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

4346

2009-2010 Regular Sessions

I N S E N A T E

April 22, 2009

Introduced by Sen. KRUGER -- 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, in relation to the regulation of unsolicited advertisements and the sale, rental or exchange of personal information

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

Section 1. Legislative findings and declaration. The legislature hereby finds and declares that the use of computers, data bases and information sharing threaten the privacy of our citizens. Personal identification information is compiled and transferred without the knowledge and consent of the data subject. In many situations, personal identification information is being used for secondary purposes, purposes different from the one for which the information was originally given or obtained. Improper collection and dissemination of personal identification information not only infringes upon individual privacy but also has increased the ability of unethical persons to engage in fraud and theft. In addition, collection and dissemination of personal identification information can threaten the security of those who wish to keep their addresses and other information secret. For these reasons, the legislature proposes this statute to provide a means by which citizens can protect their personal identification information.

S 2. The general business law is amended by adding two new sections 394-f and 394-g to read as follows:

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

(A) "UNSOLICITED ADVERTISEMENT" SHALL MEAN ANY WRITTEN SOLICITATION FOR THE PURCHASE, LEASE, CONTRACT OR INVESTMENT IN PROPERTY, GOODS OR SERVICES, INCLUDING THE OFFERING OF A PRIZE IN EXCHANGE FOR A PURCHASE OR FOR ATTENDANCE AT ANY LOCATION FOR PURPOSES OF A SOLICITATION, OR CONTRIBUTION TO ANY NATURAL PERSON WITHOUT THAT NATURAL PERSON'S EXPRESS

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

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INVITATION OR PERMISSION. HOWEVER, UNSOLICITED ADVERTISEMENT SHALL NOT INCLUDE 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) "UNSOLICITED TELEPHONE ADVERTISEMENT" SHALL MEAN THE INITIATION OF ANY TELEPHONE CALL OR MESSAGE SOLICITING THE PURCHASE, LEASE, CONTRACT OR INVESTMENT IN PROPERTY, GOODS OR SERVICES, INCLUDING THE OFFERING OF A PRIZE IN EXCHANGE FOR A PURCHASE OR FOR ATTENDANCE AT ANY LOCATION FOR PURPOSES OF A SOLICITATION, OR CONTRIBUTION TO ANY NATURAL PERSON WITHOUT THAT NATURAL PERSON'S EXPRESS INVITATION OR PERMISSION;

(C) "CONSUMER" SHALL MEAN A NATURAL PERSON WHO IS SOLICITED TO PURCHASE, RENT OR INVEST IN PROPERTY, GOODS OR SERVICES INCLUDING RECEIVING A PRIZE IN EXCHANGE FOR A PURCHASE OR ATTENDANCE; AND

(D) "ESTABLISHED BUSINESS RELATIONSHIP" SHALL MEAN A PRIOR OR EXISTING RELATIONSHIP FORMED BY A VOLUNTARY COMMUNICATION BETWEEN A DATA SUBJECT AND A PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION ON THE BASIS OF AN APPLICATION, PURCHASE OR TRANSACTION BY THE CONSUMER REGARDING PROPERTY, GOODS OR SERVICES OFFERED BY SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION WITHIN THE PAST YEAR WHICH RELATIONSHIP HAS NOT BEEN TERMINATED BY THE CONSUMER OR THE PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION.

2. WHENEVER A PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION PURCHASES OR ACQUIRES THROUGH TRADE A LISTING OF CONSUMERS UTILIZED IN ANY DIRECT UNSOLICITED ADVERTISEMENT, SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL PROVIDE WRITTEN NOTICE TO THE CONSUMER WITHIN THE ADVERTISEMENT OR AFFIXED THERETO OF THE CONSUMER'S RIGHT, HEREBY GRANTED, OF DELETING HIS OR HER NAME AND ADDRESS FROM SUCH MAILING LIST AND OF HIS OR HER RIGHT NOT TO RECEIVE ANY FURTHER UNSOLICITED ADVERTISEMENT. SUCH WRITTEN DISCLOSURE SHALL ALSO INDICATE THAT SUCH CONSUMER MAY AT ANY TIME DELETE HIS OR HER NAME AND ADDRESS FROM SUCH MAILING LIST. SUCH WRITTEN DISCLOSURE SHALL BE MADE IN A CLEAR AND CONSPICUOUS MANNER AND SHALL PROVIDE A REASONABLE METHOD BY WHICH THE CONSUMER CAN EXERCISE SUCH PREFERENCE.

