

STATE OF NEW YORK

3539

2021-2022 Regular Sessions

IN ASSEMBLY

January 27, 2021

Introduced by M. of A. CYMBROWITZ, COLTON, DINOWITZ, GALEF, GUNTHER --
read once and referred to the Committee on Consumer Affairs and
Protection

AN ACT to amend the general business law and the public service law, in
relation to allowing individuals to register their telefacsimile tele-
phone 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 Assem-
bly, do enact as follows:

1 Section 1. Section 399-z of the general business law, as amended by
2 chapter 369 of the laws of 2012, paragraph k of subdivision 1 as amended
3 and paragraphs l and m of subdivision 1 as added by chapter 484 of the
4 laws of 2016, subdivision 2 as amended by chapter 239 of the laws of
5 2017, subdivision 2-a as amended by chapter 18 of the laws of 2017,
6 subdivision 5-a as added by chapter 680 of the laws of 2019, subdivision
7 10 as added and subdivisions 9, 11, 12, 13, 14, 15, 16, and 17 as
8 amended by chapter 572 of the laws of 2019, is amended to read as
9 follows:

10 § 399-z. Telemarketing; establishment of no telemarketing sales calls
11 statewide registry; authorization of the transfer of telephone numbers
12 on the no telemarketing sales calls and telefacsimile advertising state-
13 wide registry to the national "do-not-call" registry. 1. As used in this
14 section, the following terms shall have the following meanings:

15 a. "Department" shall mean the department of state.

16 b. "Secretary" shall mean the secretary of state.

17 c. "Customer" means any natural person who is a resident of this state
18 and who is or may be required to pay for or to exchange consideration
19 for goods and services offered through telemarketing;

20 d. "Doing business in this state" means conducting telephonic sales
21 calls: (i) from a location in this state; or (ii) from a location
22 outside of this state to consumers residing in this state;

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

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1 e. "Goods and services" means any goods and services, and shall
2 include any real property or any tangible personal property or services
3 of any kind;

4 f. "Negative option feature" means, in an offer or agreement to sell
5 or provide any goods or services, a provision under which the customer's
6 silence or failure to take an affirmative action to reject such goods or
7 services or to cancel the agreement is interpreted by the seller as
8 acceptance of the offer.

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

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

17 i. "Telemarketing" means any plan, program or campaign that is
18 conducted to induce payment or the exchange of any other consideration
19 for any goods or services that involves more than one telephone call by
20 a telemarketer in which the customer is located within the state at the
21 time of the call. Telemarketing does not include the solicitation of
22 sales through media other than by telephone calls and does not include
23 calls intended to implement or complete a transaction to which the
24 customer has previously consented;

25 j. "Telemarketing sales call" means a telephone call made by a tele-
26 marketer or by any outbound telephone calling technology that delivers a
27 prerecorded message to a customer or to a customer's voicemail or
28 answering machine service for the purpose of inducing payment or the
29 exchange of any other consideration for any goods or services;

30 k. "Unsolicited telemarketing sales call" means any telemarketing
31 sales call other than a call made:

32 (i) in response to an express written or verbal request by the custom-
33 er; or

34 (ii) in connection with an established business relationship, which
35 has not been terminated by either party, unless such customer has stated
36 to the telemarketer that such customer no longer wishes to receive the
37 telemarketing sales calls of such telemarketer;

38 l. "Caller identification information" means information provided by a
39 caller identification service regarding the telephone number and name of
40 the person calling; ~~and~~

41 m. "Caller identification service" means a service that allows a tele-
42 phone subscriber to have the telephone number, and, where available,
43 name of the calling party transmitted contemporaneously with the tele-
44 phone call, and displayed on a device in or connected to the subscrib-
45 er's telephone[-];

46 n. "Unsolicited telefacsimile advertisement" means any telefacsimile
47 message that promotes goods and services for purchase by the recipient
48 of such message, except where the message is sent to a recipient with
49 which the initiator has had a preexisting business or contractual
50 relationship;

51 o. "Telefacsimile" means every process in which electronic signals are
52 transmitted by telephone lines for conversion into written text; and

53 p. "Telefacsimile advertiser" means any person, corporation, partner-
54 ship or association who initiates unsolicited telefacsimile advertise-
55 ments.

1 2. No telemarketer or seller shall engage in telemarketing at any time
2 other than between 8:00 A.M. and 9:00 P.M. at the location of the
3 customer unless the customer has given his or her express consent to the
4 call at a different time. Telemarketers shall provide, in a clear and
5 coherent manner using words with common and everyday meanings, at the
6 beginning of each telemarketing sales call all of the following informa-
7 tion:

8 a. the telemarketer's name and the person on whose behalf the solici-
9 tation is being made, if other than the telemarketer;

10 b. the purpose of the telephone call;

11 c. the identity of the goods or services for which a fee will be
12 charged; and

13 d. whether the call is being recorded.

