

A08839 Text:

STATE OF NEW YORK

8839--A

2009-2010 Regular Sessions

IN ASSEMBLY

June 11, 2009

Introduced by M. of A. PHEFFER, JAFFEE, FIELDS, SPANO, CYMBROWITZ, CHRISTENSEN, ALESSI, ORTIZ, KOON, STIRPE -- Multi-Sponsored by -- M. of A. BRENNAN, DeIMONTE, GABRYSZAK, GIBSON, GLICK, GOTTFRIED, JOHN, LUPARDO, MAGEE, MAISEL, McENENY, MENG, PERRY, TITONE, WEINSTEIN, WEISENBERG -- read once and referred to the Committee on Consumer Affairs

and Protection -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to providing for enhanced consumer protection measures and enforcement of the do-not-call registry

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 124 of the laws of 2003, paragraph j of subdivision 1 as amended
3 by chapter 214 of the laws of 2005, subdivision 3 as amended by chapter
4 69 of the laws of 2007, paragraph a of subdivision 6 as amended by chap-
5 ter 417 of the laws of 2004 and paragraph a of subdivision 7 as amended
6 by chapter 263 of the laws of 2006, 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. "Board" shall mean the consumer protection board;
13 b. "Director" means the executive director of the consumer protection
14 board;
15 c. "Customer" means any natural person who is a resident of this state
16 and who is or may be required to pay for or to exchange consideration
17 for goods and services offered through telemarketing;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets

~~[-]~~ is old law to be omitted.

A

LBD14312-04-9

A. 8839--A

2

1 d. "Doing business in this state" means conducting telephonic sales
2 calls: (i) from a location in this state; or (ii) from a location
3 outside of this state to consumers residing in this state;

4 e. "Goods and services" means any goods and services, and shall
5 include any real property or any tangible personal property or services
6 of any kind;

7 f. "Negative option feature" means, in an offer or agreement to sell
8 or provide any goods or services, a provision under which the customer's
9 silence or failure to take an affirmative action to reject such goods or

10 services or to cancel the agreement is interpreted by the seller as
11 acceptance of the offer.

12 g. "Person" means any natural person, association, partnership, firm,
13 corporation and its affiliates or subsidiaries or other business entity;

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

20 ~~[h-]~~ i. "Telemarketing" means any plan, program or campaign which is
21 conducted to induce payment or the exchange of any other consideration

22 for any goods or services by use of one or more telephones and which
23 involves more than one telephone call by a telemarketer in which the
24 customer is located within the state at the time of the call. Telemar-
25 keting does not include the solicitation of sales through media other
26 than by telephone calls;

27 ~~[i-]~~ j. "Telemarketing sales call" means a telephone call made by a
28 telemarketer or by any outbound telephone calling technology that deliv-
29 ers a prerecorded message either to a customer or to their voicemail or
30 answering machine service for the purpose of inducing payment or the
31 exchange of any other consideration for any goods or services;

32 ~~[j-]~~ k. "Unsolicited telemarketing sales call" means any telemarketing
33 sales call other than a call made:

34 (i) in response to an express written or verbal request of the custom-
35 er called; or

36 (ii) in connection with an established business relationship, which
37 has not been terminated by either party, unless such customer has stated
38 to the telemarketer that such customer no longer wishes to receive the
39 telemarketing sales calls of such telemarketer~~[j- or~~

40 ~~(iii) to an existing customer, unless such customer has stated to the~~
41 ~~telemarketer that such customer no longer wishes to receive the telemar-~~
42 ~~keting sales calls of such telemarketer].~~

43 2. ~~[a-]~~ No telemarketer or seller shall engage in telemarketing at
44 any time other than between 8:00 A.M. and 9:00 P.M. local time unless
45 the consumer has given his or her express consent to the call at a

46 different time, and shall provide, in a clear and coherent manner using
47 words with common and everyday meanings, at the beginning of each tele-
48 marketing sales call all of the following information:

49 (i) the telemarketer's name and the person on whose behalf the solici-
50 tation is being made, if other than the telemarketer;

51 (ii) the purpose of the telephone call; and

52 (iii) the identity of the goods or services for which a fee will be
53 charged.