3. WHENEVER A PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION PURCHASES OR ACQUIRES THROUGH TRADE A LISTING OF CONSUMERS UTILIZED IN ANY UNSOLICITED TELEPHONE ADVERTISEMENT, SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL DISCLOSE TO SUCH CONSUMER THAT HE OR SHE HAS THE RIGHT, HEREBY GRANTED, OF DELETING HIS OR HER NAME, ADDRESS AND TELEPHONE NUMBER FROM SUCH TELEPHONE LIST AND OF HIS OR HER RIGHT NOT TO RECEIVE ANY FURTHER UNSOLICITED TELEPHONE ADVERTISEMENT.

SUCH DISCLOSURE SHALL BE MADE AT THE BEGINNING OF THE TELEPHONE CALL AND SHALL BE MADE IN A CLEAR AND CONSPICUOUS MANNER AND SHALL INFORM THE CONSUMER THAT HE OR SHE CAN REMOVE HIS OR HER NAME, TELEPHONE NUMBER AND ADDRESS FROM THE LIST AT ANY TIME AND SHALL INFORM THE CONSUMER OF THE REASONABLE MEANS BY WHICH THE CONSUMER CAN EXERCISE SUCH PREFERENCE.

4. SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION REFERRED TO IN SUBDIVISIONS TWO AND THREE OF THIS SECTION, SHALL MAINTAIN AN EXCLUSION LIST AND SHALL NOT SEND ANY UNSOLICITED ADVERTISEMENT OR MAKE ANY UNSOLICITED TELEPHONE ADVERTISEMENT TO ANY CONSUMER ON SUCH LIST. SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL BE PROHIBITED FROM USING SUCH LIST FOR ANY PURPOSE OTHER THAN COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION AND SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL NOT SELL, RENT, EXCHANGE OR OTHERWISE MAKE AVAILABLE SUCH EXCLUSION LIST TO ANY THIRD PARTY.

5. NO PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL BE DEEMED TO HAVE VIOLATED THE PROVISIONS OF THIS SECTION, IF SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION 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.

6. DISCLOSURE SHALL NOT BE REQUIRED IN INSTANCES WHERE SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION HAS AN ESTABLISHED BUSINESS RELATIONSHIP WITH SUCH CONSUMER.

7. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF SUBDIVISION TWO OR THREE OF THIS SECTION HAS OCCURRED, THE COURT SHALL IMPOSE A CIVIL PENALTY NOT TO EXCEED TWO HUNDRED FIFTY DOLLARS. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF SUBDIVISION FOUR OF THIS SECTION HAS OCCURRED, IF SUCH VIOLATION CONSTITUTES THE FIRST SUCH OFFENSE BY SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION, THE COURT SHALL IMPOSE A CIVIL PENALTY NOT TO EXCEED FIVE HUNDRED DOLLARS. A SECOND OFFENSE AND ANY OFFENSE COMMITTED THEREAFTER SHALL BE PUNISHABLE BY A CIVIL PENALTY NOT TO EXCEED ONE THOUSAND DOLLARS.

8. WHENEVER THERE SHALL BE 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.

9. ANY PERSON WHO HAS BEEN INJURED BY REASON OF ANY VIOLATION OF THIS SECTION MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAWFUL ACT OR PRACTICE, AN ACTION TO RECOVER HIS OR HER ACTUAL DAMAGES OR FIFTY DOLLARS, WHICHEVER IS GREATER, OR BOTH SUCH ACTIONS. THE COURT MAY, IN ITS DISCRETION, INCREASE THE AWARD OF DAMAGES TO AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES UP TO ONE THOUSAND DOLLARS, IF THE COURT FINDS THE DEFENDANT WILLFULLY OR KNOWINGLY VIOLATED THIS SECTION. THE COURT MAY AWARD REASONABLE ATTORNEY'S FEES TO A PREVAILING PLAINTIFF.

