



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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DA 05-1347
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In the Matter of)	
)	
Rules and Regulations Implementing)	
The Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
American Teleservices Association, Inc. Petition for)	
Declaratory Ruling with Respect to Certain Provisions)	
of the New Jersey Consumer Fraud Act and the New)	DA 04-3185
Jersey Administrative Code)	
)	
ccAdvertising Petition for Expedited)	
Declaratory Ruling)	DA 04-3187
)	
Consumer Bankers Association Petition for Declaratory)	
Ruling with Respect to Certain Provisions of the)	
Indiana Revised Statutes and Administrative Code)	DA 04-3835
)	
Consumer Bankers Association Petition for Declaratory)	
Ruling with Respect to Certain Provisions of the)	
Wisconsin Statutes and Wisconsin Administrative Code)	DA 04-3836
)	
National City Mortgage Co. Petition for Expedited)	
Declaratory Ruling with Respect to Certain Provisions)	DA 04-3837
of the Florida Statutes)	
)	
TSA Stores, Inc. Petition for Declaratory Ruling with)	
Respect to Certain Provisions of the Florida Laws)	DA 05-342
and Regulations)	

CONSUMER & GOVERNMENTAL AFFAIRS BUREAU REOPENS PUBLIC COMMENT PERIOD FOR PETITIONS FOR DECLARATORY RULING RELATING TO PREEMPTION OF STATE TELEMARKETING LAWS

Comments Due: 30 Days After Publication in the Federal Register
Reply Comments Due: 50 Days After Publication in the Federal Register

By the Chief, Consumer & Governmental Affairs Bureau:

In late 2004 and early 2005, the Commission received six petitions for declaratory ruling seeking Commission preemption under the Telephone Consumer Protection Act (“TCPA”) of particular state

laws, as applied to interstate telemarketing calls.¹ In response to public notices issued by the Commission's Consumer & Governmental Affairs Bureau, interested parties filed comments with the Commission on issues raised in the six declaratory ruling petitions.² Since the close of the comment cycles relating to these petitions, the Commission's staff has learned of a number of recent developments that, if made a part of the formal record, may help to inform the Commission's consideration of particular issues raised in the petitions. In order to assemble a more complete administrative record that encompasses and reflects relevant developments in this area, this Public Notice reopens the public comment period for the six declaratory ruling petitions and invites interested parties to file supplemental comments in the record of those proceedings.

I. BACKGROUND

In July 2003, the Commission revised its rules implementing the TCPA and established a national do-not-call registry for consumers who wish to avoid receiving unwanted telephone solicitations.³ In the *TCPA Order*, the Commission made several determinations concerning, among other things, the relationship between state and federal do-not-call rules.⁴ In particular, the Commission recognized that, with limited exceptions, section 227(e)(1) of the Act permits states to adopt *intrastate* telemarketing requirements that are more restrictive than the federal do-not-call rules,⁵ while noting that section 227(e)(1) is silent on the issue of whether state law that imposes more restrictive regulations on *interstate* telemarketing calls may be subject to preemption.⁶ The Commission further noted that section 227(e)(1) limits the Commission's ability to preempt a state law that prohibits certain telemarketing activities,

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. A list of the six petitions for declaratory ruling is provided in section II of this Public Notice.

² *Consumer & Governmental Affairs Bureau Seeks Comment on American Teleservices Association, Inc. Petition for Declaratory Ruling on Preemption of New Jersey Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 04-3185 (rel. Oct. 4, 2004); *Consumer & Governmental Affairs Bureau Seeks Comment on CCAdvertising Petition for Declaratory Ruling on Preemption of North Dakota Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 04-3187 (rel. Oct. 4, 2004); *Consumer & Governmental Affairs Bureau Seeks Comment on Consumer Bankers Association Petition for Declaratory Ruling on Preemption of Indiana Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 04-3835 (rel. Dec. 7, 2004); *Consumer & Governmental Affairs Bureau Seeks Comment on Consumer Bankers Association Petition for Declaratory Ruling on Preemption of Wisconsin Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 04-3836 (rel. Dec. 7, 2004); *Consumer & Governmental Affairs Bureau Seeks Comment on National City Mortgage Co. Petition for Expedited Declaratory Ruling on Preemption of Florida Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 04-3837 (rel. Dec. 7, 2004); *Consumer & Governmental Affairs Bureau Seeks Comment on TSA Stores, Inc. Petition for Declaratory Ruling on Preemption of Florida Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 05-342 (rel. Feb. 9, 2005).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278, FCC 03-153, 18 FCC Rcd 14014 (2003) ("*TCPA Order*").

⁴ *TCPA Order*, 18 FCC Rcd at 14059-14065, paras. 74-85.

⁵ *TCPA Order*, 18 FCC Rcd at 14063, para. 82. Section 227(e)(1) provides that, with limited exceptions, nothing in section 227 or in the Commission's rules implementing that section "shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations. 47 U.S.C. § 227(e)(1).

