

726

2011-2012 Regular Sessions

I N   S E N A T E

(PREFILED)

January 5, 2011

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Introduced by Sen. ROBACH -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, the public service law and the state finance law, in relation to allowing individuals to register their telefacsimile telephone numbers with the consumer protection board as part of the "do not call" statewide registry

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     Section 1. Section 399-z of the general business law, as amended by  
2     chapter 344 of the laws of 2010, is amended to read as follows:  
3     S 399-z. Telemarketing; establishment of no telemarketing sales calls  
4     statewide registry; authorization of the transfer of telephone numbers  
5     on the no telemarketing sales calls AND TELEFACSIMILE ADVERTISING state-  
6     wide registry to the national "do-not-call" registry. 1. As used in this  
7     section, the following terms shall have the following meanings:  
8     a. "Board" shall mean the consumer protection board;  
9     b. "Director" means the executive director of the consumer protection  
10    board;  
11    c. "Customer" means any natural person who is a resident of this state  
12    and who is or may be required to pay for or to exchange consideration  
13    for goods and services offered through telemarketing;  
14    d. "Doing business in this state" means conducting telephonic sales  
15    calls: (i) from a location in this state; or (ii) from a location  
16    outside of this state to consumers residing in this state;  
17    e. "Goods and services" means any goods and services, and shall  
18    include any real property or any tangible personal property or services  
19    of any kind;  
20    f. "Negative option feature" means, in an offer or agreement to sell  
21    or provide any goods or services, a provision under which the customer's  
22    silence or failure to take an affirmative action to reject such goods or

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD01934-01-1

1 services or to cancel the agreement is interpreted by the seller as  
2 acceptance of the offer.

3 g. "Person" means any natural person, association, partnership, firm,  
4 corporation and its affiliates or subsidiaries or other business entity;

5 h. "Telemarketer" means any person who, for financial profit or  
6 commercial purposes in connection with telemarketing, makes telemarket-  
7 ing sales calls to a customer when the customer is in this state or any  
8 person who directly controls or supervises the conduct of a telemarket-  
9 er. For the purposes of this section, "commercial purposes" shall mean  
10 the sale or offer for sale of goods or services;

11 i. "Telemarketing" means any plan, program or campaign which is  
12 conducted to induce payment or the exchange of any other consideration  
13 for any goods or services by use of one or more telephones and which  
14 involves more than one telephone call by a telemarketer in which the  
15 customer is located within the state at the time of the call. Telemar-  
16 keting does not include the solicitation of sales through media other  
17 than by telephone calls;

18 j. "Telemarketing sales call" means a telephone call made by a tele-  
19 marketer or by any outbound telephone calling technology that delivers a  
20 prerecorded message either to a customer or to their voicemail or  
21 answering machine service for the purpose of inducing payment or the  
22 exchange of any other consideration for any goods or services;

23 k. "Unsolicited telemarketing sales call" means any telemarketing  
24 sales call other than a call made:

25 (i) in response to an express written or verbal request of the custom-  
26 er called; or

27 (ii) in connection with an established business relationship, which  
28 has not been terminated by either party, unless such customer has stated  
29 to the telemarketer that such customer no longer wishes to receive the  
30 telemarketing sales calls of such telemarketer.

31 L. "UNSOLICITED TELEFACSIMILE ADVERTISEMENT" MEANS ANY TELEFACSIMILE  
32 MESSAGE THAT PROMOTES GOODS AND SERVICES FOR PURCHASE BY THE RECIPIENT  
33 OF SUCH MESSAGE, EXCEPT WHERE THE MESSAGE IS SENT TO A RECIPIENT WITH  
34 WHICH THE INITIATOR HAS HAD A PREEXISTING BUSINESS OR CONTRACTUAL  
35 RELATIONSHIP;

36 M. "TELEFACSIMILE" MEANS EVERY PROCESS IN WHICH ELECTRONIC SIGNALS ARE  
37 TRANSMITTED BY TELEPHONE LINES FOR CONVERSION INTO WRITTEN TEXT;

38 N. "TELEFACSIMILE ADVERTISER" MEANS ANY PERSON, CORPORATION, PARTNER-  
39 SHIP OR ASSOCIATION WHO INITIATES UNSOLICITED TELEFACSIMILE ADVERTISE-  
40 MENTS.

41 2. No telemarketer or seller shall engage in telemarketing at any time  
42 other than between 8:00 A.M. and 9:00 P.M. local time unless the consum-  
43 er has given his or her express consent to the call at a different time,  
44 and shall provide, in a clear and coherent manner using words with  
45 common and everyday meanings, at the beginning of each telemarketing  
46 sales call all of the following information:

47 (i) the telemarketer's name and the person on whose behalf the solici-  
48 tation is being made, if other than the telemarketer;

49 (ii) the purpose of the telephone call; and

50 (iii) the identity of the goods or services for which a fee will be  
51 charged.

