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

June 11, 2009

Introduced by M. of A. PHEFFER, JAFFEE, FIELDS, SPANO, CYMBROWITZ, CHRISTENSEN, ALESSI, ORTIZ, KOON, STIRPE -- Multi-Sponsored by -- M. of A. BRENNAN, DelMONTE, GABRYSZAK, GIBSON, GLICK, GOTTFRIED, JOHN, LUPARDO, MAGEE, MAISEL, McENENY, MENG, PERRY, TITONE, WEINSTEIN, WEISENBERG -- read once and referred to the Committee on Consumer Affairs and Protection -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to providing for enhanced consumer protection measures and enforcement of the do-not-call registry

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

Section 1. Section 399-z of the general business law, as amended by chapter 124 of the laws of 2003, paragraph j of subdivision 1 as amended by chapter 214 of the laws of 2005, subdivision 3 as amended by chapter 69 of the laws of 2007, paragraph a of subdivision 6 as amended by chapter 417 of the laws of 2004 and paragraph a of subdivision 7 as amended by chapter 263 of the laws of 2006, is amended to read as follows:

S 399-z. Telemarketing; establishment of no telemarketing sales calls statewide registry; authorization of the transfer of telephone numbers on the no telemarketing sales calls statewide registry to the national "do-not-call" registry. 1. As used in this section, the following terms shall have the following meanings:

a. "Board" shall mean the consumer protection board;

b. "Director" means the executive director of the consumer protection board;

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

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

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

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

f. "NEGATIVE OPTION FEATURE" MEANS, IN AN OFFER OR AGREEMENT TO SELL OR PROVIDE ANY GOODS OR SERVICES, A PROVISION UNDER WHICH THE CUSTOMER'S SILENCE OR FAILURE TO TAKE AN AFFIRMATIVE ACTION TO REJECT SUCH GOODS OR SERVICES OR TO CANCEL THE AGREEMENT IS INTERPRETED BY THE SELLER AS ACCEPTANCE OF THE OFFER.

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

[g.] H. "Telemarketer" means any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, "commercial purposes" shall mean the sale or offer for sale of goods or services;

[h]. I. "Telemarketing" means any plan, program or campaign which is conducted to induce payment or the exchange of any other consideration for any goods or services by use of one or more telephones and which involves more than one telephone call by a telemarketer in which the customer is located within the state at the time of the call. Telemarketing does not include the solicitation of sales through media other than by telephone calls;

[i.] J. "Telemarketing sales call" means a telephone call made by a telemarketer OR BY ANY OUTBOUND TELEPHONE CALLING TECHNOLOGY THAT DELIVERS A PRERECORDED MESSAGE EITHER to a customer OR TO THEIR VOICEMAIL OR ANSWERING MACHINE SERVICE for the purpose of inducing payment or the exchange of any other consideration for any goods or services;

[j.] K. "Unsolicited telemarketing sales call" means any telemarketing sales call other than a call made:

(i) in response to an express written or verbal request of the customer called; or

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

(iii) to an existing customer, unless such customer has stated to the telemarketer that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer].

2. [a.] NO TELEMARKETER OR SELLER SHALL ENGAGE IN TELEMARKETING AT ANY TIME OTHER THAN BETWEEN 8:00 A.M. AND 9:00 P.M. LOCAL TIME UNLESS THE CONSUMER HAS GIVEN HIS OR HER EXPRESS CONSENT TO THE CALL AT A DIFFERENT TIME, AND SHALL PROVIDE, IN A CLEAR AND COHERENT MANNER USING WORDS WITH COMMON AND EVERYDAY MEANINGS, AT THE BEGINNING OF EACH TELEMARKETING SALES CALL ALL OF THE FOLLOWING INFORMATION:

(I) THE TELEMARKETER'S NAME AND THE PERSON ON WHOSE BEHALF THE SOLICITATION IS BEING MADE, IF OTHER THAN THE TELEMARKETER;

(II) THE PURPOSE OF THE TELEPHONE CALL; AND

(III) THE IDENTITY OF THE GOODS OR SERVICES FOR WHICH A FEE WILL BE CHARGED.

