

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In the Matter of:)
)
Rules and Regulations Implementing the) CG Docket No. **02-278; FCC 10-18**
Telephone Consumer Protection Act of)
1991.)
_____)

**COMMENTS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION**

Pursuant to the Federal Communications Commission’s (FCC or Commission) procedural schedule established in the above-referenced docket, the Michigan Public Service Commission (MPSC) hereby submits its comments to the Notice of Proposed Rulemaking (NPRM) released January 22, 2010 regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991.¹ In this NPRM, the FCC requested comments regarding proposed revisions to its rules under the TCPA. The FCC’s proposed revisions will harmonize its rules with the Federal Trade Commission’s (FTC) Telemarketing Sales Rule (TSR).

I. SUMMARY

In general, the MPSC supports harmonizing the FCC’s TCPA with the FTC’s TSR. The MPSC disagrees, however, with the provision that, for all calls, prior express consent to receive prerecorded telemarketing messages should be obtained in writing. Further, the MPSC disagrees with the exemption of prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as these terms are defined by the HIPAA Privacy Rules. The reasons in support of the MPSC’s position are discussed below.

¹ See CG Docket No. 02-278, FCC 10-18.

II. INTRODUCTION

On December 20, 2002, Michigan Governor John Engler signed into law 2002 PA 612 (Act 612), which amended the Michigan Home Solicitation Sales Act.² Act 612 regulates certain telephone solicitations, prescribed penalties and remedies for violations, and directs the Michigan Public Service Commission to establish a statewide do-not-call list. This law became effective March 31, 2003. Additionally, in December 2002, 2002 PA 613 was signed into legislation, giving the Michigan Office of the Attorney General the authority to enforce Michigan's do-not-call list law and permitting Michigan consumers to file complaints with the FTC and the FCC.

Act 612 prescribed that within 120 days after its effective date, or by July 29, 2003, the MPSC must establish a state do-not-call list or designate a vendor to maintain such a list. Beginning 90 days after establishing a do-not-call list or designating a vendor to maintain the list, telephone solicitors would be prohibited from making telephone solicitations to residential telephone customers whose names and numbers were on the list.

Act 612 also stated that if a federal government agency established a federal do-not-call list, within 120 days after the establishment of that list, the MPSC must designate the federal list as the state do-not-call list. With the amendments to the TSR, the FTC established a national do-not-call registry. When the FTC's registry development process was underway, and there was ample reason to believe that the list would be available in the near future, the FTC contracted with a vendor for the do-not-call registry, received approval for over \$18 million in funding for the registry, and announced the implementation timeline.

Internet and telephone registration for the federal list was scheduled to begin in July 2003. Telemarketers and other sellers would be able to access the registry beginning in

² MCL 445.111 *et seq*

September 2003, and enforcement of the federal do-not-call provisions was to commence in October 2003.

The FCC's authority to regulate telephone solicitations is greater than the FTC's authority, and at this time, under the TCPA, the FCC was working on rules that would establish a federal do-not-call list. On March 11, 2003, President Bush signed into law the Do-Not-Call Implementation Act³, which required the FCC to issue its final rules by September 7, 2003 and to coordinate with the FTC to maximize consistency between the agencies' rules.

The MPSC believed that adopting the national do-not-call registry as Michigan's do-not-call list would promote government efficiency by reducing the unnecessary duplication of resources. Additionally, with only one registry, customers would receive the benefit of protection against both intrastate and interstate telephone solicitations. As a result, on April 17, 2003, the MPSC issued an Order, in MPSC Case No. U-13753, adopting the FTC's federal do-not-call registry as the Michigan do-not-call list.⁴

On January 20, 2010, the FCC issued a Notice of Proposed Rulemaking regarding the Rules and Regulations Implementing the TCPA of 1991⁵ and requesting comments regarding proposed revisions to the FCC's rules to harmonize the rules with the FTC's TSR. A Notice was published in the Federal Register on March 22, 2010, establishing a comment date of May 21, 2010 and a reply comment date of June 21, 2010.⁶

³ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

⁴ MPSC Case No. U-13753, Order, April 17, 2003.