14 2-a. It shall be unlawful for any telemarketer or seller to knowingly
15 cause any caller identification service to transmit misleading, inaccur-
16 rate, or false caller identification information, provided that it shall
17 not be a violation to substitute (for the name and phone number used in,
18 or billed for, making the call) the name or telephone number of the
19 person or seller on behalf of which a telemarketing call is placed.

20 3. Prior to the purchase of any good or service, telemarketers shall
21 disclose to the customer the cost of the goods or services that are the
22 subject of the call and if the offer includes a negative option feature,
23 all material terms and conditions of the negative option feature,
24 including, but not limited to the fact that the customer's account will
25 be charged unless the customer takes an affirmative action to avoid the
26 charges, the dates the charges will be submitted for payment, and the
27 specific steps the customer must take to avoid the charge.

28 4. a. The department is authorized to establish, manage, and maintain
29 a no telemarketing sales calls and telefacsimile advertising statewide
30 registry which shall contain a list of customers who do not wish to
31 receive unsolicited telemarketing sales calls or telefacsimile advertis-
32 ing. The department may contract with a private vendor to establish,
33 manage and maintain such registry, provided the private vendor has main-
34 tained national no telemarketing sales calls or telefacsimile advertis-
35 ing registries for more than two years, and the contract requires the
36 vendor to provide the no telemarketing sales calls and telefacsimile
37 advertising registry in a printed hard copy format and in any other
38 format as prescribed by the department. Any type of copy format main-
39 tained for telemarketing sales calls shall be maintained for telefacsim-
40 ile advertising.

41 b. The department is authorized to have the national "do-not-call"
42 registry established, managed and maintained by the federal trade
43 commission pursuant to 16 C.F.R. Section 310.4 (b) (1) (iii) (B) serve
44 as the New York state no telemarketing sales calls and telefacsimile
45 advertising statewide registry provided for by this section. The depart-
46 ment is further authorized to take whatever administrative actions may
47 be necessary or appropriate for such transition including, but not
48 limited to, providing the telephone numbers of New York customers regis-
49 tered on the no telemarketing sales calls and telefacsimile advertising
50 statewide registry to the federal trade commission, for inclusion on the
51 national "do-not-call" registry.

52 5. a. No telemarketer or seller may make or cause to be made any unso-
53 licited telemarketing sales call to any customer when that customer's
54 telephone number has been on the national "do-not-call" registry, estab-
55 lished by the federal trade commission, for a period of thirty-one days

1 prior to the date the call is made, pursuant to 16 C.F.R. Section
2 310.4(b)(1)(iii)(B).

3 b. No telefacsimile advertiser may make or cause to be made any unso-
4 lited telefacsimile advertisement to any customer more than thirty
5 days after the customer's name and telephone number or numbers appear on
6 the then current quarterly no telemarketing sales calls and telefacsim-
7 ile advertising registry made available by the board pursuant to subdi-
8 vision four of this section.

9 5-a. It shall be unlawful for any telemarketer doing business in this
10 state to knowingly make an unsolicited telemarketing sales call to any
11 person in a county, city, town or village under a declared state of
12 emergency or disaster emergency as described in sections twenty-four or
13 twenty-eight of the executive law.

14 6. No telemarketer or seller shall initiate any telemarketing sales
15 call by means of a technology that delivers a pre-recorded message,
16 unless the telemarketer or seller has obtained from the customer an
17 express agreement, in writing that:

18 a. the telemarketer or seller obtained only after a clear and conspic-
19 uous disclosure that the purpose of the agreement is to authorize the
20 seller to make telemarketing sales calls to such customer;

21 b. the telemarketer or seller obtained without requiring, directly or
22 indirectly, that the agreement be executed as a condition of purchasing
23 any good or service;

24 c. evidences the willingness of the customer to receive telemarketing
25 sales calls by or made on behalf of a specific seller; and,

26 d. includes such customer's telephone number and signature.

27 7. In the case of any telemarketing sales call delivered by means of a
28 technology that delivers a pre-recorded message that could be received
29 by a customer who can use an automated interactive voice and/or keypress
30 activated opt-out mechanism to assert a do-not-call request, such call
31 shall include a mechanism that allows the customer to automatically add
32 the number called to the seller's entity specific do-not-call list, and
33 which mechanism, once invoked, immediately ends the call.

34 8. In the case of any telemarketing sales call delivered by means of a
35 technology that delivers a pre-recorded message that could be answered
36 by an answering machine or voicemail service, that the call include a
37 toll-free number that must connect the customer directly to an automated
38 interactive voice or keypress activated opt-out mechanism that allows
39 the consumer to automatically add the number called to the seller's
40 entity specific do-not-call list, and which mechanism, once invoked,
41 immediately ends the call.

