

2244

2013-2014 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2013

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, in  
relation to allowing individuals to register their telefacsimile tele-  
phone 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 369 of the laws of 2012, 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. "Department" shall mean the department of state.  
9 b. "Secretary" shall mean the secretary of state.  
10 c. "Customer" means any natural person who is a resident of this state  
11 and who is or may be required to pay for or to exchange consideration  
12 for goods and services offered through telemarketing;  
13 d. "Doing business in this state" means conducting telephonic sales  
14 calls: (i) from a location in this state; or (ii) from a location  
15 outside of this state to consumers residing in this state;  
16 e. "Goods and services" means any goods and services, and shall  
17 include any real property or any tangible personal property or services  
18 of any kind;  
19 f. "Negative option feature" means, in an offer or agreement to sell  
20 or provide any goods or services, a provision under which the customer's  
21 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.

LBD06236-01-3

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 that is  
12 conducted to induce payment or the exchange of any other consideration  
13 for any goods or services that involves more than one telephone call by  
14 a telemarketer in which the customer is located within the state at the  
15 time of the call. Telemarketing does not include the solicitation of  
16 sales through media other than by telephone calls and does not include  
17 calls intended to implement or complete a transaction to which the  
18 customer has previously consented;

19 j. "Telemarketing sales call" means a telephone call made by a tele-  
20 marketer or by any outbound telephone calling technology that delivers a  
21 prerecorded message to a customer or to a customer's voicemail or  
22 answering machine service for the purpose of inducing payment or the  
23 exchange of any other consideration for any goods or services;

24 k. "Unsolicited telemarketing sales call" means any telemarketing  
25 sales call other than a call made:

26 (i) in response to an express written or verbal request by the custom-  
27 er; or

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

32 L. "UNSOLICITED TELEFACSIMILE ADVERTISEMENT" MEANS ANY TELEFACSIMILE  
33 MESSAGE THAT PROMOTES GOODS AND SERVICES FOR PURCHASE BY THE RECIPIENT  
34 OF SUCH MESSAGE, EXCEPT WHERE THE MESSAGE IS SENT TO A RECIPIENT WITH  
35 WHICH THE INITIATOR HAS HAD A PREEXISTING BUSINESS OR CONTRACTUAL  
36 RELATIONSHIP;

37 M. "TELEFACSIMILE" MEANS EVERY PROCESS IN WHICH ELECTRONIC SIGNALS ARE  
38 TRANSMITTED BY TELEPHONE LINES FOR CONVERSION INTO WRITTEN TEXT;

39 N. "TELEFACSIMILE ADVERTISER" MEANS ANY PERSON, CORPORATION, PARTNER-  
40 SHIP OR ASSOCIATION WHO INITIATES UNSOLICITED TELEFACSIMILE ADVERTISE-  
41 MENTS.

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. at the location of the  
44 customer unless the customer has given his or her express consent to the  
45 call at a different time. Telemarketers shall provide, in a clear and  
46 coherent manner using words with common and everyday meanings, at the  
47 beginning of each telemarketing sales call all of the following informa-  
48 tion:

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

51 b. the purpose of the telephone call; and

52 c. 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 department is authorized to establish, manage, and maintain  
7 a no telemarketing sales calls AND TELEFACSIMILE ADVERTISING statewide  
8 registry which shall contain a list of customers who do not wish to  
9 receive unsolicited telemarketing sales calls OR TELEFACSIMILE ADVERTIS-  
10 ING. The department 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 OR TELEFACSIMILE ADVERTIS-  
13 ING registries for more than two years, and the contract requires the  
14 vendor to provide the no telemarketing sales calls AND TELEFACSIMILE  
15 ADVERTISING registry in a printed hard copy format and in any other  
16 format as prescribed by the department. ANY TYPE OF COPY FORMAT MAIN-  
17 TAINED FOR TELEMARKETING SALES CALLS SHALL BE MAINTAINED FOR TELEFACSIM-  
18 ILE ADVERTISING.

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

30 5. A. No telemarketer or seller may make or cause to be made any unso-  
31 licited telemarketing sales call to any customer when that customer's  
32 telephone number has been on the national "do-not-call" registry, estab-  
33 lished by the federal trade commission, for a period of thirty-one days  
34 prior to the date the call is made, pursuant to 16 C.F.R. Section  
35 310.4(b)(1)(iii)(B).