54 3. Prior to the purchase of any good or service telemarketers shall
55 disclose to the customer the cost of the goods or services that are the
56 subject of the call and if the offer includes a negative option feature,

A. 8839--A

3

1 all material terms and conditions of the negative option feature,
2 including, but not limited to the fact that the customer's account will
3 be charged unless the customer takes an affirmative action to avoid the
4 charges, the dates the charges will be submitted for payment, and the
5 specific steps the customer must take to avoid the charge.

6 4. a. The board is authorized to establish, manage, and maintain a no
7 telemarketing sales calls statewide registry which shall contain a list
8 of customers who do not wish to receive unsolicited telemarketing sales
9 calls. The board may contract with a private vendor to establish, manage
10 and maintain such registry, provided the private vendor has maintained

11 national no telemarketing sales calls registries for more than two
12 years, and the contract requires the vendor to provide the no telemar-
13 keting sales calls registry in a printed hard copy format and in any
14 other format as prescribed by the board.

15 b. The board is authorized to have the national "do-not-call" registry
16 established, managed and maintained by the federal trade commission
17 pursuant to 16 C.F.R. Section 310.4 (b) (1) (iii) (B) serve as the New
18 York state no telemarketing sales calls statewide registry provided for
19 by this section. The board is further authorized to take whatever admin-
20 istrative actions may be necessary or appropriate for such transition
21 including, but not limited to, providing the telephone numbers of New
22 York customers registered on the no telemarketing sales calls statewide

23 registry to the federal trade commission, for inclusion on the national
24 "do-not-call" registry.

25 ~~[3.]~~ 5. No telemarketer or seller may make or cause to be made any
26 unsolicited telemarketing sales call to any customer when that custom-
27 er's telephone number has been on the national "do-not-call" registry,
28 established by the federal trade commission, for a period of thirty-one
29 days prior to the date the call is made, pursuant to 16 CFR Section
30 310.4(b)(1)(iii)(B).

31 ~~[4.]~~ 6. a. The board shall provide notice to customers of the estab-
32 lishment of the national "do-not-call" registry. Any customer who wishes
33 to be included on such registry shall notify the federal trade commis-
34 sion as directed by relevant federal regulations.

35 b. Any company that provides local telephone directories to customers

36 in this state shall inform its customers of the provisions of this
37 section by means of publishing a notice in such local telephone directo-
38 ries.

39 ~~[5. The board shall prescribe rules and regulations to administer this~~
40 ~~section.~~

41 ~~[6.]~~ 7. When the board has reason to believe a telemarketer has engaged
42 in repeated unlawful acts in violation of this section, or when a notice
43 of hearing has been issued pursuant to subdivision eight of this
44 section, the board may request in writing the production of relevant
45 documents and records as part of its investigation. If the person upon
46 whom such request was made fails to produce the documents or records
47 within thirty days after the date of the request, the board may issue

48 and serve subpoenas to compel the production of such documents and
49 records. If any person shall refuse to comply with a subpoena issued
50 under this section, the board may petition a court of competent juris-
51 isdiction to enforce the subpoena and such sanctions as the court may
52 direct.

53 8. a. Where it is determined after hearing that any person has
54 violated one or more provisions of this section, the director, or any
55 person deputized or so designated by him or her may assess a fine not to
56 exceed eleven thousand dollars for each violation.

A. 8839--A

4

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

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

6 ~~[7-]~~ 9. A person shall not be held liable for violating this section
7 if:

8 a. the person has obtained a version of the "do-not-call" registry
9 from the federal trade commission no more than thirty-one days prior to
10 the date any telemarketing call is made, pursuant to 16 C.F.R. Section
11 310.4(b)(1)(iii)(B), and has established ~~[and]~~, implemented and updated
12 written policies and procedures related to the requirements of this
13 section prior to the date any telemarketing call is made;

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

16 c. the person maintains records demonstrating compliance with para-
17 graphs a and b of this subdivision and the requirements of this
18 section~~;~~ ~~and~~

19 ~~d. any subsequent unsolicited telemarketing sales call is the result~~
20 ~~of error~~.

21 10. The board shall prescribe rules and regulations to administer
22 this section.

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