

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES**

Investigation by the Department of)
Public Utilities Into Initiatives to)
Promote and Protect Consumer Interests) **D.P.U. 19-07**
in the Retail Electric Competitive Supply)
Market)

**STRAW PROPOSAL BY CONSUMER ADVOCATE STAKEHOLDERS REGARDING
PROTOCOL FOR COMPETITIVE SUPPLIER OVERSIGHT OF THEIR THIRD-
PARTY MARKETING VENDORS**

On January 18, 2019, the Department of Public Utilities (the “Department”) issued an order opening an investigation into initiatives to promote and protect consumer interests in the retail electric competitive supply market (the “Order”). In its Order, the Department determined that it could potentially “improve the protections provided to residential customers” who participate in the competitive supply market by strengthening the market in three specific areas. On June 26, 2019, the Department held its first meeting of stakeholder working groups, where the Department discussed proposed stakeholder assignments. On July 2, 2019, the Hearing Officer issued a memorandum (“Memorandum”) confirming the stakeholder assignments and requesting straw proposals based on the assignments by July 26, 2019.¹ The consumer advocate stakeholders were asked to propose a “protocol for competitive supplier oversight of their third-party marketing vendors.” Memorandum, at 2. The consumer advocate stakeholders, specifically the Attorney General’s Office (“AGO”) and National Consumer Law Center (“NCLC”), hereby submit the straw proposal contained herein.

The consumer advocates continue to believe, as noted in the AGO’s and NCLC’s Initial Comments in this docket, that the most effective way to prevent further consumer harm is to end the individual residential electric supply market. However, absent legislative intervention, the consumer advocates fully support the Department’s efforts to mitigate the consumer harm in this market. The following straw proposal is not a comprehensive list of all reforms that the consumer advocate stakeholders may support or recommend. This proposal is submitted for discussion and consideration of the Department and participating stakeholders.

As an initial matter, the needs of the most vulnerable consumers should inform the development of rules for supplier oversight as well as other consumer protections considered in this docket. The consumer advocates continue to receive complaints from elderly consumers and their caretakers regarding manipulative supplier marketing practices. Also, consumers who suffer from dementia or who have other cognitive impairments are susceptible to being preyed upon by dishonest marketers. Similarly, consumers with limited English language proficiency are frequent targets of misleading and deceptive sales practices. Rules that are developed through this docket should be strong enough to shield these consumers from harm.

¹ The AGO requested, and the Hearing Officer granted, a two-day extension to July 30, 2019.

Increased transparency and accountability are necessary to improve supplier and third-party marketer compliance. Each supplier should demonstrate, as part of its licensure review, that it actively works to ensure that those who market on its behalf, including employees and third-party vendors, operate in compliance with the law. Each supplier should also demonstrate that it maintains the records and documentation necessary to hold offenders to account. To accomplish these goals, the consumer advocates propose that the Department adopt detailed rules and regulations regarding: (1) public licensing proceedings; (2) the transparency and availability of door-to-door marketing and telemarketing information; (3) the recording of door-to-door and telemarketing interactions; (4) the independence of third party verification calls; (5) audits of recordings and customer contracts; and (6) the retention of complaint information.

Public Licensing Proceedings

As the AGO proposed in its Initial Comments in this matter, the Department's review of a supplier's license application and any renewal requests should be publicly docketed. In addition to providing an opportunity for other parties to intervene in the licensing proceeding, docketing a license application and/or renewal allows for a public repository of information regarding the supplier and its activity in the Commonwealth and elsewhere.

The Department should require, at a minimum, that the following documents and/or materials are provided by each supplier as a requirement of licensure, so that the documents are posted on the public docket on the Department's website.

1. All third-party vendor and/or marketer contracts, including any and all sub-contractors who market on the supplier's behalf. The obligation to provide this information shall be on a rolling basis, but no later than (30) days following the effective date of the contract or the date the contract is fully executed, whichever is earlier.
2. Copies of the supplier's marketing materials (or the vendor's marketing materials, as applicable), including, but not limited to, mailings; online postings/offers; telemarketing scripts; door-to-door marketing scripts; pamphlets/handouts; contract summaries; contract documents; and welcome letters. The supplier should update the marketing materials on a rolling basis, as they become available, but no less than quarterly.
3. Copies of any training materials provided by the supplier or the supplier's third-party marketer to agents conducting marketing and sales campaigns.
4. Copies of the supplier's compliance policy, if applicable.
5. Correspondence informing the Department of any lawsuits (or lack thereof) brought by the supplier's employees or the employees of its third-party vendors; lawsuits brought by the supplier's customers or other consumers who were contacted by the supplier; and any federal or state lawsuits or investigations regarding the supplier, any of its third-party vendors, or any of its corporate officers. The supplier should be required to respond to any requests by the Department or the AGO for additional information concerning the lawsuits and investigations.

