

STATE OF NEW YORK

7490

2019-2020 Regular Sessions

IN ASSEMBLY

May 7, 2019

Introduced by M. of A. DenDEKKER -- (at request of the Department of State) -- read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to telemarketing

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 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 statewide registry to the national
10 "do-not-call" registry. 1. As used in this section, the following terms
11 shall have the following meanings:

12 a. "Department" [~~shall mean~~ means the department of state.

13 b. "Secretary" [~~shall mean~~ means 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[+].

23 f. "Negative option feature" means, in an offer or agreement to sell
24 or provide any goods or services, a provision under which the customer's
25 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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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 enti-
5 ty[+].

6 h. "Telemarketer" means any person who, for financial profit or
7 commercial purposes in connection with telemarketing, (i) makes telemar-
8 keting sales calls or electronic messaging texts to a customer when the
9 customer is in this state ~~[or any person who]~~, (ii) directly controls or
10 supervises the conduct of a telemarketer, or (iii) intentionally aids,
11 contracts with or requests a telemarketer to engage in telemarketing.
12 For the purposes of this section, "commercial purposes" shall mean the
13 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 or more tele-
17 phone ~~[call]~~ calls or electronic messaging texts by a telemarketer in
18 which the customer is located within the state at the time of the call.
19 Telemarketing also includes the acceptance or collection of information
20 obtained from telephone calls or electronic messaging texts with the
21 intent of providing it to a third party who accepts or collects the
22 information to engage in telemarketing. Telemarketing does not include
23 the solicitation of sales through media other than by telephone calls or
24 electronic messaging texts and does not include calls or electronic
25 messaging texts intended to implement or complete a transaction to which
26 the customer has previously consented[+].

27 j. "Telemarketing sales call" means a telephone call or electronic
28 messaging text, made directly or indirectly by a telemarketer, or by any
29 outbound telephone calling technology that delivers a prerecorded
30 message to a customer or to a customer's voicemail or answering machine
31 service, in which such telephone call or electronic messaging text is
32 for the purpose of inducing payment or the exchange of any other consid-
33 eration for any goods or services[+].

34 k. "Unsolicited telemarketing sales call" means any telemarketing
35 sales call other than a call made:

36 (i) in response to an express written or verbal request by the custom-
37 er; 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 l. "Caller identification information" means information provided by a
43 caller identification service regarding the telephone number and name of
44 the person calling~~[+and]~~.

45 m. "Caller identification service" means a service that allows a tele-
46 phone subscriber to have the telephone number, and, where available,
47 name of the calling party transmitted contemporaneously with the tele-
48 phone call, and that is displayed on a device in or connected to the
49 subscriber's telephone.

50 n. "Area code" means the first three digits of the ten-digit telephone
51 number.

52 o. "Entity specific do-not-call list" means the list of telephone
53 numbers provided directly to the telemarketer by the owners of the tele-
54 phone numbers for the purpose of being removed from any future telemar-
55 keting calls.

p. "Short-duration volume caller" means any telemarketer that intends to surpass or has surpassed five thousand dialed telephone calls during any given day where it is reasonably anticipated that over seventy percent of telephone calls placed may go unanswered or the call duration of over seventy percent of calls placed will be less than thirty-five seconds.

q. "Automatic number identification" means any data message, protocol or part thereof which communicates the telephone number to be displayed on the caller identification of the telephone call recipient. Automatic number identification includes a calling party number, initial address message, and calling line identification.

r. "New York state automatic number identification" means any automatic number identification with an area code designated by the North American Numbering Plan to cover locations in New York state.

s. "North American Numbering Plan" has the meaning ascribed to it by federal communications commission regulations, defined in 47 C.F.R. section 52.5(d).

t. "Public switched telephone network" means all telephones, mobile telephones and devices assigned telephone numbers from the North American Numbering Plan.

