

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 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 Indiana	)	
Revised Statutes and Indiana Administrative Code	)	

**PETITION FOR DECLARATORY RULING**

The Consumer Bankers Association (“CBA”), by its attorneys and on behalf of its members, pursuant to section 554(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2, respectfully requests the Commission to issue, on an expedited basis, a declaratory ruling that certain sections of the Indiana Revised Statutes and Indiana administrative Code are preempted as applied to interstate telephone calls.<sup>1</sup>

Specifically, the CBA requests that the Commission preempt the Indiana statute and regulations to the extent they prohibit telemarketing calls to persons and entities with which the caller has an established business relationship as defined in this Commission’s rules.

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<sup>1</sup> 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.

## DISCUSSION

The CBA's member institutions have customers in every state of the United States, including Indiana. In order to advise existing customers of opportunities, such as the availability of more favorable interest rates, that those customers may find to be of value, CBA member institutions place interstate telephone calls to those customers in compliance with the Telephone Consumer Protection Act ("TCPA")<sup>2</sup> and this Commission's implementing rules.

Under the Commission's rules, telemarketing calls may be placed to any persons with whom the caller has an established business relationship, even where the called party's number has been entered on the national do-not-call registry.<sup>3</sup> An established business relationship, in turn, is defined as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months preceding the date of the call, which relationship has not been previously terminated by either party."<sup>4</sup>

The telemarketing statute of the State of Indiana provides 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 [on the do-not-call list maintained by the State of Indiana]."<sup>5</sup> Failure to comply

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<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> 47 C.F.R. § 64.1200(c)(2), (f)(9).

<sup>4</sup> *Id.* § 69.1200(f)(3).

<sup>5</sup> Burns Ind. Code Ann. § 24-4.7-4 (2004). The applicable provisions of the Indiana statute are appended as Attachment 1; the applicable provisions of Indiana's implementing regulations are appended as Attachment 2.

with this statutory prohibition constitutes “a deceptive act that is actionable by the [Indiana] attorney general ...”<sup>6</sup> Indiana’s statutory prohibitions apply to all telephone solicitors “doing business in Indiana,” which is defined as “making telephone sales calls to consumers located in Indiana *whether the telephone sales calls are made from a location in Indiana or outside Indiana.*”<sup>7</sup>

Indiana’s prohibition on calls to numbers on the Indiana do-not-call list is subject to exceptions that partially overlap with, but are substantially narrower than, the “established business relationship” of the Commission’s telemarketing rules. Specifically, and insofar as relevant here, the Indiana telemarketing statute “does not apply to any of the following:

- (1) A telephone call made in response to an express request of the person called.
- (2) A telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call.”<sup>8</sup>

These statutory exemptions, however, do not cover the most common kinds of established business relationship encompassed by the Commission’s rules, and therefore prohibit interstate calls that are permitted by applicable federal law.

Notably, the Indiana exceptions do not include relationships based upon a consumer’s past inquiry or application, during the three months preceding the call, regarding the calling party’s products or services. Instead, telephone sales calls may only be made pursuant to a past inquiry that included a “specific grant of authority made by a residential telephone subscriber at

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<sup>6</sup> *Id.* § 24-4.7-5-1.

<sup>7</sup> *Id.* § 24-4.7-2-5 (emphasis added).

<sup>8</sup> *Id.* § 24-4.7-1-1.

a verifiable date and time authorizing a telephone solicitor to make a telephone sales call to the residential telephone subscriber's residential telephone number.”<sup>9</sup>

Similarly, Indiana's exception does not include calls to persons with whom the caller has engaged, within 18 months prior to the call, in a purchase or transaction as to which payment has been made or performance completed. Instead, Indiana's exception applies only to calls concerning “a sum of money owed by the consumer who receives the telephone call to the telephone solicitor making the call . . .” or “a legally binding agreement currently in effect between the consumer who receive the call and the telephone solicitor making the call . . .”<sup>10</sup>

Finally, the Indiana statute, unlike the Commission's rules, does not expressly permit an established business relationship to extend to any affiliated entities that “the consumer reasonably would expect . . . to be included” within that category.<sup>11</sup>

The Commission permits states to impose telemarketing regulations that are more restrictive than those of the Commission's, but only with respect to intrastate calls. The Indiana statute does not restrict its coverage to intrastate calls within the State of Indiana. Accordingly, CBA members that place calls to Indiana customers from locations outside Indiana may be subject to enforcement action by the Indiana attorney general, even where those calls comply fully with federal law, in violation of this Commission's declared policy.

In its *TCPA Order* released July 3, 2003, the Commission invited “any party that believes a state law is inconsistent with section 227 or our rules [to] seek a declaratory ruling.”<sup>12</sup> In that

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<sup>9</sup> Ind. Admin. Code § 11 IAC 1-1-4 (2004).

