

4754

2011-2012 Regular Sessions

I N A S S E M B L Y

February 7, 2011

Introduced by M. of A. SIMOTAS -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to including facsimile transmissions in the no telemarketing sales calls statewide registry

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, 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 AND FACSIMILE TRANSMISSIONS statewide registry; authorization of the  
5 transfer of telephone numbers AND/OR FACSIMILE TRANSMISSIONS NUMBER OR  
6 NUMBERS on the no telemarketing sales calls AND FACSIMILE TRANSMISSIONS  
7 statewide registry to the national "do-not-call" registry. 1. As used in  
8 this section, the following terms shall have the following meanings:  
9 a. "Board" shall mean the consumer protection board[;].  
10 b. "Director" means the executive director of the consumer protection  
11 board[;].  
12 c. "Customer" means any natural person who is a resident of this state  
13 and who is or may be required to pay for or to exchange consideration  
14 for goods and services offered through telemarketing[;].  
15 d. "Doing business in this state" means conducting telephonic sales  
16 calls OR FACSIMILE TRANSMISSIONS: (i) from a location in this state; or  
17 (ii) from a location outside of this state to consumers residing in this  
18 state[;].  
19 D-1. "FACSIMILE TRANSMISSION" MEANS ANY METHOD OF TRANSMISSION OF A  
20 DOCUMENT TO A FACSIMILE MACHINE AT A REMOTE LOCATION WHICH CAN AUTOMAT-  
21 ICALLY PRODUCE A TANGIBLE COPY OF SUCH DOCUMENT.  
22 e. "Goods and services" means any goods and services, and shall  
23 include any real property or any tangible personal property or services  
24 of any kind[;].

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

LBD05209-01-1

1 f. "Negative option feature" means, in an offer or agreement to sell  
2 or provide any goods or services, a provision under which the customer's  
3 silence or failure to take an affirmative action to reject such goods or  
4 services or to cancel the agreement is interpreted by the seller as  
5 acceptance of the offer.

6 g. "Person" means any natural person, association, partnership, firm,  
7 LIMITED LIABILITY COMPANY, corporation and its affiliates or subsid-  
8 iaries or other business entity[;].

9 h. "Telemarketer" means any person who, for financial profit or  
10 commercial purposes in connection with telemarketing, makes telemarket-  
11 ing sales calls OR FACSIMILE TRANSMISSIONS to a customer when the  
12 customer is in this state or any person who directly controls or super-  
13 vises the conduct of a telemarketer. For the purposes of this section,  
14 "commercial purposes" shall mean the sale or offer for sale of goods or  
15 services[;].

16 i. "Telemarketing" means any plan, program or campaign which is  
17 conducted to induce payment or the exchange of any other consideration  
18 for any goods or services by use of one or more telephones OR FACSIMILE  
19 MACHINES and which involves more than one telephone call OR FACSIMILE  
20 TRANSMISSION by a telemarketer in which the customer is located within  
21 the state at the time of the call OR FACSIMILE TRANSMISSION. Telemar-  
22 keting does not include the solicitation of sales through media other  
23 than by telephone calls[;] OR FACSIMILE TRANSMISSIONS.

24 I-1. "TELEMARKETING FACSIMILE TRANSMISSION" MEANS A FACSIMILE TRANS-  
25 MISSION MADE BY A TELEMARKETER TO A CUSTOMER FOR THE PURPOSE OF INDUCING  
26 PAYMENT OR THE EXCHANGE OF ANY OTHER CONSIDERATION FOR ANY GOODS OR  
27 SERVICES.

28 j. "Telemarketing sales call" means a telephone call made by a tele-  
29 marketer or by any outbound telephone calling technology that delivers a  
30 prerecorded message either to a customer or to their voicemail or  
31 answering machine service for the purpose of inducing payment or the  
32 exchange of any other consideration for any goods or services[;].

33 k. "Unsolicited telemarketing sales call OR FACSIMILE TRANSMISSION"  
34 means any telemarketing sales call OR TELEMARKETING FACSIMILE TRANS-  
35 MISSION other than a call OR TRANSMISSION made:

36 (i) in response to an express written or verbal request of the custom-  
37 er called; or

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

42 2. No telemarketer or seller shall engage in telemarketing at any time  
43 other than between 8:00 A.M. and 9:00 P.M. local time unless the consum-  
44 er has given his or her express consent to the call OR FACSIMILE TRANS-  
45 MISSION at a different time, and shall provide, in a clear and coherent  
46 manner using words with common and everyday meanings, at the beginning  
47 of each telemarketing sales call OR TELEMARKETING FACSIMILE TRANSMISSION  
48 all of the following information:

49 (i) the telemarketer's name and the person on whose behalf the solici-  
50 tation is being made, if other than the telemarketer;

51 (ii) the purpose of the telephone call OR FACSIMILE TRANSMISSION; and

52 (iii) the identity of the goods or services for which a fee will be  
53 charged.

54 3. Prior to the purchase of any good or service telemarketers shall  
55 disclose to the customer the cost of the goods or services that are the  
56 subject of the call and if the offer includes a negative option feature,

1 all material terms and conditions of the negative option feature,  
2 including, but not limited to the fact that the customer's account will  
3 be charged unless the customer takes an affirmative action to avoid the  
4 charges, the dates the charges will be submitted for payment, and the  
5 specific steps the customer must take to avoid the charge.

6 4. a. The board is authorized to establish, manage, and maintain a no  
7 telemarketing sales calls AND FACSIMILE TRANSMISSIONS statewide registry  
8 which shall contain a list of customers who do not wish to receive unso-  
9 licited telemarketing sales calls AND/OR TELEMARKETING FACSIMILE TRANS-  
10 MISSIONS. The board may contract with a private vendor to establish,  
11 manage and maintain such registry, provided the private vendor has main-  
12 tained national no telemarketing sales calls AND FACSIMILE TRANSMISSIONS  
13 registries for more than two years, and the contract requires the vendor  
14 to provide the no telemarketing sales calls AND FACSIMILE TRANSMISSIONS  
15 registry in a printed hard copy format and in any other format as  
16 prescribed by the board.

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

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

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

38 b. Any company that provides local telephone directories to customers  
39 in this state shall inform its customers of the provisions of this  
40 section by means of publishing a notice in such local telephone directo-  
41 ries.

42 7. When the board has reason to believe a telemarketer has engaged in  
43 repeated unlawful acts in violation of this section, or when a notice of  
44 hearing has been issued pursuant to subdivision eight of this section,  
45 the board may request in writing the production of relevant documents  
46 and records as part of its investigation. If the person upon whom such  
47 request was made fails to produce the documents or records within thirty  
48 days after the date of the request, the board may issue and serve  
49 subpoenas to compel the production of such documents and records. If any  
50 person shall refuse to comply with a subpoena issued under this section,  
51 the board may petition a court of competent jurisdiction to enforce the  
52 subpoena and such sanctions as the court may direct.

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

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

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

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

7 a. the person has obtained a version of the "do-not-call" registry  
8 from the federal trade commission no more than thirty-one days prior to  
9 the date any telemarketing call OR FACSIMILE TRANSMISSION is made,  
10 pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and has established,  
11 implemented and updated written policies and procedures related to the  
12 requirements of this section prior to the date any telemarketing call is  
13 made;

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

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

18 10. The board shall prescribe rules and regulations to administer this  
19 section.

20 S 2. This act shall take effect on the one hundred twentieth day after  
21 it shall have become a law, provided that any rules and regulations  
22 necessary to implement the provisions of this act on its effective date  
23 are authorized and directed to be completed on or before such date.