

2899

2011-2012 Regular Sessions

I N A S S E M B L Y

January 21, 2011

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

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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 OR TELEFACSIMILE ADVERTISING. The
8 board may contract with a private vendor to establish, manage and main-
9 tain such registry, provided the private vendor has maintained national
10 no telemarketing sales calls OR TELEFACSIMILE ADVERTISING registries for
11 more than two years, and the contract requires the vendor to provide the
12 no telemarketing sales calls AND TELEFACSIMILE ADVERTISING registry in a
13 printed hard copy format and in any other format as prescribed by the
14 board. ANY TYPE OF COPY FORMAT MAINTAINED FOR TELEMARKETING SALES CALLS
15 SHALL BE MAINTAINED FOR TELEFACSIMILE ADVERTISING.

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

27 5. A. No telemarketer or seller may make or cause to be made any unso-
28 licited telemarketing sales call to any customer when that customer's
29 telephone number has been on the national "do-not-call" registry, estab-
30 lished by the federal trade commission, for a period of thirty-one days
31 prior to the date the call is made, pursuant to 16 CFR Section
32 310.4(b)(1)(iii)(B).

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

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

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

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

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

1 subpoenas to compel the production of such documents and records. If any
2 person shall refuse to comply with a subpoena issued under this section,
3 the board may petition a court of competent jurisdiction to enforce the
4 subpoena and such sanctions as the court may direct.

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

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

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

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

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

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

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

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

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

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

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

41 2. Publishing a notice in local telephone directories.

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

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

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

1 3. Monies in the account shall be available to the state consumer
2 protection board for the payment of costs of producing and distributing
3 educational materials and conducting educational activities relating to
4 the promotion of the "[unsolicited] NO telemarketing sales [call] CALLS
5 AND TELEFACSIMILE ADVERTISING STATEWIDE registry" and all related costs
6 and expenditures incurred in the administration of section three hundred
7 ninety-nine-z of the general business law and article ten-B of the
8 personal property law.

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

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

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