<sup>10</sup> *Id.* § 11 IAC 1-1-3.5.

<sup>11</sup> 47 C.F.R. § 64.1200(f)(3)(ii).

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14064-65 ¶ 84 (2003) (“*TCPA Order*”).

same Order, the Commission described the principles that would guide its resolution of such petitions:

Although section 227(e) gives states authority to impose more restrictive *intrastate* regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent *interstate* rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.<sup>13</sup>

The Indiana telemarketing statute plainly subjects the CBA's member institutions to "multiple, conflicting regulations" and frustrates "the federal objective of creating uniform national rules" for telemarketing. In order to comply with both federal and Indiana law, each of the CBA's members would be required to identify those Indiana customers with whom the member's relationship satisfies this Commission's, but not Indiana's, standard for permitting a telemarketing call to a number on the do-not-call list. Each member then would be required to compile a separate "do-not-call list" for those Indiana customers and train and supervise call center employees in its use. This costly and cumbersome effort would frustrate the Commission's announced policy of avoiding "inconsistent rules for those that telemarket on a nationwide or multi-state basis" that create "a substantial compliance burden for those entities."<sup>14</sup>

The cited portions of the Indiana statutes and regulations create a controversy and subject the CBA's member institutions to uncertainty concerning their obligations, thereby satisfying the standard for declaratory relief under the Administrative Procedure Act and the Commission's rules. Accordingly, the CBA requests that this Commission declare that the cited sections of the

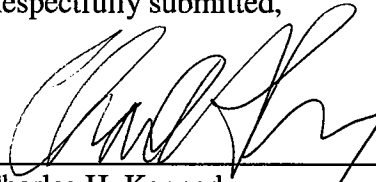
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<sup>13</sup> *Id.* at 14064 ¶ 83 (emphasis added).

<sup>14</sup> *Id.*

Indiana Statutes and Administrative Code are preempted to the extent they purport to prohibit the making of any interstate telemarketing call that is permitted, under this Commission's rules, as a call to a person or entity with whom the calling party has an established business relationship.

Respectfully submitted,



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Dated: November 19, 2004

**CERTIFICATE OF SERVICE**

I, Theresa Rollins, do hereby certify that I have on this 19<sup>th</sup> day of November, 2004, had copies of the foregoing delivered to the following, via First Class U.S. mail and electronic mail, as indicated:

Office of the Indiana Attorney General  
Indiana Government Center South  
302 West Washington Street  
Indianapolis, IN 46204

Jay Keithley, Deputy Chief  
Consumer & Governmental Affairs Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Via Email: [Jay.Keithley@fcc.gov](mailto:Jay.Keithley@fcc.gov)

Best Copy and Printing, Inc.  
Portals II  
445 12<sup>th</sup> Street, SW, Room CY-B402  
Washington, DC 20554

Via Email: [FCC@BCPIWEB.COM](mailto:FCC@BCPIWEB.COM)

A handwritten signature in black ink, reading "Theresa Rollins". The signature is written in a cursive style with a large initial "T" and "R".

Theresa Rollins

**IC 24-4.7**

**ARTICLE 4.7. TELEPHONE SOLICITATION OF CONSUMERS**

**IC 24-4.7-1**

Chapter 1. General Provisions

**IC 24-4.7-1-1**

**Application**

Sec. 1. This article does not apply to any of the following:

- (1) A telephone call made in response to an express request of the person called.
- (2) A telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call.
- (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.
  - (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.
- (4) A telephone call made by an individual licensed under IC 25-34.1 if:
  - (A) the sale of goods or services is not completed; and
  - (B) the payment or authorization of payment is not required; until after a face to face sales presentation by the seller.
- (5) A telephone call made by an individual licensed under IC 27-1-15.6 or IC 27-1-15.8 when the individual is soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer (as defined in IC 27-1-2-3).
- (6) A telephone call soliciting the sale of a newspaper of general circulation, but only if the telephone call is made by a volunteer or an employee of the newspaper.

*As added by P.L.189-2001, SEC.1. Amended by P.L.97-2004, SEC.90.*

**IC 24-4.7-1-2**

**Compliance with other law**

Sec. 2. This article does not relieve a person from complying with any other applicable law.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2**

Chapter 2. Definitions

**IC 24-4.7-2-1**

**Applicability of Definitions**

Sec. 1. The definitions in this chapter apply throughout this article.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-2**

**"Consumer" defined**

Sec. 2. "Consumer" means a residential telephone subscriber who is an actual or a prospective:

- (1) purchaser, lessee, or recipient of consumer goods or services; or
- (2) donor to a charitable organization.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-3**

**"Consumer goods or services" defined**

Sec. 3. "Consumer goods or services" means any of the following:

