

STATE OF NEW YORK

5397

2019-2020 Regular Sessions

IN ASSEMBLY

February 11, 2019

Introduced by M. of A. CYMBROWITZ, COLTON, DINOWITZ, GALEF, GUNTHER,
JAFFEE -- read once and referred to the Committee on Consumer Affairs
and Protection

AN ACT to amend the general business law and 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, paragraph k of subdivision 1 as amended
3 and paragraphs l and m of subdivision 1 as added by chapter 484 of the
4 laws of 2016, subdivision 2 as amended by chapter 239 of the laws of
5 2017 and subdivision 2-a as amended by chapter 18 of the laws of 2017,
6 is amended to read as follows:
7 § 399-z. Telemarketing; establishment of no telemarketing sales calls
8 statewide registry; authorization of the transfer of telephone numbers
9 on the no telemarketing sales calls and telefacsimile advertising state-
10 wide registry to the national "do-not-call" registry. 1. As used in this
11 section, the following terms shall have the following meanings:
12 a. "Department" shall mean the department of state.
13 b. "Secretary" shall mean the secretary of state.
14 c. "Customer" means any natural person who is a resident of this state
15 and who is or may be required to pay for or to exchange consideration
16 for goods and services offered through telemarketing;
17 d. "Doing business in this state" means conducting telephonic sales
18 calls: (i) from a location in this state; or (ii) from a location
19 outside of this state to consumers residing in this state;
20 e. "Goods and services" means any goods and services, and shall
21 include any real property or any tangible personal property or services
22 of any kind;

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

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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 corporation and its affiliates or subsidiaries or other business entity;

8 h. "Telemarketer" means any person who, for financial profit or
9 commercial purposes in connection with telemarketing, makes telemarket-
10 ing sales calls to a customer when the customer is in this state or any
11 person who directly controls or supervises the conduct of a telemarket-
12 er. For the purposes of this section, "commercial purposes" shall mean
13 the sale or offer for sale of goods or services;

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

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

27 k. "Unsolicited telemarketing sales call" means any telemarketing
28 sales call other than a call made:

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

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

35 l. "Caller identification information" means information provided by a
36 caller identification service regarding the telephone number and name of
37 the person calling; and

38 m. "Caller identification service" means a service that allows a tele-
39 phone subscriber to have the telephone number, and, where available,
40 name of the calling party transmitted contemporaneously with the tele-
41 phone call, and displayed on a device in or connected to the subscrib-
42 er's telephone.

43 n. "Unsolicited telefacsimile advertisement" means any telefacsimile
44 message that promotes goods and services for purchase by the recipient
45 of such message, except where the message is sent to a recipient with
46 which the initiator has had a preexisting business or contractual
47 relationship;

48 o. "Telefacsimile" means every process in which electronic signals are
49 transmitted by telephone lines for conversion into written text;

50 p. "Telefacsimile advertiser" means any person, corporation, partner-
51 ship or association who initiates unsolicited telefacsimile advertise-
52 ments.

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

1 coherent manner using words with common and everyday meanings, at the
2 beginning of each telemarketing sales call all of the following informa-
3 tion:

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

6 b. the purpose of the telephone call;

7 c. the identity of the goods or services for which a fee will be
8 charged; and

9 d. whether the call is being recorded.

10 2-a. It shall be unlawful for any telemarketer or seller to knowingly
11 cause any caller identification service to transmit misleading, inaccur-
12 rate, or false caller identification information, provided that it shall
13 not be a violation to substitute (for the name and phone number used in,
14 or billed for, making the call) the name or telephone number of the
15 person or seller on behalf of which a telemarketing call is placed.

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

24 4. a. The department is authorized to establish, manage, and maintain
25 a no telemarketing sales calls and telefacsimile advertising statewide
26 registry which shall contain a list of customers who do not wish to
27 receive unsolicited telemarketing sales calls or telefacsimile advertis-
28 ing. The department may contract with a private vendor to establish,
29 manage and maintain such registry, provided the private vendor has main-
30 tained national no telemarketing sales calls or telefacsimile advertis-
31 ing registries for more than two years, and the contract requires the
32 vendor to provide the no telemarketing sales calls and telefacsimile
33 advertising registry in a printed hard copy format and in any other
34 format as prescribed by the department. Any type of copy format main-
35 tained for telemarketing sales calls shall be maintained for telefacsim-
36 ile advertising.