S 394-G. SALE, RENTAL OR EXCHANGE OF PERSONAL IDENTIFICATION INFORMATION. 1. FOR PURPOSES OF THIS SECTION THE TERM: (A) "COMMERCIAL PURPOSES" SHALL MEAN THE SOLICITATION FOR THE PURCHASE, LEASE, CONTRACT OR INVESTMENT IN PROPERTY, GOODS OR SERVICES, INCLUDING THE OFFERING OF A PRIZE IN EXCHANGE FOR A PURCHASE OR FOR ATTENDANCE AT ANY LOCATION FOR PURPOSES OF A SOLICITATION, THE SOLICITATION FOR A CONTRIBUTION OR THE BUSINESS OF COMPILING PERSONAL IDENTIFICATION INFORMATION FOR SALE, LEASE OR RENT;

(B) "PERSONAL IDENTIFICATION INFORMATION" SHALL MEAN ANY INFORMATION WHICH MAY INCLUDE, BUT MAY NOT BE LIMITED TO, A NATURAL PERSON'S NAME, ADDRESS, TELEPHONE NUMBER, PURCHASING HISTORY AND SERVICES CONTRACTED, OCCUPATION, AGE AND SEX; AND

(C) "DATA SUBJECT" SHALL MEAN A NATURAL PERSON ABOUT WHOM PERSONAL IDENTIFICATION INFORMATION HAS BEEN COLLECTED.

2. EVERY PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION WHO SELLS, RENTS, EXCHANGES OR RELEASES PERSONAL IDENTIFICATION INFORMATION TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES SHALL UPON THE INITIAL CONTACT WITH A DATA SUBJECT, IN WRITING DISCLOSE AND AT LEAST ANNUALLY THEREAFTER IN WRITING DISCLOSE SUCH PRACTICE TO THE DATA SUBJECT. SUCH WRITTEN NOTIFICATION SHALL DISCLOSE CLEARLY AND CONSPICUOUSLY THE PRACTICE OF SELLING, RENTING, EXCHANGING OR RELEASING PERSONAL IDENTIFICATION INFORMATION AND SHALL INFORM THE DATA SUBJECT OF THE OPTION, HEREBY GRANTED, OF PROHIBITING THE SALE, RENTAL, EXCHANGE OR RELEASE OF THE PERSONAL IDENTIFICATION INFORMATION OF SUCH DATA SUBJECT TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES. SUCH NOTICE SHALL ALSO DISCLOSE THE REASONABLE METHOD BY WHICH A DATA SUBJECT CAN INDICATE SUCH PREFERENCE AND SHALL ALSO INDICATE THAT THE DATA SUBJECT CAN AT ANY TIME PROHIBIT THE SELLING, RENTING, EXCHANGING OR RELEASING OF PERSONAL IDENTIFICATION INFORMATION TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES. SUCH NOTICE MAY BE INSERTED IN A BILLING STATEMENT OR OTHER MAILING.

3. EVERY PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION PREPARING TO SELL, RENT, EXCHANGE OR RELEASE PERSONAL IDENTIFICATION INFORMATION, AT LEAST FIFTEEN DAYS PRIOR TO THE COMMENCEMENT OF SELLING, RENTING, EXCHANGING OR RELEASING PERSONAL IDENTIFICATION INFORMATION TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES SHALL DISCLOSE IN WRITING SUCH PRACTICE TO THE DATA SUBJECT. SUCH WRITTEN NOTIFICATION SHALL DISCLOSE CLEARLY AND CONSPICUOUSLY THE PRACTICE OF SELLING, RENTING, EXCHANGING OR RELEASING PERSONAL IDENTIFICATION INFORMATION AND SHALL INFORM THE DATA SUBJECT OF THE OPTION, HEREBY GRANTED, OF PROHIBITING THE SALE, RENTAL, EXCHANGE OR RELEASE OF THE PERSONAL IDENTIFICATION INFORMATION OF SUCH DATA SUBJECT TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES. SUCH NOTICE SHALL ALSO DISCLOSE THE REASONABLE METHOD BY WHICH A DATA SUBJECT CAN INDICATE SUCH PREFERENCE AND SHALL ALSO INDICATE THAT THE DATA SUBJECT CAN AT ANY TIME PROHIBIT THE SELLING, RENTING, EXCHANGING OR RELEASING OF PERSONAL IDENTIFICATION INFORMATION TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES. SUCH NOTICE MAY BE INSERTED IN A BILLING STATEMENT OR OTHER MAILING. SUBSEQUENT TO THE COMMENCEMENT OF THE SALE, RENTAL, EXCHANGE OR RELEASE OF PERSONAL IDENTIFICATION INFORMATION TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES, SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL PROVIDE THE ANNUAL NOTIFICATION AS PROVIDED IN SUBDIVISION TWO OF THIS SECTION.

4. SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL MAINTAIN AN EXCLUSION LIST TO INCLUDE THE LISTINGS OF THOSE DATA SUBJECTS WHO HAVE EXERCISED THE OPTION AS PROVIDED IN THIS SECTION. SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL BE PROHIBITED FROM USING SUCH LIST FOR ANY PURPOSE OTHER THAN COMPLIANCE WITH THE REQUIREMENTS OF THIS SECTION AND SHALL NOT SELL, RENT, EXCHANGE OR RELEASE SUCH EXCLUSION LIST TO OTHER PERSONS AND/OR AFFILIATES FOR THEIR COMMERCIAL PURPOSES.

5. NO PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION SHALL BE DEEMED TO HAVE VIOLATED THE PROVISIONS OF THIS SECTION, IF SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION 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.

6. THE PROVISIONS OF THIS SECTION PROHIBITING THE RELEASE OF INFORMATION SHALL NOT APPLY TO THE REPORTING OF NECESSARY INFORMATION TO CONSUMER REPORTING AGENCIES, IN COMPLIANCE WITH THE PROVISIONS OF THE FEDERAL FAIR CREDIT REPORTING ACT (15 U.S.C. SECTION 1681 ET SEQ.) AND ARTICLE TWENTY-FIVE OF THIS CHAPTER KNOWN AS THE FAIR CREDIT REPORTING ACT AND ANY REGULATIONS PROMULGATED THEREUNDER.

7. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF SUBDIVISION TWO OR THREE OF THIS SECTION HAS OCCURRED, THE COURT SHALL IMPOSE A CIVIL PENALTY NOT TO EXCEED TWO HUNDRED FIFTY DOLLARS. WHENEVER THE COURT SHALL DETERMINE THAT A VIOLATION OF SUBDIVISION FOUR OF THIS SECTION HAS OCCURRED, IF SUCH VIOLATION CONSTITUTES THE FIRST SUCH OFFENSE BY SUCH PERSON, FIRM, PARTNERSHIP, CORPORATION OR ASSOCIATION, THE COURT SHALL IMPOSE A CIVIL PENALTY NOT TO EXCEED FIVE HUNDRED DOLLARS. A SECOND OFFENSE AND ANY OFFENSE COMMITTED THEREAFTER SHALL BE PUNISHABLE BY A CIVIL PENALTY NOT TO EXCEED ONE THOUSAND DOLLARS.

8. WHENEVER THERE SHALL BE 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.

9. ANY PERSON WHO HAS BEEN INJURED BY REASON OF ANY VIOLATION OF THIS SECTION MAY BRING AN ACTION IN HIS OR HER OWN NAME TO ENJOIN SUCH UNLAWFUL ACT OR PRACTICE, AN ACTION TO RECOVER HIS OR HER ACTUAL DAMAGES OR FIFTY DOLLARS, WHICHEVER IS GREATER, OR BOTH SUCH ACTIONS. THE COURT MAY, IN ITS DISCRETION, INCREASE THE AWARD OF DAMAGES TO AN AMOUNT NOT TO EXCEED THREE TIMES THE ACTUAL DAMAGES UP TO ONE THOUSAND DOLLARS, IF THE COURT FINDS THE DEFENDANT WILLFULLY OR KNOWINGLY VIOLATED THIS SECTION. THE COURT MAY AWARD REASONABLE ATTORNEY'S FEES TO A PREVAILING PLAINTIFF.

S 3. 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 4. This act shall take effect on the ninetieth day after it shall have become a law.