

The New York City Department of Consumer Affairs'
Response to SAPA Notice PSC-39-10-00019-P
Implementation of NY General Business Law § 349-d
Case 98-M-1343, Uniform Business Practices

Submitted to
Honorable Jaclyn A. Brillings, Secretary
New York State Public Service Commission

November 15, 2010

Introduction

The New York City Department of Consumer Affairs (DCA) files these comments in response to the Public Service Commission's (PSC) September 29, 2010 Notice of Rulemaking to implement the requirements of General Business Law (GBL) 349-d adopting a State energy service company ("ESCO") Consumer Bill of Rights. DCA's proposed modifications to the draft Bill of Rights and the revised Uniform Business Practices ("UBP") are necessary to ensure that consumers fully understand their rights before purchasing retail energy services from ESCOs and to prevent deceptive business practices by these companies.

DCA submits these comments against the backdrop of successfully petitioning the PSC in 2007, with the New York State Consumer Protection Board (CPB), to adopt and implement stringent marketing standards for ESCOs to protect consumers from predatory marketing practices. DCA acknowledges and applauds the significant steps taken by the PSC to address this need and the improvements that it made to the UBP as a result.¹ The changes we urge here will strengthen and further the PSC's important work in this area.²

Background on DCA

DCA is the largest municipal consumer protection agency in the country. Its mission is to empower consumers and businesses to ensure a fair and vibrant marketplace. The Department

¹ A copy of the DCA and CPB joint petition is available at http://www.nyc.gov/html/dca/downloads/pdf/ESCO_petition_122107.pdf. As outlined in its October 27, 2008 final Order Adopting Amendments to the Uniform Business Practices ("PSC Order"), PSC staff acted upon the 2007 Petition by conducting an informal survey of distribution utilities' experiences regarding ESCO marketing practices and the handling of customer complaints. The PSC identified areas of concern, including: (1) inadequate oversight provisions in the UBP related to ESCO marketing activity; (2) insufficient remedial options in the UBP; and (3) a general insufficiency of the residential consumer protections provided by the UBP. The PSC Order amended the UBP to address the staff concerns and those identified in the 2007 Petition. See PSC Order at pp. 3-24.

² State of New York, Uniform Business Practices, Sec. 10.

also helps residents protect their money by licensing and inspecting businesses, conducting extensive community outreach and large-scale education campaigns, mediating consumer complaints, bringing targeted enforcement actions and educating and empowering consumers through its Office of Financial Empowerment.

Licensing and inspecting businesses. DCA licenses over 71,000 businesses in 55 different industries and inspects thousands of businesses each year for compliance with the City's laws and regulations.

Conducting extensive community outreach. DCA educates consumers and businesses through press releases, press conferences, educational materials, tip sheets, consumer bills of rights, meetings with business associations and community groups, public hearings and large-scale public awareness campaigns.

Mediating consumer complaints. DCA mediates thousands of individual consumer complaints annually to address specific violations of licensing and consumer protection laws. DCA's receipt of complaints concerning deceptive marketing by ESCOs prompted it to file the ESCO petition.

Bringing targeted enforcement actions. DCA enforces the City's consumer protection and licensing laws and works with other city, state and federal law enforcement agencies to protect consumers from unfair and deceptive practices. The Department's aggressive enforcement actions against industries, including major wireless companies, tax preparers, electronics stores and secondhand car dealers, have ensured that consumers are protected from deceptive or misleading marketing practices and are provided with information to make meaningful market choices.³

Educating and empowering residents through DCA's Office of Financial Empowerment (OFE). OFE is the first local government initiative in the nation with a mission to *educate, empower, and protect* its residents with low incomes so they can build assets and make the most of their financial resources. OFE focuses on increasing access to high-quality, low-cost financial education and counseling so that consumers can use their money wisely. In particular, it provides the "gold standard" in financial education: free, professional, one-on-one financial counseling at more than 20 Financial Empowerment Centers across the City.