As with other parties who appear in front of the Department, any material that the supplier believes to be confidential should be submitted in redacted form and accompanied by a motion for confidential treatment. Moreover, the AGO should receive an unredacted copy of each document and correspondence submitted by the supplier to the Department. The legislature provided the Attorney General with enforcement authority over the consumer protection provisions of G.L. c. 164, § 1B through §1F. G.L. c. 164, § 102C(a). Accordingly, the AGO should have access to all documents and materials submitted in compliance with those statutory provisions and any regulations promulgated pursuant thereto.

Transparency and Availability of Door-to-Door Marketing and Telemarketing Information

The supplier's door-to-door marketing information, specifically the location of its campaigns and the contact information for the supplier and third-party vendor, should be made available on the Department's website so that municipal officials and other authorities have easy and quick access to this information. Before any door-to-door marketing campaign may begin, the supplier or its agent should provide a completed Notice of Door-to-Door Marketing to the Department in a form that the Department could easily publish on its website. If the Company or its agents fail to submit the Notice of Door-to-Door Marketing as required, or include false information in the notice, then the Department should impose financial penalties, including but not limited to licensure review, in addition to pursuing any other relief available under law. *See* G.L. c. 268, § 6.

The Department should also implement several changes to the current Notice of Door-to-Door Marketing, issued at D.P.U. 14-140-G. Specifically, the Department should amend the Notice to include the following additional information:

1. In part 3 ("Third Party Door-to-Door Vendor"), list at least three contact people for the Third Party Door-to-Door Vendor, instead of one contact person.
2. In part 5 ("Permits and licensing"), require that a copy of the municipal permit or license for the door-to-door marketing campaign be attached to the completed Notice of Door-to-Door Marketing.
3. In part 8, in addition to the City/Town Name, also provide the zip code of the area where the marketing campaign will be conducted.
4. In "Notice of Door-to-Door Marketing Filing Requirements," part A, add that the notice shall be emailed to a representative of the Office of the Attorney General in addition to the Director of the Department's Consumer Division.
5. In "Notice of Door-to-Door Marketing Filing Requirements," part B, change the amount of notice that must be provided from "5:00pm the day before the start of a door-to-door marketing campaign..." to "at least two business days before the start of a door-to-door marketing campaign..."

Recording of Door-to-Door and Telemarketing Interactions

Each interaction between a salesperson and a potential customer or a customer should be recorded, in a manner that complies with the requirements of federal and state law including the

Massachusetts wiretap law, G.L. c. 272, § 99. In-person (door-to-door) and over the phone (telemarketing) interactions should be recorded. Each potential customer or customer should be asked for permission to record the interaction; if the customer or potential customer refuses, the salesperson must end the conversation but may offer written marketing materials to the customer. The customer or potential customer must be at least eighteen years old, otherwise the salesperson must end the conversation and leave the premises.

As part of its application for a license to operate in Massachusetts, the Department could require the supplier to explain what type of recording equipment or technology will be used, and the Department could then choose whether to approve the use of that recording equipment or technology. The supplier should be required to maintain all recordings for a period of five years, and to identify each recording with the date, time and address or account number of the customer or potential customer. The supplier, its vendors and its agents must take all reasonable precautions to protect the confidentiality of customer or potential customer information in these recordings and in any related documents. Further, suppliers or their agents that fail to maintain recordings or provide them to the Department and AGO upon request should be licensure review and/or civil penalties as determined by the Department.

Independence of Third-Party Verification Calls

Current law defines the term “third party verification,” in part, as: “[A]n appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative who has obtained the customer's oral authorization to change to a new electricity service provider.” G.L. c. 164, § 1F(8)(a)(iii). All third-party verification calls, therefore, must be conducted by an independent vendor, who is operating in a physically separate location from the telemarketing representative, or the door-to-door marketing representative, if applicable.