42 9. In the case of any telemarketing sales call made by a natural
43 person, the telemarketer or seller shall inform the customer that he or
44 she may request that his or her telephone number be added to the sell-
45 er's entity specific do-not-call list. If the customer opts to do so,
46 the telemarketer or seller shall immediately end the call and shall add
47 the number called to such list or cause the number called to be added to
48 such list.

49 10. No telemarketer or seller shall transmit, share, or otherwise make
50 available any customer's contact information, including name, telephone
51 number, or email address, which has been provided to such telemarketer
52 or seller by such customer, to any person, corporation, or other entity
53 without the express agreement of the consumer in writing or in electron-
54 ic format, unless otherwise required by law, or pursuant to a lawful
55 subpoena or court order.

1 11. Telemarketers and sellers shall keep for a period of twenty-four
2 months from the date the record is created records relating to its tele-
3 marketing activities.

4 12. a. The department shall provide notice to customers of the estab-
5 lishment of the national "do-not-call" registry. Any customer who wishes
6 to be included on such registry shall notify the federal trade commis-
7 sion as directed by relevant federal regulations.

8 b. Any company that provides local telephone directories to customers
9 in this state shall inform its customers of the provisions of this
10 section by means of publishing a notice in such local telephone directo-
11 ries.

12 c. Any company in the state that sells equipment capable of transmit-
13 ting a telefacsimile shall inform its customers of the provisions of
14 this section by means of posting a notice issued by the board.

15 13. When the department has reason to believe a telemarketer has
16 engaged in repeated unlawful acts in violation of this section, or when
17 a notice of hearing has been issued pursuant to subdivision fourteen of
18 this section, the department may request in writing the production of
19 relevant documents and records as part of its investigation. If the
20 person upon whom such request was made fails to produce the documents or
21 records within thirty days after the date of the request, the department
22 may issue and serve subpoenas to compel the production of such documents
23 and records. If any person shall refuse to comply with a subpoena issued
24 under this section, the department may petition a court of competent
25 jurisdiction to enforce the subpoena and such sanctions as the court may
26 direct.

27 14. a. Where it is determined after hearing that any person has
28 violated one or more provisions of this section, the secretary, or any
29 person deputized or so designated by him or her may assess a fine not to
30 exceed eleven thousand dollars for each violation.

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

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

36 15. A person shall not be held liable for violating this section if:

37 a. the person has obtained a version of the "do-not-call" registry
38 from the federal trade commission no more than thirty-one days prior to
39 the date any telemarketing call or unsolicited telefacsimile advertising
40 is made, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and the
41 person can demonstrate that, as part of the person's routine business
42 practice at the time of an alleged violation, it has established, imple-
43 mented and updated written policies and procedures related to the
44 requirements of this section prior to the date any telemarketing call is
45 made;

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

48 c. the person maintains and can produce records demonstrating compli-
49 ance with paragraphs a and b of this subdivision and the requirements of
50 this section.

51 16. The department shall prescribe rules and regulations to administer
52 this section.

53 17. Severability. If any clause, sentence, paragraph or part of this
54 section shall be adjudged by any court of competent jurisdiction to be
55 invalid, such judgment shall not affect, impair or invalidate the
56 remainder thereof, but shall be confined in its operation to the clause,

1 sentence, paragraph or part thereof directly involved in the controversy
2 in which such judgment shall have been rendered.

3 § 2. Section 92-d of the public service law, as amended by chapter 546
4 of the laws of 2000, the opening paragraph as amended by chapter 226 of
5 the laws of 2020, is amended to read as follows:

6 § 92-d. Telephone solicitations. Each local exchange telephone company
7 shall inform its customers of the provisions of section ninety-two-i of
8 this article, sections three hundred ninety-nine-p, three hundred nine-
9 ty-nine-z and three hundred ninety-nine-pp of the general business law,
10 and article ten-B of the personal property law, as such provisions
11 relate to the rights of consumers with respect to cramming, telemarket-
12 ers, sellers, the no telemarketing sales [~~call~~ calls and telefacsimile
13 advertising statewide registry, and automatic dialing-announcing
14 devices, by means of:

15 1. Inserting a notice annually in the customers' billing statements;
16 and

17 2. Publishing a notice in local telephone directories.

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

26 § 4. This act shall take effect on the one hundred eightieth day after
27 it shall have become a law; provided, however, that if chapter 226 of
28 the laws of 2020 shall not have taken effect on or before such date then
29 the amendments to section 92-d of the public service law made by section
30 two of this act shall take effect on the same date and in the same
31 manner as such chapter of the laws of 2020, takes effect. Effective
32 immediately, the addition, amendment and/or repeal of any rule or regu-
33 lation necessary for the implementation of this act on its effective
34 date are authorized to be made on or before such effective date.