⁵ See CG Docket No. 02-278, FCC 10-18.

⁶ See 75 FR 13471.

III. DISCUSSION

In general, the MPSC supports harmonizing the FCC's TCPA with the FTC's TSR. The MPSC disagrees, however, with the provision that, for all calls, prior express consent to receive prerecorded telemarketing messages should be obtained in writing. Further, the MPSC disagrees with the exemption of prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as these terms are defined by the HIPAA Privacy Rules.

Below, the MPSC provides comments to specific questions presented in the NPRM as published in the Federal Register.

Paragraph 4: The Commission seeks comment on whether it should revise Sections 64.1200(a)(1) and 64.1200(a)(2) of its rules to provide that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing.

Comment: The MPSC questions whether it is in consumers' best interest to require, for all calls, prior written consent to receive prerecorded telemarketing messages. The problem associated with the E-SIGN Act and electronic signatures can be observed when reviewing the cramming complaints received by the MPSC's Service Quality Division. In 2009, the MPSC's Service Quality Division received approximately 570 cramming complaints. Of these, 178 (or 31%) were complaints regarding "forged" electronic signatures.⁷ The MPSC states that a recorded verification of the verbal consent would be more effective than a written consent requirement.

Before modifying its rules, the MPSC recommends reviewing the number of complaints the FTC has received from consumers regarding telemarketers leaving the consumer

⁷ In this context, we define a forged electronic signature as a consumer's name and/or telephone number typed onto a company's Internet form, indicating that the consumer agrees to the form's text, but which the consumer denies completing. The form may contain the consumer's correct name or a totally different name but always includes the consumer's telephone number.

prerecorded messages - even though written consent was never provided. Further, if a written consent requirement is approved; penalties should be imposed on companies who knowingly produce forged electronic signatures as proof that a customer consented to receive prerecorded telephone calls.

Paragraph 6: The Commission seeks comments on the relevancy of Congress' concern, expressed nearly two decades ago, with respect to the burden placed on telemarketers to obtain written consent prior to using prerecorded telemarketing messages in light of the multitude of quick and cost effective options now available for obtaining written consent, other than via traditional pen and paper.

Comment: The concerns expressed by Congress nearly two decades ago regarding the potential burdens of a written consent requirement are no longer relevant. E-sign options have greatly reduced the burden of a written consent requirement. But, as discussed above, the MPSC urges the FCC to take into consideration that E-sign options can be forged and penalties should be imposed as a further deterrent.

Paragraph 8: Assuming the Commission has legal authority to adopt a written consent requirement prior to permitting telemarketers to use prerecorded telemarketing messages, the FCC seeks comment on whether it should adopt the same requirement both for calls governed by Section 227(b)(1)(A) of the Federal Communications Act, which in general prohibits automated or artificial or prerecorded message calls without prior express consent to emergency lines, health care facilities, and cellular services, and for calls governed by Section 227(b)(1)(B) of the Federal Communications Act, which in general prohibits prerecorded message calls without prior express consent to residential telephone lines.

Comment: If the Commission decides to adopt a written consent requirement, the MPSC believes that the wording in Sections 227(b)(1)(A) and 227(b)(1)(B) of the Federal Communications Act should be consistent.

Paragraph 9: If, after reviewing the record, the Commission determines that it does not have legal authority to adopt a written consent requirement for telemarketers prior to utilizing prerecorded telemarketing messages, it seeks comment on what, if any, additional steps should be required by senders who choose to obtain consent orally in order to verify that consent was, in fact, given.

Comment: The MPSC supports requiring companies to keep recorded copies of each phone call, in its entirety, in which a customer gives oral consent to receive prerecorded telemarketing calls. This allows the company to provide proof, in the customer's own voice, that the customer gave his/her consent.

