

2125

2013-2014 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 9, 2013

Introduced by M. of A. SIMOTAS, GUNTHER, COLTON, MILLER, CASTRO, GALEF,
HOOPER -- Multi-Sponsored by -- M. of A. CERETTO, MALLIOTAKIS, MONTES-
ANO -- 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 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 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 statewide registry to the
7 national "do-not-call" registry. 1. As used in this section, the follow-
8 ing terms shall have the following meanings:
9 a. "Department" shall mean the department of state.
10 b. "Secretary" shall mean the secretary of state.
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 OR FACSIMILE TRANSMISSIONS: (i) from a location in this state; or
16 (ii) from a location outside of this state to consumers residing in this
17 state[;].
18 D-1. "FACSIMILE TRANSMISSION" MEANS ANY METHOD OF TRANSMISSION OF A
19 DOCUMENT TO A FACSIMILE MACHINE AT A REMOTE LOCATION WHICH CAN AUTOMAT-
20 ICALLY PRODUCE A TANGIBLE COPY OF SUCH DOCUMENT.

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

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1 e. "Goods and services" means any goods and services, and shall
2 include any real property or any tangible personal property or services
3 of any kind[;].

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

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

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

19 i. "Telemarketing" means any plan, program or campaign that is
20 conducted to induce payment or the exchange of any other consideration
21 for any goods or services that involves more than one telephone call OR
22 FACSIMILE TRANSMISSION by a telemarketer in which the customer is
23 located within the state at the time of the call OR FACSIMILE TRANS-
24 MISSION. Telemarketing does not include the solicitation of sales
25 through media other than by telephone calls OR FACSIMILE TRANSMISSIONS
26 and does not include calls intended to implement or complete a trans-
27 action to which the customer has previously consented[;].

28 I-1. "TELEMARKETING FACSIMILE TRANSMISSION" MEANS A FACSIMILE TRANS-
29 MISSION MADE BY A TELEMARKETER TO A CUSTOMER FOR THE PURPOSE OF INDUCING
30 PAYMENT OR THE EXCHANGE OF ANY OTHER CONSIDERATION FOR ANY GOODS OR
31 SERVICES.

32 j. "Telemarketing sales call" means a telephone call made by a tele-
33 marketer or by any outbound telephone calling technology that delivers a
34 prerecorded message to a customer or to a customer's voicemail or
35 answering machine service for the purpose of inducing payment or the
36 exchange of any other consideration for any goods or services[;].

37 k. "Unsolicited telemarketing sales call OR FACSIMILE TRANSMISSION"
38 means any telemarketing sales call OR TELEMARKETING FACSIMILE TRANS-
39 MISSION other than a call OR TRANSMISSION made:

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

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

46 2. No telemarketer or seller shall engage in telemarketing at any time
47 other than between 8:00 A.M. and 9:00 P.M. at the location of the
48 customer unless the customer has given his or her express consent to the
49 call OR FACSIMILE TRANSMISSION at a different time. Telemarketers shall
50 provide, in a clear and coherent manner using words with common and
51 everyday meanings, at the beginning of each telemarketing sales call OR
52 TELEMARKETING FACSIMILE TRANSMISSION all of the following information:

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

55 b. the purpose of the telephone call OR FACSIMILE TRANSMISSION; and

1 c. the identity of the goods or services for which a fee will be
2 charged.

3 3. Prior to the purchase of any good or service, telemarketers shall
4 disclose to the customer the cost of the goods or services that are the
5 subject of the call and if the offer includes a negative option feature,
6 all material terms and conditions of the negative option feature,
7 including, but not limited to the fact that the customer's account will
8 be charged unless the customer takes an affirmative action to avoid the
9 charges, the dates the charges will be submitted for payment, and the
10 specific steps the customer must take to avoid the charge.

11 4. a. The department is authorized to establish, manage, and maintain
12 a no telemarketing sales calls AND FACSIMILE TRANSMISSIONS statewide
13 registry which shall contain a list of customers who do not wish to
14 receive unsolicited telemarketing sales calls AND/OR TELEMARKETING
15 FACSIMILE TRANSMISSIONS. The department may contract with a private
16 vendor to establish, manage and maintain such registry, provided the
17 private vendor has maintained national no telemarketing sales calls AND
18 FACSIMILE TRANSMISSIONS registries for more than two years, and the
19 contract requires the vendor to provide the no telemarketing sales calls
20 AND FACSIMILE TRANSMISSIONS registry in a printed hard copy format and
21 in any other format as prescribed by the department.

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

34 5. No telemarketer or seller [may] SHALL make or cause to be made any
35 unsolicited telemarketing sales call AND FACSIMILE TRANSMISSION to any
36 customer when that customer's telephone number [has] AND/OR FACSIMILE
37 TRANSMISSION NUMBER OR NUMBERS HAVE been on the national "do-not-call"
38 registry, established by the federal trade commission, for a period of
39 thirty-one days prior to the date the call is made, pursuant to 16
40 C.F.R. Section 310.4(b)(1)(iii)(B).

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

45 a. the telemarketer or seller obtained only after a clear and conspic-
46 uous disclosure that the purpose of the agreement is to authorize the
47 seller to make telemarketing sales calls OR TELEMARKETING FACSIMILE
48 TRANSMISSIONS 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 OR TELEMARKETING FACSIMILE TRANSMISSIONS by or made on
54 behalf of a specific seller; and,

55 d. includes such customer's telephone number AND/OR FACSIMILE TRANS-
56 MISSION NUMBER OR NUMBERS and signature.

1 7. In the case of any telemarketing sales call OR TELEMARKETING
2 FACSIMILE TRANSMISSION delivered by means of a technology that delivers
3 a pre-recorded message that could be received by a customer who can use
4 an automated interactive voice and/or keypress activated opt-out mech-
5 anism to assert a do-not-call request, such call OR FACSIMILE TRANS-
6 MISSION shall include a mechanism that allows the customer to automat-
7 ically add the number called to the seller's entity specific do-not-call
8 list, and which mechanism, once invoked, immediately ends the call OR
9 FACSIMILE TRANSMISSION.

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

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

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

26 b. Any company that provides local telephone directories to customers
27 in this state shall inform its customers of the provisions of this
28 section by means of publishing a notice in such local telephone directo-
29 ries.

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

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

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

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

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

52 a. the person has obtained a version of the "do-not-call" registry
53 from the federal trade commission no more than thirty-one days prior to
54 the date any telemarketing call OR FACSIMILE TRANSMISSION is made,
55 pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and the person can
56 demonstrate that, as part of the person's routine business practice at

1 the time of an alleged violation, it has established, implemented and
2 updated written policies and procedures related to the requirements of
3 this section prior to the date any telemarketing call OR TELEMARKETING
4 FACSIMILE TRANSMISSION is made;
5 b. the person has trained his or her personnel in the requirements of
6 this section; and
7 c. the person maintains and can produce records demonstrating compli-
8 ance with paragraphs a and b of this subdivision and the requirements of
9 this section.
10 14. The department shall prescribe rules and regulations to administer
11 this section.
12 15. Severability. If any clause, sentence, paragraph or part of this
13 section shall be adjudged by any court of competent jurisdiction to be
14 invalid, such judgment shall not affect, impair or invalidate the
15 remainder thereof, but shall be confined in its operation to the clause,
16 sentence, paragraph or part thereof directly involved in the controversy
17 in which such judgment shall have been rendered.
18 S 2. This act shall take effect on the one hundred twentieth day after
19 it shall have become a law, provided that any rules and regulations
20 necessary to implement the provisions of this act on its effective date
21 are authorized and directed to be completed on or before such date.