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

42 6. No telemarketer or seller shall initiate any telemarketing sales  
43 call by means of a technology that delivers a pre-recorded message,  
44 unless the telemarketer or seller has obtained from the customer an  
45 express agreement, in writing that:

46 a. the telemarketer or seller obtained only after a clear and conspic-  
47 uous disclosure that the purpose of the agreement is to authorize the  
48 seller to make telemarketing sales calls to such customer;

49 b. the telemarketer or seller obtained without requiring, directly or  
50 indirectly, that the agreement be executed as a condition of purchasing  
51 any good or service;

52 c. evidences the willingness of the customer to receive telemarketing  
53 sales calls by or made on behalf of a specific seller; and,

54 d. includes such customer's telephone number and signature.

55 7. In the case of any telemarketing sales call delivered by means of a  
56 technology that delivers a pre-recorded message that could be received

1 by a customer who can use an automated interactive voice and/or keypress  
2 activated opt-out mechanism to assert a do-not-call request, such call  
3 shall include a mechanism that allows the customer to automatically add  
4 the number called to the seller's entity specific do-not-call list, and  
5 which mechanism, once invoked, immediately ends the call.

6 8. In the case of any telemarketing sales call delivered by means of a  
7 technology that delivers a pre-recorded message that could be answered  
8 by an answering machine or voicemail service, that the call include a  
9 toll-free number that must connect the customer directly to an automated  
10 interactive voice or keypress activated opt-out mechanism that allows  
11 the consumer to automatically add the number called to the seller's  
12 entity specific do-not-call list, and which mechanism, once invoked,  
13 immediately ends the call.

14 9. Telemarketers and sellers shall keep for a period of twenty-four  
15 months from the date the record is created records relating to its tele-  
16 marketing activities.

17 10. a. The department shall provide notice to customers of the estab-  
18 lishment of the national "do-not-call" registry. Any customer who wishes  
19 to be included on such registry shall notify the federal trade commis-  
20 sion as directed by relevant federal regulations.

21 b. Any company that provides local telephone directories to customers  
22 in this state shall inform its customers of the provisions of this  
23 section by means of publishing a notice in such local telephone directo-  
24 ries.

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

28 11. When the department has reason to believe a telemarketer has  
29 engaged in repeated unlawful acts in violation of this section, or when  
30 a notice of hearing has been issued pursuant to subdivision twelve of  
31 this section, the department may request in writing the production of  
32 relevant documents and records as part of its investigation. If the  
33 person upon whom such request was made fails to produce the documents or  
34 records within thirty days after the date of the request, the department  
35 may issue and serve subpoenas to compel the production of such documents  
36 and records. If any person shall refuse to comply with a subpoena issued  
37 under this section, the department may petition a court of competent  
38 jurisdiction to enforce the subpoena and such sanctions as the court may  
39 direct.

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

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

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

49 13. A person shall not be held liable for violating this section if:

50 a. the person has obtained a version of the "do-not-call" registry  
51 from the federal trade commission no more than thirty-one days prior to  
52 the date any telemarketing call OR UNSOLICITED TELEFACSIMILE ADVERTISE-  
53 MENT is made, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and the  
54 person can demonstrate that, as part of the person's routine business  
55 practice at the time of an alleged violation, it has established, imple-  
56 mented and updated written policies and procedures related to the

1 requirements of this section prior to the date any telemarketing call is  
2 made;

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

5 c. the person maintains and can produce records demonstrating compli-  
6 ance with paragraphs a and b of this subdivision and the requirements of  
7 this section.

8 14. The department shall prescribe rules and regulations to administer  
9 this section.

10 15. Severability. If any clause, sentence, paragraph or part of this  
11 section shall be adjudged by any court of competent jurisdiction to be  
12 invalid, such judgment shall not affect, impair or invalidate the  
13 remainder thereof, but shall be confined in its operation to the clause,  
14 sentence, paragraph or part thereof directly involved in the controversy  
15 in which such judgment shall have been rendered.

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

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

27 1. Inserting a notice annually in the customers' billing statements;  
28 and

29 2. Publishing a notice in local telephone directories.

30 S 3. Separability clause; construction. If any part or provision of  
31 this act or the application thereof to any person or circumstances be  
32 adjudged invalid by any court of competent jurisdiction, such judgment  
33 shall be confined in its operation to the part, provision or application  
34 directly involved in the controversy in which such judgment shall have  
35 been rendered and shall not affect or impair the validity of the remain-  
36 der of this act or the application thereof to other persons or circum-  
37 stances.

38 S 4. This act shall take effect on the one hundred eightieth day after  
39 it shall have become a law, provided, however, that effective immediate-  
40 ly, the addition, amendment and/or repeal of any rules or regulations  
41 necessary for the implementation of section one of this act on its  
42 effective date is authorized and directed to be made and completed on or  
43 before such effective date.