37 b. The department is authorized to have the national "do-not-call"
38 registry established, managed and maintained by the federal trade
39 commission pursuant to 16 C.F.R. Section 310.4 (b) (1) (iii) (B) serve
40 as the New York state no telemarketing sales calls and telefacsimile
41 advertising statewide registry provided for by this section. The depart-
42 ment is further authorized to take whatever administrative actions may
43 be necessary or appropriate for such transition including, but not
44 limited to, providing the telephone numbers of New York customers regis-
45 tered on the no telemarketing sales calls and telefacsimile advertising
46 statewide registry to the federal trade commission, for inclusion on the
47 national "do-not-call" registry.

48 5. a. No telemarketer or seller may make or cause to be made any unso-
49 licited telemarketing sales call to any customer when that customer's
50 telephone number has been on the national "do-not-call" registry, estab-
51 lished by the federal trade commission, for a period of thirty-one days
52 prior to the date the call is made, pursuant to 16 C.F.R. Section
53 310.4(b)(1)(iii)(B).

54 b. No telefacsimile advertiser may make or cause to be made any unso-
55 licited telefacsimile advertisement to any customer more than thirty
56 days after the customer's name and telephone number or numbers appear on

1 the then current quarterly no telemarketing sales calls and telefacsim-
2 ile advertising registry made available by the board pursuant to subdivi-
3 vision four of this section.

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

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

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

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

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

17 7. In the case of any telemarketing sales call delivered by means of a
18 technology that delivers a pre-recorded message that could be received
19 by a customer who can use an automated interactive voice and/or keypress
20 activated opt-out mechanism to assert a do-not-call request, such call
21 shall include a mechanism that allows the customer to automatically add
22 the number called to the seller's entity specific do-not-call list, and
23 which mechanism, once invoked, immediately ends the call.

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

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

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

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

43 c. Any company in the state that sells equipment capable of transmit-
44 ting a telefacsimile shall inform its customers of the provisions of
45 this section by means of posting a notice issued by the board.

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

1 jurisdiction to enforce the subpoena and such sanctions as the court may
2 direct.

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

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

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

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

13 a. the person has obtained a version of the "do-not-call" registry
14 from the federal trade commission no more than thirty-one days prior to
15 the date any telemarketing call or unsolicited telefacsimile advertise-
16 ment is made, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B), and the
17 person can demonstrate that, as part of the person's routine business
18 practice at the time of an alleged violation, it has established, imple-
19 mented and updated written policies and procedures related to the
20 requirements of this section prior to the date any telemarketing call is
21 made;

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

24 c. the person maintains and can produce records demonstrating compli-
25 ance with paragraphs a and b of this subdivision and the requirements of
26 this section.

27 14. The department shall prescribe rules and regulations to administer
28 this section.

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

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

38 § 92-d. Telephone solicitations. Each local exchange telephone company
39 shall inform its customers of the provisions of sections three hundred
40 ninety-nine-p [~~and~~], three hundred ninety-nine-z and three hundred
41 ninety-nine-pp of the general business law and article ten-B of the
42 personal property law, as such provisions relate to the rights of
43 consumers with respect to telemarketers, sellers, the no telemarketing
44 sales [~~call~~] calls and telefacsimile advertising statewide registry, and
45 automatic dialing-announcing devices, by means of:

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

48 2. Publishing a notice in local telephone directories.

49 § 3. Separability clause; construction. If any part or provision of
50 this act or the application thereof to any person or circumstances be
51 adjudged invalid by any court of competent jurisdiction, such judgment
52 shall be confined in its operation to the part, provision or application
53 directly involved in the controversy in which such judgment shall have
54 been rendered and shall not affect or impair the validity of the remain-
55 der of this act or the application thereof to other persons or circum-
56 stances.

1 § 4. This act shall take effect on the one hundred eightieth day after
2 it shall have become a law. Effective immediately, the addition, amend-
3 ment and/or repeal of any rule or regulation necessary for the implemen-
4 tation of this act on its effective date are authorized to be made and
5 completed on or before such effective date.