numbers of subscribers on the Indiana do-not-call list that are involved in current, uncompleted transactions with the caller.
2. Delete from the calling list the telephone numbers of subscribers on the Indiana do-not-call list that are not excluded by step 1, but that only have authorized a call from, or are engaged in a current, uncompleted transaction with, an affiliate of the caller.
3. Generate a calling list of Indiana residential telephone numbers that remain after application of steps 1 and 2.

For calls to Wisconsin residents:

1. From a list of residential telephone numbers that the caller is permitted to call under federal law, identify the telephone numbers of residential subscribers that are on the Wisconsin do-not-call list. Delete from the calling list all telephone numbers that are on the Wisconsin do-not-call list, except:
 - a. the telephone numbers of subscribers on the Wisconsin do-not-call list that have requested a telephone solicitation as defined by Wisconsin law; and
 - b. the telephone numbers of subscribers on the Wisconsin do-not-call list that are “current clients” of the caller as defined by Wisconsin law.
2. Identify the telephone numbers on the Wisconsin do-not-call list that are not excluded by step 1, but where the proposed call concerns a product or service different from any product or service the subscriber has a current agreement to receive from the caller. Remove numbers so identified from the calling list.
3. Remove from the calling list the telephone numbers of subscribers on the Wisconsin do-not-call list that are not excluded by steps 1

and 2, but that only have authorized calls from, or are current clients of, an affiliate of the caller.

4. Generate a calling list of Wisconsin residential telephone numbers that remain after application of steps 1 through 3.

These state-specific “scrubbing” processes, which must be implemented not just for Indiana and Wisconsin but for interstate calls to all states that fail to recognize the federal EBR exemption for interstate calling, represent an orders-of-magnitude increase beyond the level of complexity required for compliance with federal law. These processes also introduce new levels of uncertainty and legal risk. For example, neither Indiana nor Wisconsin clearly defines the circumstances that will constitute a specific request for a telemarketing call under their rules. Accordingly, in deciding when an Indiana or Wisconsin telephone number must be “scrubbed” from a calling list, CBA members must interpret these vague requirements at their own risk.

These risks and uncertainties are compounded when the calling decisions, for interstate calls to Indiana and Wisconsin, must be made by member institution personnel on a call-by-call basis. Some member institutions, for example, do not generate company-wide calling lists but permit individual employees, who may have worked personally with the called parties on past transactions or have received consumer inquiries, to decide for themselves whether a particular call may be made. By permitting such decentralized decision-making, those institutions can respond more quickly and flexibly to consumers’ inquiries and needs. Some CBA members provide their employees with complex decision tables that are designed to assist in this process. For example, a typical decision table will require an employee to take the following steps simply to ensure that the proposed call meets federal standards: (a) ascertain the nature of the subscriber (business or residential); (b) ascertain the purpose of the call (telemarketing collection, etc.); (c) determine whether the called party is a non-customer, current customer or former customer; (d) determine whether the number appears on the federal do-not-call list; and (e) determine

whether the called party has inquired about the caller's product or service within the preceding 3 months, or whether the called party's last transaction or purchase with the caller occurred within the preceding 18 months.

When the called party is in Indiana or Wisconsin, the decision table must call for additional information and still more decisions. Essentially, the decision table must replicate the entire decision process by which numbers would be included on or excluded from Indiana or Wisconsin calling lists, as described above.

This call-by-call approach, even more than the centralized generation and updating of a company-wide calling list, imposes substantial costs and risks on CBA member organizations. In order to use complex decision tables accurately, employees must be trained in their use. CBA members also must ensure that all potential callers have ready access to accurate, updated information on Indiana and Wisconsin consumers' inquiry and transaction histories. Even with a high level of training and access to accurate data, the possibility of error remains, and error will lead to liability under Indiana and Wisconsin law.

Faced with these costs, complexities and risks, many CBA member institutions simply will decline to call customers on the Indiana and Wisconsin do-not-call lists, even where those customers have an EBR with those institutions of the kind recognized by federal law. The potential loss of revenue resulting from such abandonment of large markets for the member institutions' services must be counted among the costs of failure to enforce this Commission's jurisdiction over interstate telemarketing.

II. CONGRESS HAS GRANTED THIS COMMISSION PLENARY JURISDICTION OVER INTERSTATE TELEMARKETING

As the CBA and a number of commenters, including the Joint Petitioners, have pointed out, the fundamental objection to enforcement of the Indiana and Wisconsin telemarketing rules,

as applied to interstate calling, is the states' lack of jurisdiction to enforce such rules.²²

Specifically, to the extent that any state statutes or rules purport to regulate the practices of telemarketers that place calls to those states' residents from locations outside the borders of those states, those statutes and rules are barred by the Communications Act, the TCPA and the Supremacy Clause of the United States Constitution.

The Indiana and Wisconsin telemarketing statutes and regulations plainly exceed the jurisdiction of those states under the Communications Act and the TCPA. Both states purport to regulate interstate calls, and neither state claims to act under a general consumer protection statute or similar law not directed specifically at telemarketing. Accordingly, even if the challenged statutes and regulations were not substantially more restrictive than the counterpart regulations of the FCC, enforcement of those statutes and regulations as to interstate telemarketing would be barred on jurisdictional grounds.

As the CBA's filing of this date in support of the Joint Petition points out, however, the Commission should not delay its resolution of the pending CBA petitions while it considers the broader jurisdictional claim of exclusive federal jurisdiction over interstate telemarketing. The CBA petitions have been pending for eight months; the record in those proceedings is exhaustively complete; and the conflict preemption claims made in those petitions are logically independent of the jurisdictional arguments raised in the Joint Petition. Accordingly, the pending CBA petitions should be granted without further delays.

²² See, e.g., Verizon Comments in Support of CBA and Nat'l City Mortgage Petitions for Declaratory Rulings (Feb. 2, 2005); American Financial Services Association Comments (Feb. 2, 2005); Joint Petition, *supra* note 2.

III. THE CAMPAIGN AGAINST THIS COMMISSION'S JURISDICTION CONTINUES TO ESCALATE

As the CBA points out in today's filing in support of the Joint Petition, various parties have made every effort to politicize and inflame the legitimate issues raised by the preemption petitions that the CBA and other parties have filed at this Commission's request. Recently, those efforts have increased rather than declined, with Indiana's Attorney General appearing on network television to denounce the preemption petitions, and the Indiana legislature passing a new law that prohibits any violator of the Indiana telemarketing statute from doing business with the State, *even if the Indiana statute is preempted by order of this Commission*. These efforts certainly are within the rights of public officials who are politically accountable to their constituents; but they have created an atmosphere of misinformation and rumor that can only be dispelled by this Commission's resolution of the underlying issues. For that reason, and for the other reasons stated in these comments, the pending CBA petitions should be granted without further delay.

Respectfully submitted,

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Dated: July 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2005, a copy of the foregoing **COMMENTS** was served by electronic mail, or U.S. First Class mail, as indicated, upon the following:

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