Protecting consumers through meaningful disclosures and consumer bills of rights. As a consistent and vocal proponent for meaningful disclosures across a range of industries, DCA implements and enforces local laws requiring clear and conspicuous disclosures to ensure consumers know their rights before making a purchase or entering a deal.⁴ For example, DCA recently promulgated rules requiring debt collectors to include in their communications a disclosure if the statute of limitations on collecting the debt has expired, as well as disclosures concerning the consequences to a consumer of paying a debt that is beyond the statute of limitations.⁵ Other licensees must similarly provide meaningful disclosures that protect consumers before they make a costly mistake. Thus, home improvement contractors licensed by DCA must provide written contracts with an itemized list of labor and materials, a schedule of payments linked to project milestones, and notices of cancellation that the consumer can

³ Chapter 64, §2203(a).

⁴ New York City Department of Consumer Affairs. Comments to Docket No. R-1286, Truth in Lending Submitted to the Board of Governors of the Federal Reserve System (July 18, 2008) (supporting proposed amendments that improve advertising requirements, fee disclosures and the disclosure of a right to opt out of credit changes).

⁵ Rules of the City of New York, Title 6, § 2-191(a).

execute.⁶ The Department's rules likewise impose strict requirements on Immigration Service Providers. Such entities are required to disclose, among other things, fee schedule and cancellation policies in English and the language(s) in which they are providing immigration services.⁷

Consumers using paid tax preparers in New York City also benefit from strong disclosure requirements. In fact, DCA developed the City's Consumer Bill of Rights Regarding Tax Preparers ("NYC Taxpayer Bill of Rights").⁸ This Bill of Rights entitles taxpayers to receive a statement describing the tax preparation service, with estimates of the service's total cost and the date when the refund will arrive, before becoming obligated to any tax preparer.⁹

Based upon this broad and varied experience of protecting New Yorkers' money by enforcing the City's consumer protection statute, educating consumers and businesses about their rights and responsibilities, helping New Yorkers save and make the most of their hard-earned dollars, empowering New York City residents to make wise choices in the marketplace through disclosures and consumer bills of rights and protecting consumers from the deceptive marketing by ESCOs, we respectfully submit the following recommendations to improve the PSC's draft ESCO Bill of Rights and UBP.

Recommendations

The new requirement of an ESCO Consumer Bill of Rights will help consumers understand their choices and rights in the residential energy marketplace. A clear and straightforward Bill of Rights will discourage ESCO marketers from misrepresenting the service they are offering to consumers. To be most effective, the Bill of Rights must be clear and easy to read, contain helpful content and be delivered to consumers at the time when it would be most useful to them. The following specific recommendations amplify these important points, and they must be addressed, as applicable, in the ESCO Consumer Bill of Rights and revised Uniform Business Practices.

I. Clear and Easy-to-Read Disclosures

The ESCO Bill of Rights will not be useful to consumers unless the information in it is clear and accessible.¹⁰ Accordingly, the Bill of Rights must employ plain language disclosures in a clear and easy-to-read format. It must make use of PSC branding in order to improve consumer confidence in the information provided. It must provide energy customers with the right to file complaints and be heard. And, in New York, it certainly must be presented in multiple languages.

Plain language. Consumers who are provided with information and contracts in plain language are in a much better position to make sound decisions concerning their energy choices. "Plain

⁶ Rules of the City of New York, Title 6, §2-221.

⁷ New York City Administrative Code, Title 20, §20-772.

⁸ NYC Taxpayer Bill of Rights, available at: <http://nyc.gov/html/dca/downloads/pdf/consumerbillofrights.pdf>.

⁹ New York City Administrative Code, Title 20, §20-740.1.

¹⁰ In a message to Congress in 1962, President John F. Kennedy clearly set forth the rationale for consumer bills of rights. President Kennedy said that the rights of consumers include the right to be informed and the right to be heard. See John F. Kennedy in a Special Message to the Congress on Protecting the Consumer Interest, March 15, 1962 (noting consumers have the right to be protected from "fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to ... the facts ... need[ed] to make an informed choice.").

language” is variously defined and described in statutes and regulations. The thrust of these definitions is explicitness and clarity.¹¹ For example, New York State’s General Obligations Law requires residential leases to be written in a clear and coherent manner using words with common meanings.¹²

New York City too has a plain language guide for clear and effective communication, which it says is “essential for City agencies to achieve their missions”, particularly because approximately 25 percent of adults in the City do not speak English well.¹³ The directives in this guide for writing in plain language are relatively simple: (1) include only important and directly relevant information, (2) use simple language, (3) keep sentences and paragraphs short, (4) make the writing personal and use the active voice.

