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

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I N A S S E M B L Y

June 6, 2012

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Barrett, Dinowitz, Camara, Gabryszak, Markey, Quart, P. Rivera, Simanowitz, Simotas, Abbate, DenDekker) -- (at request of the Governor) -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to telemarketing; and to repeal certain provisions of such law relating thereto

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

Section 1. Subparagraph 5 of paragraph a of subdivision 10 of section 399-pp of the general business law is REPEALED, subparagraph 6 of paragraph a is renumbered subparagraph 5, and a new subdivision 10-a is added to read as follows:

10-A. THE FOLLOWING PERSONS ARE EXEMPT FROM THE FEE AND BONDING REQUIREMENTS SET FORTH IN PARAGRAPH F OF SUBDIVISION THREE AND SUBDIVISION FOUR OF THIS SECTION: A PERSON ENGAGED IN A BUSINESS OR OCCUPATION WHICH IS LICENSED, REGISTERED, CHARTERED, CERTIFIED OR INCORPORATED WITH OR BY ANY STATE OR FEDERAL AGENCY. PROVIDED, HOWEVER, ANY PERSON NOT LICENSED, REGISTERED, CHARTERED, CERTIFIED OR INCORPORATED WITH ANY NEW YORK STATE OR FEDERAL AGENCY, SHALL SUBMIT EVIDENCE TO THE SECRETARY OF STATE, IN A FORM AND MANNER TO BE PRESCRIBED BY THE SECRETARY, OF ANY LICENSE, REGISTRATION, CHARTER, CERTIFICATION OR INCORPORATION ISSUED BY AN AGENCY OR GOVERNMENTAL ENTITY IN THIS OR ANY OTHER STATE.

S 2. Section 399-z of the general business law, as amended by chapter 344 of the laws of 2010, paragraphs a and b of subdivision 1 as added by section 39, subdivision 4 as amended by section 40 and subdivisions 6, 7 and 8 as amended by section 41 of part A of chapter 62 of the laws of 2011, 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. "Department" shall mean the department of state.

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

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

LBD12139-06-2

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;

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;

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;

[.] i. "Telemarketing" means any plan, program or campaign [which] THAT 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] THAT 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 AND DOES NOT INCLUDE CALLS INTENDED TO IMPLEMENT OR COMPLETE A TRANSACTION TO WHICH THE CUSTOMER HAS PREVIOUSLY CONSENTED;

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] A CUSTOMER'S voicemail or answering machine service for the purpose of inducing payment or the exchange of any other consideration for any goods or services;

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] BY 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.

2. 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] AT THE LOCATION OF THE CUSTOMER unless the [consumer] CUSTOMER has given his or her express consent to the call at a different time[, and]. TELEMARKETERS 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)] A. the telemarketer's name and the person on whose behalf the solicitation is being made, if other than the telemarketer;

[(ii)] B. the purpose of the telephone call; and

[(iii)] C. 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 department 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 department 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 department.

b. The department 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 department 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.

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] C.F.R. Section 310.4(b)(1)(iii)(B).

6. NO TELEMARKETER OR SELLER SHALL INITIATE ANY TELEMARKETING SALES CALL BY MEANS OF A TECHNOLOGY THAT DELIVERS A PRE-RECORDED MESSAGE, UNLESS THE TELEMARKETER OR SELLER HAS OBTAINED FROM THE CUSTOMER AN EXPRESS AGREEMENT, IN WRITING THAT:

A. THE TELEMARKETER OR SELLER OBTAINED ONLY AFTER A CLEAR AND CONSPICUOUS DISCLOSURE THAT THE PURPOSE OF THE AGREEMENT IS TO AUTHORIZE THE SELLER TO MAKE TELEMARKETING SALES CALLS TO SUCH CUSTOMER;