3. PRIOR TO THE PURCHASE OF ANY GOOD OR SERVICE TELEMARKETERS SHALL DISCLOSE TO THE CUSTOMER THE COST OF THE GOODS OR SERVICES THAT ARE THE SUBJECT OF THE CALL AND IF THE OFFER INCLUDES A NEGATIVE OPTION FEATURE,

ALL MATERIAL TERMS AND CONDITIONS OF THE NEGATIVE OPTION FEATURE, INCLUDING, BUT NOT LIMITED TO THE FACT THAT THE CUSTOMER'S ACCOUNT WILL BE CHARGED UNLESS THE CUSTOMER TAKES AN AFFIRMATIVE ACTION TO AVOID THE CHARGES, THE DATES THE CHARGES WILL BE SUBMITTED FOR PAYMENT, AND THE SPECIFIC STEPS THE CUSTOMER MUST TAKE TO AVOID THE CHARGE.

4. A. The board is authorized to establish, manage, and maintain a no telemarketing sales calls statewide registry which shall contain a list of customers who do not wish to receive unsolicited telemarketing sales calls. The board may contract with a private vendor to establish, manage and maintain such registry, provided the private vendor has maintained national no telemarketing sales calls registries for more than two years, and the contract requires the vendor to provide the no telemarketing sales calls registry in a printed hard copy format and in any other format as prescribed by the board.

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

[3.] 5. No telemarketer or seller may make or cause to be made any unsolicited telemarketing sales call to any customer when that customer's telephone number has been on the national "do-not-call" registry, established by the federal trade commission, for a period of thirty-one days prior to the date the call is made, pursuant to 16 CFR Section 310.4(b)(1)(iii)(B).

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

b. Any company that provides local telephone directories to customers in this state shall inform its customers of the provisions of this section by means of publishing a notice in such local telephone directories.

[5. The board shall prescribe rules and regulations to administer this section.

6.] 7. WHEN THE BOARD HAS REASON TO BELIEVE A TELEMARKETER HAS ENGAGED IN REPEATED UNLAWFUL ACTS IN VIOLATION OF THIS SECTION, OR WHEN A NOTICE OF HEARING HAS BEEN ISSUED PURSUANT TO SUBDIVISION EIGHT OF THIS SECTION, THE BOARD MAY REQUEST IN WRITING THE PRODUCTION OF RELEVANT DOCUMENTS AND RECORDS AS PART OF ITS INVESTIGATION. IF THE PERSON UPON WHOM SUCH REQUEST WAS MADE FAILS TO PRODUCE THE DOCUMENTS OR RECORDS WITHIN THIRTY DAYS AFTER THE DATE OF THE REQUEST, THE BOARD MAY ISSUE AND SERVE SUBPOENAS TO COMPEL THE PRODUCTION OF SUCH DOCUMENTS AND RECORDS. IF ANY PERSON SHALL REFUSE TO COMPLY WITH A SUBPOENA ISSUED UNDER THIS SECTION, THE BOARD MAY PETITION A COURT OF COMPETENT JURISDICTION TO ENFORCE THE SUBPOENA AND SUCH SANCTIONS AS THE COURT MAY DIRECT.

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

b. Any proceeding conducted pursuant to paragraph a of this subdivision shall be subject to the state administrative procedure act.

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

[7.] 9. A person shall not be held liable for violating this section if:

a. the person has obtained a version of the "do-not-call" registry from the federal trade commission no more than thirty-one days prior to the date any telemarketing call is made, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and has established [and], implemented AND UPDATED written policies and procedures related to the requirements of this section PRIOR TO THE DATE ANY TELEMARKETING CALL IS MADE;

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

c. the person maintains records demonstrating compliance with paragraphs a and b of this subdivision and the requirements of this section[; and

d. any subsequent unsolicited telemarketing sales call is the result of error].

10. THE BOARD SHALL PRESCRIBE RULES AND REGULATIONS TO ADMINISTER THIS SECTION.

S 2. This act shall take effect on the one hundred twentieth day after it shall have become a law.