u. "Telephone dialing services" means any service providing telephone call distribution or telephone call dialing services, including but not limited to off-premise, on-premise, gateway and internet-based means of originating telephone calls to the devices on the public switched telephone network.

v. "Downstream carrier" means any person providing transporting telephone call traffic accepted from another carrier, such as an upstream carrier.

w. "Upstream carrier" means any person transporting telephone call traffic to another carrier, such as a downstream carrier.

x. "Automatic telephone dialing system" means any equipment or service which has the capability to store or produce telephone numbers to be called, and to dial such numbers.

y. "Auto-dialed call" means any telephone call initiated by an automatic telephone dialing system.

z. "Electronic messaging text" means real-time or near real-time non-voice messages in text form over communications networks, and includes the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable or other like connection between the points of origin and reception of such transmission.

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;

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

d. whether the call is being recorded.

2-a. It shall be unlawful for any telemarketer or seller to knowingly cause any caller identification service to transmit misleading, inaccurate, or false caller identification information, provided that it shall

1 not be a violation to substitute (for the name and [~~phone~~] telephone
2 number used in, or billed for, making the call) the name or telephone
3 number of the person or seller on behalf of which a telemarketing call
4 is placed.

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

13 4. a. The department is authorized to establish, manage, and maintain
14 a no telemarketing sales calls statewide registry which shall contain a
15 list of customers who do not wish to receive unsolicited telemarketing
16 sales calls. The department may contract with a private vendor to estab-
17 lish, manage and maintain such registry, provided the private vendor has
18 maintained national no telemarketing sales calls registries for more
19 than two years, and the contract requires the vendor to provide the no
20 telemarketing sales calls registry in a printed hard copy format and in
21 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 15 U.S.C. 6151, and referenced by 16 C.F.R.
25 Section 310.4 (b) (1) (iii) (B), to serve as the New York state no tele-
26 marketing sales calls statewide registry provided for by this section.
27 The department is further authorized to take whatever administrative
28 actions may be necessary or appropriate for such transition including,
29 but not limited to, providing the telephone numbers of New York custom-
30 ers registered on the no telemarketing sales calls statewide registry to
31 the federal trade commission, for inclusion on the national "do-not-
32 call" registry.

33 5. No telemarketer or seller may make or cause to be made any unsolic-
34 ited telemarketing sales call to any customer when that customer's tele-
35 phone number has been on the national "do-not-call" registry, estab-
36 lished by the federal trade commission, for a period of thirty-one days
37 prior to the date the call is made, pursuant to 16 C.F.R. Section
38 310.4(b)(1)(iii)(B).

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

43 a. the telemarketer or seller obtained only after a clear and conspic-
44 uous disclosure, using plain language and printed in type no less than
45 twelve-point type, that the purpose of the agreement is to authorize the
46 seller to make telemarketing sales calls to such customer;

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

50 c. evidences the willingness of the customer to receive telemarketing
51 sales calls by or made on behalf of a specific seller; [~~and,~~]

52 d. includes such customer's telephone number and signature[~~;~~];

53 e. is displayed before any mechanism offered to the customer to verify
54 or acknowledge consent; and

55 f. contains the following language:

1 (i) "This express agreement applies only between the customer and the
2 specific entity offering the agreement, and any named partner or affil-
3 iate entity."

4 (ii) "By clicking or otherwise acknowledging agreement, I understand
5 that I consent to and may receive telemarketing sales calls even if I
6 have previously entered my number on the national 'do-not-call' registry
7 maintained by the federal trade commission."

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

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

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

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

30 b. Any company that provides local telephone directories to customers
31 in this state shall inform its customers of the provisions of this
32 section by means of publishing a notice in such local telephone directo-
33 ries.