- (1) Tangible or intangible personal property or real property that is normally used for personal, family, or household purposes.
- (2) Property intended to be attached to or installed on real property without regard to whether it is attached or installed.
- (3) Services related to property described in subdivision (1) or (2).
- (4) Credit cards or the extension of credit.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-4**

**"Division" defined**

Sec. 4. "Division" refers to the consumer protection division of the office of the attorney general.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-5**

**"Doing business in Indiana" defined**

Sec. 5. "Doing business in Indiana" means making telephone sales calls to consumers located in Indiana whether the telephone sales calls are made from a location in Indiana or outside Indiana.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-6**

**"Fund" defined**

Sec. 6. "Fund" refers to the consumer protection division telephone solicitation fund established by IC 24-4.7-3-6.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-7**

**"Listing" defined**

Sec. 7. "Listing" refers to the no telephone sales solicitation listing published by the division under IC 24-4.7-3 that lists the names of persons who do not wish to receive telephone sales calls.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-8**

**"Telephone number" defined**

Sec. 8. "Telephone number" means a residential telephone number.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-9**

**"Telephone sales call" defined**

Sec. 9. "Telephone sales call" means a telephone call made to a consumer for any of the following purposes:

- (1) Solicitation of a sale of consumer goods or services.
- (2) Solicitation of a charitable contribution.
- (3) Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

The term includes a call made by use of automated dialing or recorded message devices.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-2-10**

**"Telephone solicitor" defined**

Sec. 10. "Telephone solicitor" means an individual, a firm, an organization, a partnership, an association, or a corporation, including affiliates and subsidiaries, doing business in Indiana.

*As added by P.L.189-2001, SEC.1.*

### **IC 24-4.7-3**

#### **Chapter 3. Duties of the Division**

### **IC 24-4.7-3-1**

#### **Quarterly listing**

Sec. 1. (a) A quarterly listing of telephone numbers of Indiana consumers who request not to be solicited by telephone shall be established, maintained, and published as provided in this section.

(b) The telephone number of a consumer shall be placed on the listing if the consumer requests to be added to the listing according to a procedure approved by the division.

(c) The listing shall be updated upon receipt of a request from a consumer.

(d) A telephone solicitor may obtain a copy of the listing upon request of the telephone solicitor as provided in this section.

(e) The division shall establish a fee to be paid by a telephone solicitor for obtaining a copy of the listing. The fee established under this subsection may not exceed the amount necessary to cover the cost of providing the listing to telephone solicitors.

*As added by P.L.189-2001, SEC.1.*

### **IC 24-4.7-3-2**

#### **Agents**

Sec. 2. (a) The division may contract with an agent to perform the division's duties under section 1 of this chapter if both of the following conditions are satisfied:

(1) The agent has demonstrated experience in maintaining a national no sales solicitation calls listing.

(2) The contract requires the vendor to provide the listing in:

(A) a printed hard copy format; and

(B) any other format offered;

at a cost that does not exceed the production cost of the format offered.

(b) If the division enters into a contract under this section, the division must retain the ultimate authority for the following:

(1) Approval of the procedures for establishment, maintenance, and publication of the listing.

(2) Establishing fees required by section 1(e) of this chapter.

*As added by P.L.189-2001, SEC.1.*

### **IC 24-4.7-3-3**

#### **Investigation**

Sec. 3. The division shall investigate complaints received concerning violations of this article.

*As added by P.L.189-2001, SEC.1.*

### **IC 24-4.7-3-4**

#### **Notifications**

Sec. 4. The division shall notify Indiana residents of the rights and duties created by this article.

*As added by P.L.189-2001, SEC.1.*

#### **IC 24-4.7-3-5**

##### **Reports**

Sec. 5. (a) The division shall, after June 30 and before October 1 of each year, report to the regulatory flexibility committee established by IC 8-1-2.6-4 on the following:

- (1) For the state fiscal year ending June 30, 2002, the expenses incurred by the division in establishing the listing.
- (2) The total amount of fees deposited in the fund during the most recent state fiscal year.
- (3) The expenses incurred by the division in maintaining and promoting the listing during the most recent state fiscal year.
- (4) The projected budget required by the division to comply with this article during the current state fiscal year.
- (5) Any other expenses incurred by the division in complying with this article during the most recent state fiscal year.
- (6) The total number of subscribers on the listing at the end of the most recent state fiscal year.
- (7) The number of new subscribers added to the listing during the most recent state fiscal year.
- (8) The number of subscribers removed from the listing for any reason during the most recent state fiscal year.

(b) The regulatory flexibility committee shall, before November 1 of each year, issue in an electronic format under IC 5-14-6 a report and recommendations to the legislative council concerning the information received under subsection (a).

