STATE OF NEW YORK

6885--A

2021-2022 Regular Sessions

IN SENATE

May 20, 2021

Introduced by Sen. THOMAS -- (at request of the Department of State) -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to strengthening consumer consent rules that apply to live and robocall telemarketing calls

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, paragraphs h, i, j, k, l and m of subdivision 1 as amended and paragraph n as added by chapter 239 of the laws of 2021, subdivision 2 as amended by chapter 239 of the laws of 2017, subdivision 2-a as amended by chapter 18 of the laws of 2017, subdivision 5-a as added by chapter 680 of the laws of 2019, subdivisions 9, 11, 12, 13, 14, 15, 16 and 17 as amended and subdivision 10 as added by chapter 572 of the laws of 2019, 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~~] **Telemarketing sales calls mandates, prohibitions, and "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[~~,~~].

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

LBD09656-04-2

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 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 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 **one or** more [~~**than one**~~] telephone [~~**call**~~] **calls** or electronic messaging [~~**text**~~] **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 or electronic messaging text other than:

(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[~~;~~].

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 tele-

phone call, and displayed on a device in or connected to the subscriber's telephone[~~; and~~].

n. "Electronic messaging text" means real-time or near real-time non-voice messages in text form **sent** 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.

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.

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 **voice service providing** 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 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 custom-

ers 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).

5-a. It shall be unlawful for any telemarketer doing business in this state to knowingly make an unsolicited telemarketing sales call to any person in a county, city, town or village under a declared state of emergency or disaster emergency as described in sections twenty-four or twenty-eight of the executive law.

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**. No such agreement shall authorize any telemarketing sales calls more than thirty days after execution of the agreement, and the agreement must provide** that:

a. the telemarketer or seller obtained only after a clear and conspicuous disclosure**, using plain language and printed in 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."

6-a. No telemarketer or seller may initiate any telephone call using an automatic telephone dialing system or an artificial or pre-recorded voice, without prior express and verifiable consent from the owner of the telephone number receiving the call.

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. In the case of any telemarketing sales call made by a natural person, the telemarketer or seller shall inform the customer that he or she may request that his or her telephone number be added to the seller's entity specific do-not-call list. If the customer opts to do so, the telemarketer or seller shall immediately end the call and shall add the number called to such list or cause the number called to be added to such list.

10. No telemarketer or seller shall transmit, share, or otherwise make available any customer's contact information, including name, telephone number, or email address, which has been provided to such telemarketer or seller by such customer, to any person, corporation, or other entity without the express agreement of the consumer in writing or in electronic format, unless otherwise required by law, or pursuant to a lawful subpoena or court order. **No such agreement shall authorize a telemarketer or seller to transmit, share, or otherwise make available such consumer's contact information for more than thirty days after execution of the agreement.**

11. 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.

12. 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.

13. When the department has reason to believe a [~~telemarketer~~] **person** has engaged in repeated unlawful acts in violation of this section, or when a notice of hearing has been issued pursuant to subdivision 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~~] **fourteen** 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 **to request a civil penalty not to exceed one thousand dollars per day, actual damages sustained by reason of the failure to comply, and** such sanctions as the court may direct.

14. a. Where it is determined after **an opportunity for a** 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~~] **twenty-two** 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.

15. [~~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.~~

~~16.~~] The department shall prescribe rules and regulations to administer this section.

[~~17.~~] **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 immediately.