34 11. a. Any provider of telephone dialing services to short-duration
35 volume callers or persons intending to engage in short-duration volume
36 calls shall register all New York state automated number identification
37 numbers with the department prior to allowing their use in the origi-
38 nation of outbound telephone calls. Registration of automated number
39 identification numbers shall include the telemarketer's (i) billing
40 telephone number, (ii) billing address, (iii) billing company and (iv)
41 billing contact. Failure to comply with this subdivision shall subject
42 the telemarketer, telephone dialing service and all downstream carriers
43 to joint liability for violations of this section. Downstream carriers
44 shall be jointly liable with upstream carriers from whom they accept
45 call traffic.

46 b. No person may initiate a telephone call on behalf of a short-dura-
47 tion volume caller displaying a New York state automated number iden-
48 tification that has not been registered for use with the department or
49 assigned by the North American Numbering Plan to that person or entity.
50 Telephone dialing services are prohibited from displaying New York state
51 automated number identification information which has neither been
52 registered for use by the caller nor assigned by the North American
53 Numbering Plan directly to the short-duration volume caller.

54 c. Any telephone call from a short-duration volume caller containing
55 an automated number identification that is not registered with the

1 department shall display the billing telephone number of the person
2 initiating the call.

3 12. No telemarketer or seller may initiate any telephone call using an
4 automatic telephone dialing system or an artificial or prerecorded
5 voice, without prior express and verifiable consent, containing all
6 elements of subdivision six of this section, from the owner of the tele-
7 phone number receiving the call.

8 ~~[11.]~~ 13. When the department has reason to believe a telemarketer has
9 engaged in repeated unlawful acts in violation of this section, or when
10 a notice of hearing has been issued pursuant to subdivision ~~[twelve]~~
11 fourteen of this section, the department may request in writing the
12 production of relevant documents and records as part of its investi-
13 gation. If the person upon whom such request was made fails to produce
14 the documents or records within thirty days after the date of the
15 request, the department may issue and serve subpoenas to compel the
16 production of such documents and records. If any person shall refuse to
17 comply with a subpoena issued under this section, the department may
18 petition a court of competent jurisdiction to enforce the subpoena, and
19 notwithstanding any other provisions of law, to request a civil penalty
20 not to exceed one thousand dollars, actual damages sustained by reason
21 of the failure to comply, and such sanctions as the court may direct.

22 ~~[12.]~~ 14. a. Where it is determined after hearing that any person has
23 violated one or more provisions of this section, the secretary, or any
24 person deputized or so designated by him or her may assess a fine not to
25 exceed eleven thousand dollars for each violation.

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

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

31 ~~[13. A person shall not be held liable for violating this section if:~~
32 ~~a. the person has obtained a version of the "do not call" registry~~
33 ~~from the federal trade commission no more than thirty-one days prior to~~
34 ~~the date any telemarketing call is made, pursuant to 16 C.F.R. Section~~
35 ~~310.4(b)(1)(iii)(B), and the person can demonstrate that, as part of the~~
36 ~~person's routine business practice at the time of an alleged violation,~~
37 ~~it has established, implemented and updated written policies and proce-~~
38 ~~dures related to the requirements of this section prior to the date any~~
39 ~~telemarketing call is made;~~

40 ~~b. the person has trained his or her personnel in the requirements of~~
41 ~~this section; and~~

42 ~~c. the person maintains and can produce records demonstrating compli-~~
43 ~~ance with paragraphs a and b of this subdivision and the requirements of~~
44 ~~this section.~~

45 ~~14.]~~ 15. The department shall prescribe rules and regulations to
46 administer this section.

47 ~~[15.]~~ 16. Severability. If any clause, sentence, paragraph or part of
48 this section shall be adjudged by any court of competent jurisdiction to
49 be invalid, such judgment shall not affect, impair or invalidate the
50 remainder thereof, but shall be confined in its operation to the clause,
51 sentence, paragraph or part thereof directly involved in the controversy
52 in which such judgment shall have been rendered.

53 § 2. This act shall take effect on the one hundred eightieth day after
54 it shall have become a law.