52 3. Prior to the purchase of any good or service telemarketers shall  
53 disclose to the customer the cost of the goods or services that are the  
54 subject of the call and if the offer includes a negative option feature,  
55 all material terms and conditions of the negative option feature,  
56 including, but not limited to the fact that the customer's account will

1 be charged unless the customer takes an affirmative action to avoid the  
2 charges, the dates the charges will be submitted for payment, and the  
3 specific steps the customer must take to avoid the charge.

4 4. a. The board is authorized to establish, manage, and maintain a no  
5 telemarketing sales calls AND TELEFACSIMILE ADVERTISING statewide regis-  
6 try which shall contain a list of customers who do not wish to receive  
7 unsolicited telemarketing sales calls. The board may contract with a  
8 private vendor to establish, manage and maintain such registry, provided  
9 the private vendor has maintained national no telemarketing sales calls  
10 registries for more than two years, and the contract requires the vendor  
11 to provide the no telemarketing sales calls AND TELEFACSIMILE ADVERTIS-  
12 ING registry in a printed hard copy format and in any other format as  
13 prescribed by the board. ANY TYPE OF COPY FORMAT MAINTAINED FOR TELE-  
14 MARKETING SALES CALLS SHALL BE MAINTAINED FOR TELEFACSIMILE ADVERTISING.

15 b. The board is authorized to have the national "do-not-call" registry  
16 established, managed and maintained by the federal trade commission  
17 pursuant to 16 C.F.R. Section 310.4 (b) (1) (iii) (B) serve as the New  
18 York state no telemarketing sales calls AND TELEFACSIMILE ADVERTISING  
19 statewide registry provided for by this section. The board is further  
20 authorized to take whatever administrative actions may be necessary or  
21 appropriate for such transition including, but not limited to, providing  
22 the telephone numbers of New York customers registered on the no tele-  
23 marketing sales calls AND TELEFACSIMILE ADVERTISING statewide registry  
24 to the federal trade commission, for inclusion on the national "do-not-  
25 call" registry.

26 5. A. No telemarketer or seller may make or cause to be made any unso-  
27 licited telemarketing sales call to any customer when that customer's  
28 telephone number has been on the national "do-not-call" registry, estab-  
29 lished by the federal trade commission, for a period of thirty-one days  
30 prior to the date the call is made, pursuant to 16 CFR Section  
31 310.4(b)(1)(iii)(B).

32 B. NO TELEFACSIMILE ADVERTISER MAY MAKE OR CAUSE TO BE MADE ANY UNSO-  
33 LICITED TELEFACSIMILE ADVERTISEMENT TO ANY CUSTOMER MORE THAN THIRTY  
34 DAYS AFTER THE CUSTOMER'S NAME AND TELEPHONE NUMBER OR NUMBERS APPEAR ON  
35 THE THEN CURRENT QUARTERLY NO TELEMARKETING SALES CALLS AND TELEFACSIM-  
36 ILE ADVERTISING REGISTRY MADE AVAILABLE BY THE BOARD PURSUANT TO SUBDI-  
37 VISION TWO OF THIS SECTION.

38 6. a. The board shall provide notice to customers of the establishment  
39 of the national "do-not-call" registry. Any customer who wishes to be  
40 included on such registry shall notify the federal trade commission as  
41 directed by relevant federal regulations.

42 b. Any company that provides local telephone directories to customers  
43 in this state shall inform its customers of the provisions of this  
44 section by means of publishing a notice in such local telephone directo-  
45 ries.

46 C. ANY COMPANY IN THIS STATE THAT SELLS EQUIPMENT CAPABLE OF TRANSMIT-  
47 TING A TELEFACSIMILE SHALL INFORM ITS CUSTOMERS OF THE PROVISIONS OF  
48 THIS SECTION BY MEANS OF POSTING A NOTICE ISSUED BY THE BOARD.

49 7. When the board has reason to believe a telemarketer has engaged in  
50 repeated unlawful acts in violation of this section, or when a notice of  
51 hearing has been issued pursuant to subdivision eight of this section,  
52 the board may request in writing the production of relevant documents  
53 and records as part of its investigation. If the person upon whom such  
54 request was made fails to produce the documents or records within thirty  
55 days after the date of the request, the board may issue and serve  
56 subpoenas to compel the production of such documents and records. If any

1 person shall refuse to comply with a subpoena issued under this section,  
2 the board may petition a court of competent jurisdiction to enforce the  
3 subpoena and such sanctions as the court may direct.

