STATE OF NEW YORK

6327

2019-2020 Regular Sessions

IN SENATE

June 5, 2019

Introduced by Sen. PARKER -- (at request of the Department of State) -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

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:

Section 1. Section 399-z of the general business law, as amended by chapter 369 of the laws of 2012, paragraph k of subdivision 1 as amended and paragraphs l and m of subdivision 1 as added by chapter 484 of the laws of 2016, subdivision 2 as amended by chapter 239 of the laws of 2017 and subdivision 2-a as amended by chapter 18 of the laws of 2017, is amended to read as follows:

§ 399-z. Telemarketing; establishment of no telemarketing sales calls statewide registry; authorization of the transfer of telephone numbers on the no telemarketing sales calls 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~~] means the department of state.

b. "Secretary" [~~shall mean~~] means 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, **(i)** makes telemarketing sales calls **or electronic messaging texts** to a customer when the customer is in this state [~~**or any person who**~~], **(ii)** directly controls or supervises the conduct of a telemarketer**, or (iii) intentionally aids, contracts with or requests a telemarketer to engage in telemarketing**. 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 **or more** telephone [~~**call**~~] **calls or electronic messaging texts** by a telemarketer in which the customer is located within the state at the time of the call. **Telemarketing also includes the acceptance or collection of information obtained from telephone calls or electronic messaging texts with the intent of providing it to a third party who accepts or collects the information to engage in telemarketing.** Telemarketing does not include the solicitation of sales through media other than by telephone calls **or electronic messaging texts** and does not include calls **or electronic messaging texts** intended to implement or complete a transaction to which the customer has previously consented[~~;~~].

j. "Telemarketing sales call" means a telephone call **or electronic messaging text,** made **directly or indirectly** 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**, in which such telephone call or electronic messaging text is** 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. "Caller identification information" means information provided by a caller identification service regarding the telephone number and name of the person calling[~~**; and**~~].

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

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

o. "Entity specific do-not-call list" means the list of telephone numbers provided directly to the telemarketer by the owners of the telephone numbers for the purpose of being removed from any future telemarketing 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

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

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 statewide registry which shall contain a list of customers who do not wish to receive unsolicited telemarketing sales calls. 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 registries for more than two years, and the contract requires the vendor to provide the no telemarketing sales calls registry in a printed hard copy format and in any other format as prescribed by the department.

b. The department is authorized to have the national "do-not-call" registry established, managed and maintained by the federal trade commission pursuant to **15 U.S.C. 6151, and referenced by** 16 C.F.R. Section 310.4 (b) (1) (iii) (B)**, to** serve as the New York state no telemarketing sales calls 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 statewide registry to the federal trade commission, for inclusion on the national "do-not-call" registry.

5. 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).

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**, using plain language and printed in type no less than twelve-point type,** 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[~~.~~]**;**

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

f. contains the following language:

(i) "This express agreement applies only between the customer and the specific entity offering the agreement, and any named partner or affiliate entity."

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

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.

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

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

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

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

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

[~~11.~~] 13. 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~~] fourteen 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 notwithstanding any other provisions of law, to request a civil penalty not to exceed one thousand dollars, actual damages sustained by reason of the failure to comply, and such sanctions as the court may direct.

[~~12.~~] 14. 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 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.~~] 15. The department shall prescribe rules and regulations to administer this section.

[~~15.~~] 16. 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.

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