⁶ *TCPA Order*, 18 FCC Rcd at 14064, para. 82.

including the making of telephone solicitations.⁷ The Commission concluded that this provision is ambiguous as to whether it applies to both intrastate and interstate calls.⁸ Finally, the Commission indicated that it would consider any alleged conflicts between state and federal law on a case-by-case basis.⁹

II. THE PETITIONS FOR DECLARATORY RULING

The six petitions for declaratory ruling that are the subject of this Public Notice ask the Commission to preempt particular provisions of state telemarketing laws, as applied to interstate telemarketing calls. A brief description of the petitions follows immediately below:

- The *ATA/New Jersey Petition* seeks preemption of the New Jersey Consumer Fraud Act and regulations, as applied to interstate telemarketing calls, to the extent that the exemption provided under New Jersey law for calls made to persons with whom the caller has an established business relationship (“EBR”) is narrower than the EBR exemption provided under the Commission’s rules.¹⁰ The petition also seeks preemption to the extent that, unlike the Commission’s rules, New Jersey law does not exempt calls made to persons with whom the caller has a “personal relationship” and imposes stricter identification and disclosure requirements upon the commencement of a telephone solicitation.¹¹
- The *ccAdvertising/North Dakota Petition* states that the petitioner is a Virginia-based company that uses prerecorded messages to conduct political polling, most of which involves interstate calls.¹² The petition seeks preemption of the North Dakota Century Code to the extent that it prohibits the use of autodialed, prerecorded messages in connection with interstate political polling calls without authorization from the called party.¹³ The petition states that this provision is in conflict with the TCPA and section 64.1200(a)(2)(ii) of the Commission’s rules,¹⁴ both of which permit political polling calls using prerecorded messages.¹⁵
- The *CBA/Indiana Petition* seeks preemption of the Indiana Revised Statutes and Indiana Administrative Code, as applied to interstate telemarketing calls, to the extent that the EBR

⁷ *TCPA Order*, 18 FCC Rcd at 14063, para. 82.

⁸ *TCPA Order*, 18 FCC Rcd at 14063, para. 82.

⁹ *TCPA Order*, 18 FCC Rcd at 14064, para. 84.

¹⁰ *American Teleservices Association Petition for Declaratory Ruling with Respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code*, DA 04-3185, filed Aug. 24, 2004 (“*ATA/New Jersey Petition*”) (citing N.J. Stat. Ann. § 56:8-119, *et seq.* (West 2003) and N.J. Admin. Code tit. 13, § 45D (2004)).

¹¹ *ATA/New Jersey Petition* at 9-10.

¹² *ccAdvertising (aka FreeEats.com, Inc.) Petition for Expedited Declaratory Ruling*, DA 04-3187, filed Sept. 13, 2004 (“*ccAdvertising/North Dakota Petition*”), at 2-3 (citing N.D. Cent. Code § 51-28-02).

¹³ *ccAdvertising/North Dakota Petition* at 9-11.

¹⁴ 47 C.F.R. § 64.1200(a)(2)(ii).

¹⁵ *ccAdvertising/North Dakota Petition* at 4-6, 9.

exemption recognized under Indiana law is narrower than the EBR exemption recognized under the Commission's rules.¹⁶ In particular, the petition contends that, unlike the Commission's EBR definition, Indiana law does not recognize as a basis for an EBR exemption relationships based upon: (1) a consumer's past inquiry or application, during the three months preceding a call, regarding the party's products or services; or (2) a consumer's purchase or transaction, within 18 months prior to the call, as to which payment has been made or performance completed.¹⁷ The petition further contends that Indiana law conflicts with federal law to the extent that the former does not provide an exception for affiliates of an entity with which a called party has an EBR.¹⁸

- The *CBA/Wisconsin Petition* seeks preemption of the Wisconsin Statutes and Wisconsin Administrative Code, as applied to interstate telemarketing calls, to the extent that the EBR exemption recognized under Wisconsin law is narrower than the EBR exemption recognized under the Commission's rules.¹⁹ In particular, CBA contends that Wisconsin law does not recognize as the basis for an EBR exemption: (1) calls made to residential subscribers who have made an inquiry or application regarding products or services, but have not expressly asked to be called in response to that inquiry or application; (2) calls made to residential subscribers who have engaged in a completed purchase or transaction with the caller; (3) calls made to existing customers for the purpose of offering additional or different products from those the seller already is providing to the customer; and (4) calls from an affiliate of the entity with whom a subscriber has an EBR.²⁰
- The *NCMC/Florida Petition* seeks preemption of the Florida Statutes, as applied to interstate telemarketing calls, to the extent that they prohibit telephone solicitations to persons with whom a caller has an EBR if such calls involve the use of a prerecorded message.²¹ The petition asserts that this provision of Florida's law conflicts with section 64.1200(a)(2) of the Commission's rules to the extent that such a call is permitted under federal law if it is made to a person with whom the caller has an EBR.²²
- The *TSA/Florida Petition* seeks preemption of Florida's telemarketing law, as applied to interstate telemarketing calls, to the extent that it restricts or prohibits telephone solicitations to

¹⁶ *Consumer Bankers Association Petition for Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code*, DA 04-3835, filed Nov. 19, 2004 ("CBA/Indiana Petition") (citing Burns Ind. Code Ann. § 24-4.7-4 (2004) and Ind. Admin. Code § 11 IAC 1-1-4 and § 11 IAC 1-1-3.5 (2004)).