*As added by P.L.189-2001, SEC.1. Amended by P.L.28-2004, SEC.163.*

#### **IC 24-4.7-3-6**

##### **Purpose**

Sec. 6. (a) The consumer protection division telephone solicitation fund is established for the purpose of the administration of this article and shall be used exclusively for this purpose.

(b) The division shall administer the fund.

(c) The division shall deposit all revenue received under this article in the fund.

(d) Money in the fund is continuously appropriated to the division for the administration of this article.

(e) Money in the fund at the end of a state fiscal year does not revert to the state general fund. However, if the amount of money in the fund at the end of a particular state fiscal year exceeds two hundred thousand dollars (\$200,000), the treasurer of state shall transfer the excess from the fund to the state general fund.

*As added by P.L.189-2001, SEC.1.*

#### **IC 24-4.7-3-7**

##### **Adoption of rules**

Sec. 7. The division may adopt rules under IC 4-22-2 to

implement this article.  
*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-4**

**Chapter 4. Telephone Solicitations**

**IC 24-4.7-4-1**

**Prohibitions**

Sec. 1. 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.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-4-2**

**Violations; disclosure**

Sec. 2. A telephone solicitor who makes a telephone sales call to a telephone number shall immediately disclose the following information upon making contact with the consumer:

- (1) The solicitor's true first and last name.
- (2) The name of the business on whose behalf the telephone solicitor is soliciting.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-4-3**

**Directories**

Sec. 3. (a) This section does not apply to a person obtaining consumer information for inclusion in directory assistance and telephone directories sold by telephone companies.

(b) A telephone solicitor or person who obtains consumer information that includes telephone numbers shall exclude the telephone numbers that appear on the division's most current listing.

*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-4-4**

**Contracts and sales**

Sec. 4. (a) This section does not apply to any of the following:

- (1) A sale in which:
  - (A) no prior payment is made to a merchant;
  - (B) an invoice accompanies the goods or services; and
  - (C) a consumer is allowed seven (7) days to cancel the services or return the goods without obligation for payment.
- (2) A contractual agreement that:
  - (A) requires payment; and
  - (B) allows the consumer at least ten (10) days to cancel the contract and receive a full refund of the payment.
- (3) A sale regulated by 170 IAC 7-1.1-19.
- (4) A newspaper subscription executed through a telephone call.

(b) A contract made under a telephone sales call is not valid and enforceable against a consumer unless the contract complies with this section.

(c) A contract made under a telephone sales call must satisfy all of the following:

(1) The contract must be reduced to writing and signed by the consumer.

(2) The contract must contain the name, address, and business telephone number of the seller, the total price of the contract, and a detailed description of the goods or services being sold.

(3) The description of goods or services as stated in the contract must be the same as the description principally used in the telephone solicitation.

(4) The contract must contain, in bold, conspicuous type immediately preceding the signature the words "you are not obligated to pay any money unless you sign this contract and return it to the seller".

(5) The contract may not exclude from its terms any oral or written representations made by the telephone solicitor to the consumer in connection with the transaction.

*As added by P.L.189-2001, SEC.1. Amended by P.L.22-2002, SEC.1.*

#### **IC 24-4.7-4-5**

##### **Transactions**

Sec. 5. (a) This section does not apply to any of the following:

(1) A transaction made in accordance with prior negotiations in the course of a visit by a consumer to a merchant that operates a retail business establishment that has a fixed, permanent location where consumer goods are displayed or offered for sale on a continuing basis.

(2) A transaction in which:

(A) a consumer may obtain a full refund for the return of undamaged and unused goods; or

(B) a consumer may, within seven (7) days after receipt of merchandise by a consumer, give a cancellation of services notice to a seller and return the merchandise, and the seller must process the refund within thirty (30) days after receipt of the returned merchandise.

(3) A transaction in which a consumer purchases goods or services under a television, radio, or print advertisement or a sample, brochure, or catalog of a merchant that contains:

(A) the name, address, and business telephone number of the merchant;

(B) a description of the goods or services being sold; and

(C) limitations or restrictions that apply to the offer.

(4) A transaction in which a merchant is a bona fide charitable organization.

(b) A contract made under a telephone sales call in violation of this section is not valid and enforceable against a consumer.

(c) A merchant who engages a telephone solicitor to make or cause to be made a telephone sales call may not:

(1) make or submit a charge to a consumer's credit card account; or

(2) make or cause to be made any electronic transfer of funds; until the merchant receives from the consumer a copy of the contract,

signed by the consumer, that complies with this chapter.  
*As added by P.L.189-2001, SEC.1.*

**IC 24-4.7-4-6**

**Other applicable law**

Sec. 6. A telephone solicitor must also comply with all other applicable laws, including the following, if applicable:

(1) IC 24-5-12.

(2) IC 24-5-14.

*As added by P.L.189-2001, SEC.1. Amended by P.L.22-2002, SEC.2.*