Paragraph 10: As a policy matter, the Commission tentatively concludes that harmonizing its prior consent requirement with the FTC's may reduce the potential for industry and consumer confusion surrounding a telemarketer's obligations to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's rule. It tentatively concludes that written consent also may enhance the Commission's enforcement efforts and serve to protect both consumers and industry from erroneous claims that consent was or was not given, to the extent that, unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent. The Commission seeks comment on these tentative conclusions.

Comment: In general, the MPSC supports harmonizing the FCC's TCPA with the FTC's TSR. These changes would help alleviate consumer confusion about different

telemarketing requirements for different industries. One possible exception is the provision that, for all calls, prior express consent to receive prerecorded telemarketing messages must be obtained in writing. Instead of written consent, the MPSC asserts that a taped copy of the telephone conversation where a customer authorizes prerecorded telemarketing calls from a company would be less ambiguous than a signature on an electronic consent form.

The allowance of electronic consent will not aid the Commission's efforts in enforcing a telemarketers' obligation to obtain consent before using prerecorded telemarketing calls. It would be extremely difficult for the Commission to enforce penalties against a company that produces a forged electronic form as proof of a customer authorizing the use of prerecorded telemarketing calls. It would additionally be equally as difficult to prove that a company completed the form themselves with the consumer's information as opposed to another customer completing the form incorrectly for him/herself or on behalf of another person.

Paragraph 15: The Commission seeks comment on whether it should reconsider its 1992 determination that an established business relationship may be deemed to constitute express invitation or permission to receive unsolicited prerecorded telemarketing calls.

The Commission seeks comment on whether it should conform its rule to the FTC's Telemarketing Sales Rule by eliminating the established business relationship exemption from the general prohibition on prerecorded telemarketing calls to residential telephone lines.

Comment: The Commission should reconsider its 1992 determination that an established business relationship may be deemed to constitute an express invitation or permission to receive unsolicited prerecorded telemarketing calls. Prerecorded telemarketing calls (*i.e.*, sales calls) should not be "deemed invited or permitted" by established business customers.

Prerecorded telemarketing calls are intrusive whether or not the caller has a preexisting relationship with the recipient.

The MPSC believes that the Commission should conform its rule to the FTC's TSR by eliminating the established business relationship exemption from the general prohibition on prerecorded telemarketing calls to residential telephone lines.

Paragraph 18: If the Commission retains the current exemption for established business customers, it seeks comment, particularly from individual consumers and consumer groups, regarding whether consumers would support the use of prerecorded telemarketing messages by sellers and telemarketers with established business customers if such messages provided an interactive opt-out mechanism that would provide a means to avoid future prerecorded messages from that seller.

Comment: As stated above, The FCC should eliminate the established business relationship exemption from the general prohibition on prerecorded telemarketing calls to residential telephone lines. However, if the Commission retains the current exemption for established business customers, the MPSC recommends an opt-out mechanism. The opt-out mechanism should be offered early in the recorded message and a per incident fine should be established for telemarketers failing to provide the opt-out mechanism.

Paragraph 19: Finally, the Commission tentatively concludes that adopting the same rules as the FTC's, with respect to prerecorded message calls to established business customers, may reduce the potential for industry and consumer confusion surrounding a telemarketer's authority to place unsolicited prerecorded message calls to established customers to the extent that similarly situated entities would no longer be subject to different requirements depending upon whether an entity is subject to the FTC's rule or to the Commission's. The Commission seeks comment on this tentative conclusion.

Comment: In general, the MPSC states that the more consistent the FTC's and FCC's rules are the less consumer and industry confusion there will be. Nevertheless, revisions that result in a reduction of regulatory oversight should be avoided.