4 8. a. Where it is determined after hearing that any person has  
5 violated one or more provisions of this section, the director, or any  
6 person deputized or so designated by him or her may assess a fine not to  
7 exceed eleven thousand dollars for each violation.

8 b. Any proceeding conducted pursuant to paragraph a of this subdivi-  
9 sion shall be subject to the state administrative procedure act.

10 c. Nothing in this subdivision shall be construed to restrict any  
11 right which any person may have under any other statute or at common  
12 law.

13 9. A person shall not be held liable for violating this section if:

14 a. the person has obtained a version of the "do-not-call" registry  
15 from the federal trade commission no more than thirty-one days prior to  
16 the date any telemarketing call OR UNSOLICITED TELEFACSIMILE ADVERTISE-  
17 MENT is made, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and has  
18 established, implemented and updated written policies and procedures  
19 related to the requirements of this section prior to the date any tele-  
20 marketing call is made;

21 b. the person has trained his or her personnel in the requirements of  
22 this section; and

23 c. the person maintains records demonstrating compliance with para-  
24 graphs a and b of this subdivision and the requirements of this section.

25 10. The board shall prescribe rules and regulations to administer this  
26 section.

27 S 2. Section 92-d of the public service law, as amended by chapter 546  
28 of the laws of 2000, the opening paragraph as separately amended by  
29 chapter 547 of the laws of 2000, is amended to read as follows:

30 S 92-d. Telephone solicitations. Each local exchange telephone company  
31 shall inform its customers of the provisions of sections three hundred  
32 ninety-nine-p [and], three hundred ninety-nine-z and three hundred  
33 ninety-nine-pp of the general business law and article ten-B of the  
34 personal property law, as such provisions relate to the rights of  
35 consumers with respect to telemarketers, sellers, the no telemarketing  
36 sales [call] CALLS AND TELEFACSIMILE ADVERTISING statewide registry, and  
37 automatic dialing-announcing devices, by means of:

38 1. Inserting a notice annually in the customers' billing statements;  
39 and

40 2. Publishing a notice in local telephone directories.

41 S 3. Section 97-www of the state finance law, as added by chapter 547  
42 of the laws of 2000, is amended to read as follows:

43 S 97-www. [1.] Consumer protection account. 1. There is hereby estab-  
44 lished in the joint custody of the state comptroller and the commission-  
45 er of taxation and finance an account within the miscellaneous special  
46 revenue fund to be known as the "consumer protection account."

47 2. Such account shall consist of all fees and penalties received by  
48 the state consumer protection board pursuant to article ten-B of the  
49 personal property law[, AND section three hundred ninety-nine-z of the  
50 general business law, and any additional monies appropriated, credited  
51 or transferred to such account by the [Legislature] LEGISLATURE. Any  
52 interest earned by the investment of monies in such account shall be  
53 added to such account, become part of such account, and be used for the  
54 purposes of such account.

55 3. Monies in the account shall be available to the state consumer  
56 protection board for the payment of costs of producing and distributing

1 educational materials and conducting educational activities relating to  
2 the promotion of the "[unsolicited] NO telemarketing sales [call] CALLS  
3 AND TELEFACSIMILE ADVERTISING STATEWIDE registry" and all related costs  
4 and expenditures incurred in the administration of section three hundred  
5 ninety-nine-z of the general business law and article ten-B of the  
6 personal property law.

7 4. Monies [in the account] shall be paid out of the account on the  
8 audit and warrant of the state comptroller on vouchers certified or  
9 approved by the EXECUTIVE DIRECTOR OF THE state consumer protection  
10 board or [any officer or employee designated by the executive director]  
11 BY HIS OR HER DULY DESIGNATED REPRESENTATIVE, IN THE MANNER PRESCRIBED  
12 BY LAW.

13 S 4. Separability clause; construction. If any part or provision of  
14 this act or the application thereof to any person or circumstances be  
15 adjudged invalid by any court of competent jurisdiction, such judgment  
16 shall be confined in its operation to the part, provision or application  
17 directly involved in the controversy in which such judgment shall have  
18 been rendered and shall not affect or impair the validity of the remain-  
19 der of this act or the application thereof to other persons or circum-  
20 stances.

21 S 5. This act shall take effect on the one hundred eightieth day after  
22 it shall have become a law, provided, however, that effective immediate-  
23 ly, the addition, amendment and/or repeal of any rules or regulations  
24 necessary for the implementation of section one of this act on its  
25 effective date is authorized and directed to be made and completed on or  
26 before such effective date.