Clear, easy-to-read format. The PSC can greatly enhance the effectiveness of the Bill of Rights by specifying specific formatting, font size and font styles for the Bill of Rights. Again, New York State’s General Obligations Law is instructive. It requires residential leases to be written in a clear and coherent manner *and appropriately divided and captioned by its various sections*.¹⁴

The draft ESCO Bill of Rights, however, fails to group the different rights under appropriate headings. It should include different topical headings to delineate clearly different types of rights. It should require the Bill of Rights to be presented in at least 12-point font, and it should require differentiation of font styles. For example, bold face fonts or larger fonts can help draw attention to the different themes or topical headings. These changes are particularly important for senior citizens.¹⁵ Finally, to clearly connect the consumer to the rights enumerated, each bullet or at least each subject-specific section should succinctly and directly begin, “You have the right to ...”¹⁶

PSC branding. A cornerstone of consumer protection is informed choice. Markets function well when information flows freely and meaningful consumer choices can be made based upon an actual understanding of the offer and its terms. An important way to ensure this outcome is to empower consumers with the tools necessary to obtain all important information, such as the source of information being presented to consumers. The Public Service Commission should clearly identify itself as the owner of the Bill of Rights and conspicuously show the PSC’s logo or seal at the top of this document. This will support fully informed choice and avoid any misimpression that the ESCO Bill of Rights is simply a part of the seller’s promotional material that should be ignored. In addition, the ESCO Bill of Rights should include clear references to the PSC’s website, which will not only lend the document additional credibility but will also refer consumers directly to helpful consumer information about the residential energy marketplace.

¹¹ See *Unfair and Deceptive Practices* Sec. 5.2.2 (National Consumer Law Center, 6th ed. 2007).

¹² N.Y. Gen. Oblig. Law Sec. 5-702 (Consol. 2008); see also Health Insurance Portability and Accountability Act of 1996, Final Privacy Preamble, 65 Fed. Reg. 82548 (Dec. 28, 2000)(HIPPA requirements satisfied if the entity “makes a reasonable effort to: organize materials to serve the needs of the reader; write short sentences in the active voice, using “you” and other pronouns; use common, everyday words in sentences and divide materials into short sections”)

¹³ See Easy to Read NYC, Guidelines for Clear and Effective Communication, www.nyc.gov/easytoread. The guide goes on to note that 15 percent of City residents did not complete high school.

¹⁴ N.Y. Gen. Oblig. Law Sec. 5-702 (Consol. 2008) (emphasis added).

¹⁵ See: <http://www.unc.edu/~jkullama/inls181/final/font.html>.

¹⁶ See, New Jersey Automobile Insurance Consumer Bill of Rights (http://www.state.nj.us/dobi/division_consumers/pdf/autorights090101.pdf) for an example of clear and direct statements of rights. See also www.plainlanguage.gov/whyPL/index.cfm.

Consumer complaints. The Bill of Rights must state clearly that consumers can lodge complaints with the PSC. The Bill of Rights should include the PSC's Consumer Services Division website address, mailing address and telephone number to help consumers file complaints. The Bill of Rights should clearly state that consumers have grounds to make such complaints for failure to provide or adhere to the Bill of Rights for the use of high pressure sales tactics or other deceptive practices and for any other situation that leads the consumer to be dissatisfied with the ESCO, including for minimizing or denigrating the rights set forth by the Bill of Rights.¹⁷

Languages. Because many ESCOs aggressively market energy services in multiple languages (through door-to-door sales and telemarketing to consumers whose primary language is not English), the PSC must prepare translations of the final language of the ESCO Bill of Rights into the most commonly used languages of consumers in New York.¹⁸ In the instance where the ESCO seller uses a language different from one of the most common languages, the new law is clear that the seller has the obligation to "provide any written materials, including contracts and the ESCO Consumers' Bill of Rights *in the same language utilized to solicit the prospective customer.*"¹⁹ Thus, the burden should be on the ESCO to accurately and in good faith provide written translations of the ESCO Bill of Rights for any customer it serves who speaks one of the less common languages.²⁰

