S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

January 23, 2009

Introduced by M. of A. PHEFFER, DINOWITZ, GIANARIS, GREENE, CARROZZA, ORTIZ, SWEENEY -- Multi-Sponsored by -- M. of A. BOYLAND, CLARK, CYMBROWITZ, DESTITO, ENGLEBRIGHT, GALEF, GLICK, HOOPER, HOYT, JOHN, MAGEE, MARKEY, MAYERSOHN, McENENY, MILLMAN, PERRY, TOWNS -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to the regulation of unsolicited advertisements

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

Section 1. The general business law is amended by adding a new section 394-f to read as follows:

S 394-F. UNSOLICITED ADVERTISEMENTS. 1. FOR PURPOSES OF THIS SECTION THE TERMS:

(A) "UNSOLICITED ADVERTISEMENT" MEANS ANY WRITTEN MATERIAL ADVERTISING THE COMMERCIAL AVAILABILITY OR QUALITY OF ANY PROPERTY, GOODS, OR SERVICES WHICH IS MAILED OR DELIVERED TO A CONSUMER WHO IS SPECIFICALLY IDENTIFIED BY BIOGRAPHICAL INFORMATION WITHOUT THAT CONSUMER'S EXPRESS INVITATION OR PERMISSION. SUCH TERM SHALL NOT INCLUDE MATERIAL TRANSMITTED TO A CONSUMER OVER THE INTERNET AND COMMUNITY PUBLICATIONS WHICH ARE DISTRIBUTED TO THE PUBLIC, WITHOUT CONSIDERATION, FOR PURPOSES OF COMMUNITY INFORMATION AND COMMUNITY ADVERTISING WHICH ARE EXEMPT FROM SALES AND USE TAX PURSUANT TO SUBDIVISION (I) OF SECTION ELEVEN HUNDRED FIFTEEN OF THE TAX LAW;

(B) "CONSUMER" MEANS A NATURAL PERSON WHO IS THE RECIPIENT OF AN UNSOLICITED ADVERTISEMENT;

(C) "SENDER" MEANS A PERSON, FIRM, PARTNERSHIP, LIMITED LIABILITY COMPANY, CORPORATION, ASSOCIATION, OR OTHER ENTITY ESTABLISHED OR FORMED FOR PROFIT.

2. EVERY SENDER OF AN UNSOLICITED ADVERTISEMENT TO A CONSUMER SHALL PROVIDE SUCH CONSUMER, ON AN ANNUAL BASIS, WITH A WRITTEN NOTICE OF THE CONSUMER'S RIGHT, GRANTED BY THIS SECTION, TO ELECT NOT TO RECEIVE ANY

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

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FURTHER UNSOLICITED ADVERTISEMENTS FROM SUCH SENDER. SUCH WRITTEN DISCLOSURE SHALL BE MADE IN A CLEAR AND CONSPICUOUS MANNER AND SHALL SET FORTH A REASONABLE METHOD BY WHICH THE CONSUMER CAN EXERCISE SUCH RIGHT. SUCH WRITTEN DISCLOSURE MAY INDICATE THAT SUCH CONSUMER MAY AT ANY TIME ELECT NOT TO RECEIVE ANY FURTHER UNSOLICITED ADVERTISEMENTS FROM SUCH SENDER.

3. SUCH SENDER SHALL MAINTAIN AN EXCLUSION LIST AND SHALL NOT SEND ANY UNSOLICITED ADVERTISEMENT TO ANY CONSUMER ON SUCH LIST. SUCH SENDER IS PROHIBITED FROM USING SUCH LIST FOR ANY PURPOSE OTHER THAN COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION.

4. NO SENDER SHALL BE DEEMED TO HAVE VIOLATED THE PROVISIONS OF THIS SECTION IF SUCH SENDER SHOWS, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE VIOLATION WAS NOT INTENTIONAL AND RESULTED FROM A BONA FIDE ERROR MADE NOTWITHSTANDING THE MAINTENANCE OF PROCEDURES REASONABLY ADOPTED TO AVOID ANY SUCH ERROR.

5. NO PENALTY SHALL BE IMPOSED UNDER THIS SECTION FOR ANY MAILING SENT TO A CONSUMER IF SUCH MAILING WAS SENT WITHIN A REASONABLE PERIOD OF TIME AFTER RECEIVING THE CONSUMER'S PRIMARY NOTIFICATION TO BE PLACED ON SUCH LIST.

6. WHENEVER A COURT DETERMINES THAT A VIOLATION OF THIS SECTION HAS OCCURRED, THE COURT SHALL IMPOSE A CIVIL PENALTY NOT TO EXCEED ONE HUNDRED DOLLARS. A SECOND OFFENSE AND ANY OFFENSE COMMITTED THEREAFTER ARE PUNISHABLE BY A CIVIL PENALTY NOT TO EXCEED FIVE HUNDRED DOLLARS.

7. WHENEVER THERE IS A VIOLATION OF THIS SECTION, AN APPLICATION MAY BE MADE BY THE ATTORNEY GENERAL, IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK, TO A COURT OR JUSTICE HAVING JURISDICTION, BY A SPECIAL PROCEEDING, TO ISSUE AN INJUNCTION AND, UPON NOTICE TO THE DEFENDANT OF NOT LESS THAN FIVE DAYS, TO ENJOIN AND RESTRAIN THE CONTINUANCE OF SUCH VIOLATION; AND IF IT SHALL APPEAR TO THE SATISFACTION OF THE COURT OR JUSTICE THAT THE DEFENDANT HAS, IN FACT, VIOLATED THIS SECTION, AN INJUNCTION MAY BE ISSUED BY THE COURT OR JUSTICE, ENJOINING AND RESTRAINING ANY FURTHER VIOLATIONS, WITHOUT REQUIRING PROOF THAT ANY PERSON HAS, IN FACT, BEEN INJURED OR DAMAGED THEREBY. IN ANY SUCH PROCEEDING, THE COURT MAY MAKE ALLOWANCES TO THE ATTORNEY GENERAL AS PROVIDED IN PARAGRAPH SIX OF SUBDIVISION (A) OF SECTION EIGHTY-THREE HUNDRED THREE OF THE CIVIL PRACTICE LAW AND RULES AND DIRECT RESTITUTION. IN CONNECTION WITH ANY SUCH PROPOSED APPLICATION, THE ATTORNEY GENERAL IS AUTHORIZED TO TAKE PROOF AND MAKE A DETERMINATION OF THE RELEVANT FACTS AND TO ISSUE SUBPOENAS IN ACCORDANCE WITH THE CIVIL PRACTICE LAW AND RULES.

S 2. If any provision of this act or the application of such provision in certain circumstances shall be held invalid, the validity of the remainder of this act and its applicability to other circumstances shall not be affected.

S 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.