Paragraph 22: On the basis of information presented in the record of the FTC's rulemaking proceeding on healthcare related prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as those terms are defined in the HIPAA Privacy Rule, the Commission seeks comment on whether it likewise should exempt such calls from the general prohibition on prerecorded message calls to residential lines under the TCPA. If so, it seeks comment on the Commission's authority to exempt these calls either under Section 227(b)(2)(B)(i) of the Federal Communications Act, regarding calls that are not made for a commercial purpose, or under Section 227(b)(2)(B)(ii) of the Federal Communications Act, regarding commercial calls that do not adversely affect the privacy rights of the called party and that do not transmit an unsolicited advertisement.

Comment: Exemptions should not be given to healthcare-related prerecorded *marketing*⁸ message calls.

⁸ The HIPAA Privacy Rule defines "marketing" as making "a communication about a product or service that encourages recipients of the communication to purchase or use the product or service" and "An arrangement between a covered entity and any other entity whereby the covered entity discloses protected health information to the other entity, in exchange for direct or indirect remuneration, for the other entity or its affiliate to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service." OCR HIPAA Privacy, *MARKETING*, 45 CFR 164.501, 164.508(a)(3).

Paragraph 30: The Commission also seeks comment as to whether it should revise its opt-out requirements to make them more consistent with the FTC's, and, if so, how to do so in a manner that is consistent with the "technical and procedural standards" provision of the TCPA.

Comment: MPSC believes that the Commission should revise its opt-out requirements to make them consistent with the FTC's.

Paragraph 33: In addition, the Commission seeks comments on whether it should revise the standard by which it measures the three percent call abandonment rate to include a "per campaign limitation" in order to eliminate any potential incentive for telemarketers to engage in such practices and to make the Commission's standard more consistent with the FTC's.

Additionally, the FCC notes that the FTC has clarified that the term "campaign" refers to "the offer of the same good or service for the same seller." If the Commission adopts a "per campaign limitation," as proposed, it seeks comment on whether it also should adopt the FTC's definition of the term "campaign."

Comment: The MPSC believes the Commission should revise its call abandonment rate standard to include a "per campaign limitation" and should adopt the FTC's definition of the term "campaign".

Paragraph 34: If the Commission adopts an express written consent requirement and/or an automated interactive opt-out mechanism, such as those adopted by the FTC, it seeks comments on whether it also should adopt similar implementation periods to ensure that companies have adequate time to prepare and comply.

If the Commission adopts these or similar requirements, it seeks comment on whether to allow sellers and telemarketers, as did the FTC, to continue placing prerecorded telemarketing calls to consumers with whom the seller has an established business relationship for the duration of the implementation period for the express written consent requirement.

Finally, it seeks comment on an appropriate implementation period for the proposed change to the Commission's call abandonment rules.

Comment: If the Commission adopts an express written consent requirement before permitting prerecorded telemarketing messages and/or an automated interactive opt-out mechanism, the MPSC believes that the Commission should adopt a similar implementation period as the FTC.⁹

Additionally, the MPSC does not object to permitting companies to place prerecorded telemarketing calls to consumers with whom the seller has an established business relationship for the duration of the implementation period for the express written consent requirement.

The MPSC further feels that an appropriate implementation period for the proposed change to the Commission's call abandonment rules would be somewhere between six to twelve months.

⁹ The FTC deferred the effective date of the requirement that prerecorded message calls provide an automated interactive opt-out mechanism for three months and deferred the express written agreement requirement for twelve months.

IV. CONCLUSION

The MPSC Staff supports harmonizing the FCC's TCPA with the FTC's TSR. The MPSC disagrees, however, with the provision that, for all calls, prior express consent to receive prerecorded telemarketing messages should be obtained in writing. Further, the MPSC disagrees with the exemption of prerecorded message calls made by, or on behalf of, a covered entity or its business associate, as these terms are defined by the HIPAA Privacy Rules.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION

By its attorneys:

/s/ Anne M. Uitvlugt _____
Steven D. Hughey (P32203)
Anne M. Uitvlugt (P71641)
Assistant Attorneys General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 241-6680

Dated: May 21, 2010