II. Content

The law requires the PSC to "summarize the protections" in the ESCO Bill of Rights.²¹ All information that will have an impact on a consumer's decision making and that will inform him/her of the ESCO's obligations must therefore be included in the Bill of Rights. Complete and accurate disclosures are necessary to fully empower consumers in sales negotiations about energy services.²² In addition, the Bill of Rights should include a brief statement about the purpose of the Bill of Rights itself. According to the law, persons marketing or selling ESCOs also must "properly identify" themselves and the ESCO, explain that they "[do] not represent a distribution utility," and "explain the purpose of the solicitation."²³ If consumers know that ESCO sellers must "properly identify" themselves and the ESCO, then consumers can determine if

¹⁷ Several bills of rights on a variety of topics clearly articulate the consumer's ability to file complaints if his or her rights stemming from the Bill of Rights are curtailed or denigrated. See, e.g., various Texas Insurance Department bills of rights here: <http://www.tdi.state.tx.us/commish/rights.html> (stating "You have the right to be treated fairly and honestly when you make a claim"... "When you file a claim on your own policy, you have the right to have your claim processed and paid promptly"); see Nevada Public Utilities Commission Bill of Rights, available at: http://pucweb1.state.nv.us/PUCN/%28X%281%29S%28svipa445w3hprf454s3nwkbq%29%29/ConsumerInfo/dkt_01-3015/BillofRights.aspx (stating "If you believe a utility is denying you a right covered by the Bill of Rights, contact the Commission's Consumer Complaint Resolution Division...")

¹⁸ DCA, for example makes its NYC Taxpayer Bill of Rights, see supra note 8, available in seven languages other than English. See New York City Department of Consumer Affairs Publications, Consumer Publications, Tax Preparation, available at: http://www.nyc.gov/html/dca/html/publications/consumer_publications.shtml#tax.

¹⁹ GBL Sec. 349-d.2 (e) (emphasis added).

²⁰ DCA is quite familiar with the language needs of New Yorkers. As a licensing agency in a City in which over 170 languages are spoken, the Department has significant experience in communicating effectively with businesses and consumers who do not necessarily speak English. In New York State, this is, quite simply, a necessity.

²¹ GBL § 349-d.4

²² See NYC Taxpayer Bill of Rights, supra note 8. In addition to the identity and credentials of the tax preparer, the Bill of Rights informs consumers they have the right to know how all fees are calculated. And it includes a clear description of the difference between a refund and a refund anticipation loan, which is important descriptive information. In this context, the ESCO Bill of Rights can clear up a great deal of consumer confusion simply by explaining the difference between public utilities and ESCOs.

²³ Id.

they are working with a legitimate energy provider.²⁴ These important additional disclosures, omitted from the current draft, must be included in the ESCO Bill of Rights.²⁵

III. Timing

The purpose of requiring a consumer Bill of Rights is to ensure that consumers know their rights and the ESCOs legal obligations *while* they are being marketed by energy services and well before they commit to an ESCO's service contract. Nonetheless, at the PSC's "Technical Conference" in New York City on October 6, 2010 and in SAPA submissions, industry representatives urged the PSC to only require ESCOs to give consumers the Bill of Rights at the point that the contract is being entered.²⁶ Such timing would subvert the purpose of the Bill of Rights. DCA urges the PSC to modify the UBP to require that ESCOs provide the Bill of Rights to prospective customers at the time when it would be most useful to them. This will depend on the manner in which the ESCO actually markets and sells its services.