The Department should promulgate regulations clarifying that the term “independent third party” means (1) a vendor whose compensation is not tied in any way to the success, or lack thereof, of customer enrollments or retentions and (2) a vendor who is not affiliated with the supplier or any third-party marketer who markets, or has marketed, on behalf of the supplier. Further, to ensure compliance with the statute and (proposed) regulation, the Department should require that each supplier submit, as a requirement of licensure, a copy of the vendor contract between the supplier and the independent vendor who will conduct the supplier’s third-party verification calls. The contract should be submitted to the Department on a rolling basis, but no later than (30) days following the effective date of the contract or the date the contract is fully executed, whichever is earlier. The supplier should also be required to conduct audits of its third-party verification calls to ensure the calls are (1) independent, as required by law and (proposed) regulation; and (2) strictly used for the stated purpose—to confirm the customer’s oral authorization to change to a new electricity service provider—and not used as an extension, in any way, of the sales and marketing campaigns. Finally, as recommended below, the supplier should be required to retain third-party verification call recordings for a period of five years.

Requirements to Audit Recordings and Contracts

In order to exercise closer oversight, each supplier should regularly audit recordings of phone calls and door-to-door recordings for sales conducted by its third-party marketers. Each supply company should also audit and review a representative sample of completed contracts to ensure compliance with applicable laws and to ensure that agents fully disclose the nature of the product they are selling.

If a supplier discovers that deceptive, misleading or false information was provided to a customer or prospective customer in a marketing phone call or a door-to-door interaction, or that the contract was not signed by the customer of record, the supplier should terminate its agreement with the vendor or agent, void and refund any residential energy sales contracts that originated as a result, and report the incidents to the Department and AGO within five business days.

Consumers continue to report unwanted competitive energy supply telemarketing calls, including calls from false or “spoofed” phone numbers. It is common for Massachusetts consumers to receive calls that appear to be from a distribution utility’s customer service phone number, but are actually spoofed calls by energy supply marketers. Suppliers should act as soon as possible to exercise stricter oversight of the practices of their vendors or sales agents who use telemarketing. All telemarketing and sales calls made by suppliers and their agents must be in compliance with all applicable state and federal laws, include the Massachusetts Telemarketing Solicitation law at G.L. c. 159C.

There are a number of steps that suppliers should take promptly to monitor the actions of telemarketing sales agents, including but not limited to the following:

1. Suppliers should verify with their agents that each sales call is placed from a phone number that accurately identifies either the supplier or the marketer as the entity placing the call.
2. If the supplier learns that any vendor or agent is using spoofed phone numbers which identify a party other than the supplier or vendor, the supplier must immediately terminate the business relationship with the vendor and report the spoofing incidents to the Department, AGO, and the Massachusetts Department of Telecommunications and Cable or other appropriate agency.
3. The supplier should also void and refund any residential energy sales contracts made as a result of spoofed phone calls or other deceptive phone calls made by the marketer.
4. If the supplier or any vendor or agent makes telemarketing calls to phone numbers that appear on the Massachusetts or federal “Do Not Call” lists, then the Company and its vendor shall immediately cease making these phone calls, void and refund any contracts made as a result of illegal phone calls, and report these phone calls to the Department, AGO and Massachusetts Department of Telecommunications and Cable or other appropriate agency.
5. Furthermore, in order to deter the particularly egregious practice of spoofing, the supplier on whose behalf spoofing occurs should be subjected to an automatic penalty.

Retention of Complaint Information

Suppliers should keep documentation related to customer complaints and inquiries for at least five years. For each complaint or inquiry, any third-party marketer who was involved in the transactions should be easily identified in the documentation.

In addition to any other reporting of complaint data, suppliers should provide a log summarizing all customer complaints and inquiries to the Department and the AGO on an annual basis. If requested by the Department or AGO, the supplier should also provide detailed information about complaints or inquiries. Additionally, municipal governments should be able to obtain documentation related to complaints within the city or town. If requested by a municipality, the supplier should provide all complaints from residents of the municipality to the requesting official for the time period specified by the municipality.

Finally, in addition to any consequences outlined *supra*, if a third-party vendor, including a subcontractor of third-party vendor, fails to comply with the (proposed) regulations, the supplier on whose behalf the vendor or subcontractor markets should be subject to penalties according to G.L. c. 164, § 1F(7).

Respectfully submitted,

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Dated: July 30, 2019