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

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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 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 ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 399-z of the general business law, as amended by chapter 369 of the laws of 2012, 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 AND TELEFACSIMILE ADVERTISING 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.

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

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

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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 that is conducted to induce payment or the exchange of any other consideration for any goods or services 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 to a customer or to 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 by the customer; 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[.];

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

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

N. "TELEFACSIMILE ADVERTISER" MEANS ANY PERSON, CORPORATION, PARTNERSHIP OR ASSOCIATION WHO INITIATES UNSOLICITED TELEFACSIMLE ADVERTISEMENTS.

2. No telemarketer or seller shall engage in telemarketing at any time other than between 8:00 A.M. and 9:00 P.M. at the location of the customer unless the customer has given his or her express consent to the call at a different time. 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:

a. the telemarketer's name and the person on whose behalf the solicitation is being made, if other than the telemarketer;

b. the purpose of the telephone call; and

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 AND TELEFACSIMILE ADVERTISING statewide registry which shall contain a list of customers who do not wish to receive unsolicited telemarketing sales calls OR TELEFACSIMILE ADVERTISING. 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 OR TELEFACSIMILE ADVERTISING registries for more than two years, and the contract requires the vendor to provide the no telemarketing sales calls AND TELEFACSIMILE ADVERTISING registry in a printed hard copy format and in any other format as prescribed by the department. ANY TYPE OF COPY FORMAT MAINTAINED FOR TELEMARKETING SALES CALLS SHALL BE MAINTAINED FOR TELEFACSIMILE ADVERTISING.

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 AND TELEFACSIMILE ADVERTISING 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 AND TELEFACSIMILE ADVERTISING statewide registry to the federal trade commission, for inclusion on the national "do-not-call" registry.

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

B. NO TELEFACSIMILE ADVERTISER MAY MAKE OR CAUSE TO BE MADE ANY UNSOLICITED TELEFACSIMILE ADVERTISEMENT TO ANY CUSTOMER MORE THAN THIRTY DAYS AFTER THE CUSTOMER'S NAME AND TELEPHONE NUMBER OR NUMBERS APPEAR ON THE THEN CURRENT QUARTERLY NO TELEMARKETING SALES CALLS AND TELEFACSIMILE ADVERTISING REGISTRY MADE AVAILABLE BY THE BOARD PURSUANT TO SUBDIVISION FOUR OF THIS SECTION.

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 twenty-four 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.

C. ANY COMPANY IN THE STATE THAT SELLS EQUIPMENT CAPABLE OF TRANSMITTING A TELEFACSIMILE SHALL INFORM ITS CUSTOMERS OF THE PROVISIONS OF THIS SECTION BY MEANS OF POSTING A NOTICE ISSUED BY THE BOARD.

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 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.

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.

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 OR UNSOLICITED TELEFACSIMILE ADVERTISEMENT 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.

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

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

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

2. Publishing a notice in local telephone directories.

S 3. Separability clause; construction. If any part or provision of this act or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this act or the application thereof to other persons or circumstances.

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