Door-to-door sales. DCA urges the PSC to require ESCOs to provide a prospective customer with the Bill of Rights in advance of any sales presentation, not right before the contract is signed when an ESCO seller already might have cajoled a prospective customer to agree to service. New York City's law regarding tax preparers is instructive on this point. It requires each tax preparer to "give to each consumer, free of charge, a current, legible copy of the consumer Bill of Rights regarding tax preparers *prior to any discussion with the consumer.*"²⁷ The PSC should adopt a similar approach, requiring immediate provision of the Bill of Rights by persons selling ESCO services door-to-door. The nature of door-to-door sales and the tendency for pressure sales in this context warrant this type of protection.²⁸ In addition, many of the rights identified in the Bill of Rights are only effective if received prior to the consummation of the sale, like the statement that prospective customers do not need to choose the alternative energy supplier.

Phone sales. For sales initiated or completed by telephone, the ESCO representative should be required, after identifying himself or herself and briefly stating the purpose of the call, to alert the prospective customer about the Bill of Rights, summarizing its contents and advising the

²⁴ For example, in New York City, DCA requires the licensing of many businesses, such as auto dealers and home improvement contractors. This information can be requested by consumers and residents can check on the license status of our licensees by calling the City at 311.

²⁵ See, e.g., NYC Taxpayer Bill of Rights, available at:

<http://www.nyc.gov/html/dca/downloads/pdf/consumerbillofrights.pdf>, which informs consumers that they have the right to know the individual tax preparer's qualifications. DCA has found that this is important information to include in the Bill of Rights because it gives customers of paid tax preparers the certainty that they can trust the paid preparer with sensitive personal and tax information. Similarly, in the context of ESCOs, the Bill of Rights should inform consumers that they must be provided with the identity of the seller and the ESCO, so they will know they have the right to ask for identifying information before turning over sensitive personal information, such as social security numbers.

²⁶ Information about the technical conference is available on the New York Department of Public Service site, here: <http://www3.dps.state.ny.us/W/PSCWeb.nsf/All/8DD2B96E91D7447E85257687006F3922?OpenDocument>.

See [SAPA submission by the Small Customer Marketer Coalition](#), available at:

<http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRefId={1CD29EF1-7DAF-41AB-AE67-5BE2D2796478}> (urging that the Bill of Rights need only be given prior to entry of a contract or at acceptance of services).

²⁷ Id. (emphasis added).

²⁸ See generally, Comments of the National Consumer Law Center, Consumers for Auto Reliability and Safety, Consumer Federation of America and Consumers Union regarding Cooling-Off Rule Regulatory Review, available at: <http://s96153.gridserver.com/elements/www.consumerfed.org/file/NCLC%20Cooling%20Off%20Comments%209-25-09%281%29.pdf> (September 25, 2009), p. 3 (noting the continued need for strong door-to-door sales rules, using as evidence the abuses of construction contractors in the aftermath of Hurricane Katrina through door-to-door sales).

prospective customer that he or she can access the Bill of Rights online or request it by mail.²⁹ In addition, the ESCO representative must inform prospective customers of their right to end the conversation if they so desire. As with the written Bill of Rights, the disclosure must be direct and in plain language.³⁰ The PSC should require ESCOs to include the actual written ESCO Bill of Rights in any written correspondence about the services offered, including after a phone call, even if the prospective customer acknowledged an understanding of his or her right to review the Bill of Rights online or declined an offer by the ESCO to send the Bill of Rights by mail.

Online sales. For internet sales, the UBP should require the ESCO Bill of Rights to be presented as a non-avoidable screen, *prior* to any enrollment or decision to “proceed to checkout” for ESCO services. That is, the ESCO Bill of Rights should be presented sooner than so many software licensing agreements, which often are presented only after the decision has been made to purchase or download the software covered by the license. Rather, the ESCO Bill of Rights should form a part of the prospective customer’s considerations in deciding whether or not to use the ESCO’s services. In addition, as the PSC certainly knows, unscrupulous businesses may attempt to avoid disclosure requirements by obscuring and burying information, which makes it important for the screen to present information clearly and conspicuously.³¹

The right of rescission under the UPB is not a substitute for providing a consumer with a Bill of Rights prior to the signing of a contract. Industry representatives at the Technical Conference suggested to the PSC that it is unnecessary for ESCOs to give a potential customer the Bill of Rights before the consumer executes a contract because the consumer can enforce his or her rights by rescinding the contract. The right to rescind is a critical right for consumers. Nonetheless, it is a remedy of last resort, not one that is a substitute for providing consumers with information that will help them decide whether to enter a contract at all. A Bill of Rights is a prophylactic measure. Just as a doctor would not tell a patient to have surgery instead of