¹⁷ *CBA/Indiana Petition* at 2-4.

¹⁸ *CBA/Indiana Petition* at 4.

¹⁹ *Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code*, DA 04-3836, filed Nov. 19, 2004 ("CBA/Wisconsin Petition") (citing Wis. Stat. § 100.52 (2003) and Wis. Admin. Code, Agriculture, Trade and Consumer Protection, §§ 127.02-127.20 and 127.80-127.84).

²⁰ *CBA/Wisconsin Petition* at 3-6.

²¹ *National City Mortgage Co. Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Florida Statutes*, DA 04-3837, filed Nov. 22, 2004 ("NCMC/Florida Petition") (citing Fla. Stat. § 501.059).

²² *NCMC/Florida Petition* at 2-4 (citing 47 C.F.R. § 64.1200(a)(2)).

persons with whom a caller has an EBR if such calls involve the use of a prerecorded message.²³ TSA asserts that this provision of Florida's law conflicts with section 64.1200(a)(2) of the Commission's rules to the extent that such a call is permitted under federal law if it is made to a person with whom the caller has an EBR.²⁴

III. REOPENING OF COMMENT CYCLE

Since the close of the comment cycles established in the six declaratory ruling proceedings described herein, the Commission's staff has become aware of a number of recent developments that potentially may bear on the Commission's resolution of the pending petitions. In particular, a recently filed petition for declaratory ruling describes an "increasing number of divergent state laws applicable to interstate telemarketing" and lists several telemarketing-related bills that have been introduced in state legislatures in recent months that, if enacted, would apply to interstate telemarketing calls.²⁵ Similarly, we are aware of recent court proceedings involving adjudications of state enforcement actions in which the proper relationship between state and federal telemarketing laws has been at issue before the court.²⁶ Finally, we note that the Consumer & Governmental Affairs Bureau is releasing contemporaneously with this Public Notice two additional public notices seeking public comment on two separate petitions for declaratory ruling that raise issues relating to the Commission's jurisdiction and preemption authority under the TCPA.²⁷

In an effort to assemble a more complete administrative record that encompasses and reflects recent developments in this area, this Public Notice reopens the public comment period for the above-captioned declaratory ruling petitions and invites interested parties to file supplemental comments in the record of those proceedings. All commenting parties are instructed to reference in the caption of their comments CG Docket No. 02-278, as well as the DA number assigned to the individual petition for declaratory ruling to which their comments relate.

²³ *TSA Stores, Inc. (The Sports Authority) Petition for Declaratory Ruling with Respect to Certain Provisions of the Florida Laws and Regulations*, DA 05-342, filed Feb. 1, 2005 ("TSA/Florida Petition") (citing Fla. Stat. § 501.059).

²⁴ *TSA/Florida Petition* at 3-5 (citing 47 C.F.R. § 64.1200(a)(2)).

²⁵ *See Alliance Contact Services, et al. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing*, filed April 29, 2005, at 7-8, 29-32.

²⁶ *See, e.g., North Dakota v. FreeEats.com, Inc.*, Opinion and Order, No. 04-C-1694 (N.D. Dist. Ct. Feb. 2, 2005); *North Dakota v. FreeEats.com, Inc.*, Stipulation for Entry of Final Judgment, No. 04-C-1694 (N.D. Dist. Ct. March 9, 2005) (state court holding that interstate political polling calls using prerecorded message violate state's telemarketing law).

²⁷ *See Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Relating to Commission's Jurisdiction Over Interstate Telemarketing*, Public Notice, CG Docket No. 02-278, DA 05-1346 (rel. May 13, 2005) (seeking comment on joint petition filed by 33 organizations engaged in interstate telemarketing activities in which petitioners ask Commission to declare its exclusive regulatory jurisdiction over interstate telemarketing); *Consumer & Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling on Preemption of California Telemarketing Rules*, Public Notice, CG Docket No. 02-278, DA 05-1348 (rel. May 13, 2005) (seeking comment on petition for declaratory ruling in which petitioner asks Commission *not* to preempt particular provisions of California's telemarketing laws).

IV. PROCEDURAL MATTERS

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments in this proceeding on or before the 30th day after publication of this Public Notice in the Federal Register, and reply comments may be filed on or before the 50th day after publication of this Public Notice in the Federal Register. When filing comments, please reference CG Docket No. 02-278 and the DA number identifying the petition(s) to which a comment relates. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Room TW-B204, Washington, DC 20554.

This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules, 47 C.F.R. § 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, DC 20554, (202) 418-0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their web site: www.bcpiweb.com or by calling 1-800-378-3160.

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FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer & Governmental Affairs Bureau, Federal Communications Commission, 202-418-2512 (voice), Kelli.Farmer@fcc.gov.

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