B. THE TELEMARKETER OR SELLER OBTAINED WITHOUT REQUIRING, DIRECTLY OR INDIRECTLY, THAT THE AGREEMENT BE EXECUTED AS A CONDITION OF PURCHASING ANY GOOD OR SERVICE;

C. EVIDENCES THE WILLINGNESS OF THE CUSTOMER TO RECEIVE TELEMARKETING SALES CALLS BY OR MADE ON BEHALF OF A SPECIFIC SELLER; AND,

D. INCLUDES SUCH CUSTOMER'S TELEPHONE NUMBER AND SIGNATURE.

7. IN THE CASE OF ANY TELEMARKETING SALES CALL DELIVERED BY MEANS OF A TECHNOLOGY THAT DELIVERS A PRE-RECORDED MESSAGE THAT COULD BE RECEIVED BY A CUSTOMER WHO CAN USE AN AUTOMATED INTERACTIVE VOICE AND/OR KEYPRESS ACTIVATED OPT-OUT MECHANISM TO ASSERT A DO-NOT-CALL REQUEST, SUCH CALL SHALL INCLUDE A MECHANISM THAT ALLOWS THE CUSTOMER TO AUTOMATICALLY ADD THE NUMBER CALLED TO THE SELLER'S ENTITY SPECIFIC DO-NOT-CALL LIST, AND WHICH MECHANISM, ONCE INVOKED, IMMEDIATELY ENDS THE CALL.

8. IN THE CASE OF ANY TELEMARKETING SALES CALL DELIVERED BY MEANS OF A TECHNOLOGY THAT DELIVERS A PRE-RECORDED MESSAGE THAT COULD BE ANSWERED BY AN ANSWERING MACHINE OR VOICEMAIL SERVICE, THAT THE CALL INCLUDE A TOLL-FREE NUMBER THAT MUST CONNECT THE CUSTOMER DIRECTLY TO AN AUTOMATED INTERACTIVE VOICE OR KEYPRESS ACTIVATED OPT-OUT MECHANISM THAT ALLOWS THE CONSUMER TO AUTOMATICALLY ADD THE NUMBER CALLED TO THE SELLER'S ENTITY SPECIFIC DO-NOT-CALL LIST, AND WHICH MECHANISM, ONCE INVOKED, IMMEDIATELY ENDS THE CALL.

9. TELEMARKETERS AND SELLERS SHALL KEEP FOR A PERIOD OF THIRTY-SIX MONTHS FROM THE DATE THE RECORD IS CREATED RECORDS RELATING TO ITS TELEMARKETING ACTIVITIES.

10. a. The department 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.

[7.] 11. When the department 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] TWELVE of this section, the department 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 department 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 department may petition a court of competent jurisdiction to enforce the subpoena and such sanctions as the court may direct.

[8.] 12. a. Where it is determined after hearing that any person has violated one or more provisions of this section, the secretary, 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.

[9.] 13. 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 THE PERSON CAN DEMONSTRATE THAT, AS PART OF THE PERSON'S ROUTINE BUSINESS PRACTICE AT THE TIME OF AN ALLEGED VIOLATION, IT has established, 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 AND CAN PRODUCE records demonstrating compliance with paragraphs a and b of this subdivision and the requirements of this section.

[10.] 14. The [board] DEPARTMENT shall prescribe rules and regulations to administer this section.

15. SEVERABILITY. IF ANY CLAUSE, SENTENCE, PARAGRAPH OR PART OF THIS SECTION SHALL BE ADJUDGED BY ANY COURT OF COMPETENT JURISDICTION TO BE INVALID, SUCH JUDGMENT SHALL NOT AFFECT, IMPAIR OR INVALIDATE THE REMAINDER THEREOF, BUT SHALL BE CONFINED IN ITS OPERATION TO THE CLAUSE, SENTENCE, PARAGRAPH OR PART THEREOF DIRECTLY INVOLVED IN THE CONTROVERSY IN WHICH SUCH JUDGMENT SHALL HAVE BEEN RENDERED.

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