²⁹ In summarizing the ESCO Bill of Rights over the phone, the ESCO representative must address the customer directly and in the second person (i.e., in terms of “you” rather than “one” or “prospective customers” or some other way of referring to the individuals protected by the Bill of Rights). The PSC should provide ESCO representatives with a script for callers to follow. An abbreviated example script goes as follows: “Before I tell you about the services _____ can provide, I am required by New York State law to tell you several things. My name is _____, and I am a representative of _____. I am calling today to offer you alternative energy services to those you may be purchasing from your public utility, but you should know that you have rights. I will summarize these rights for you, and you may access the full Bill of Rights at _____ or by asking me at any time to send the Bill of Rights to you by mail. You do not need to purchase energy services from _____ today or at any time. You are entitled to purchase your energy service from your public utility, such as Con Edison, or from any energy service company, like _____. [PSC to provide summary of remainder of Bill of Rights.]”

³⁰ See, e.g., DCA Rule Regarding Debt Collection Agencies, available at: http://www.nyc.gov/html/dca/downloads/pdf/debt_collection_agency_law_rules.pdf. Among other things, the rule requires debt collectors to disclose clearly even technical information, like the statute of limitations: “WE ARE REQUIRED BY LAW TO GIVE YOU THE FOLLOWING INFORMATION ABOUT THIS DEBT. The legal time limit (statute of limitations) for suing you to collect this debt has expired. However, if somebody sues you anyway to try to make you pay this debt, court rules REQUIRE YOU to tell the court that the statute of limitations has expired to prevent the creditor from obtaining a judgment. Even though the statute of limitations has expired, you may CHOOSE to make payments. However, BE AWARE: if you make a payment, the creditor’s right to sue you to make you pay the entire debt may START AGAIN.” Id. at §2-191.

³¹ See, e.g., FTC Dot Com Disclosures <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf> (last visited Nov. 10, 2010). See also Rules of the City of New York §5-06; Mayor’s Office of Adult Education and Mayor’s Office of Immigrant Affairs, “Easy-to-Read NYC, Guidelines for Clear and Effective Communication,” <http://www.nyc.gov/html/oath/pdf/Easy-to-Read%20NYC.pdf> (last visited Feb. 23, 2010). In addition, plain language and appropriate formatting and structure may be even more important for the web-based context than paper format. See http://www.plainlanguage.gov/whyPL/web_writing/index.cfm (noting the importance of plain language and helpful formatting because “people scan when they read documents online [and] need structure to help find the content they want so they can use it and appreciate the experience”).

getting a vaccine, ESCOs should not be permitted to rely on rescission in lieu of timely provision of the Bill of Rights. Further, many consumers will not rescind contracts due to perceived difficulty in doing so or because the period of time for rescission has lapsed. And, in some instances, consumers may be defrauded out of the right to rescind.³²

Dissemination of the Bill of Rights. Widespread circulation of the Bill of Rights will increase consumer understanding of the energy market and create a level playing field among reputable ESCOs. New York City's local law governing tax preparers is again instructive. The Law not only requires the Department to annually update the Bill of Rights, but to "publicize the availability" of it.³³ We recommend the PSC to engage in similar outreach and educational efforts.

Conclusion

The Department urges the PSC to adopt the proposed modifications to the Bill of Rights and UBP to help consumers make informed choices in the energy marketplace and to protect them from deceptive practices.

Respectfully submitted,



Jonathan Mintz
Commissioner
New York City Department of Consumer Affairs

³² See text and accompanying footnote 33:
<http://s96153.gridserver.com/elements/www.consumerfed.org/file/NCLC%20Cooling%20Off%20Comments%209-25-09%281%29.pdf> (recalling that less than a year after the passage of the California Car Buyers Bill of Rights which was meant, in part, to secure the right of consumers to rescission, most auto dealers found a way to undermine it, "rendering the so-called "right" meaningless").

³³ New York City Administrative Code, Title 20, §20-740.1 (b).