



**Division of
Consumer Protection**

Consumer Protection Law

Do Not Call

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New York State
DEPARTMENT OF STATE
Division of Consumer Protection
www.dos.ny.gov

Andrew M. Cuomo
Governor

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Consumer Protection Law

Do Not Call

State Do Not Call Law

General Business

§ 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 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;
 - 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, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of telemarketer. 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 telephone call by a telemarketer in which the customer is located within the state at the time of the call. Telemarketing does not include the solicitation of sales through media other than by telephone calls and does not include calls intended to implement or complete a transaction to which the customer has previously consented;
 - j. "Telemarketing sales call" means a telephone call made 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 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.
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; and (c) the identity of the goods or services for which a fee will be charged.
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 16 C.F.R. Section 310.4 (b) (1) (iii) (B) 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 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.
 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. 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 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 such sanctions as the court may direct.
 - 12.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. The Department shall prescribe rules and regulations to administer this section.
15. 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.

State Do Not Call Regulations

21 NYCRR Part 4602 General Provisions

Section 4602.1 Authorization of transfer of telephone numbers to Federal registry.

- (a) The New York State Department of State is authorized to have the national "do-not-call" registry, established, managed and maintained by the Federal Trade Commission pursuant to 16 CFR, section 310.4(b)(1)(iii)(B) (herein referred to as the national "do-not-call" registry) serve as the New York State "do-not-call" registry.
- (b) Consumer telephone numbers listed on the New York State no telemarketing sales calls statewide registry will be transferred to the Federal Trade Commission for inclusion in its national "do-not-call" registry as established by 16 CFR section 310.4(b)(1)(iii)(B).
- (c) The registry is open to all natural persons who:
 - (1) reside in this State; and
 - (2) have telephone service in this State that receives incoming calls.

Section 4602.2 Definitions.

- (a) Consumer means any natural person who:
 - (1) resides in this State; and
 - (2) has telephone service in this State that receives incoming calls. The term customer shall have the same meaning as the definition of consumer defined herein.
- (b) Doing business in this State means conducting telephonic sales calls:
 - (1) from any location within New York State; or
 - (2) from a location outside of New York State to consumers residing and having a telephone number in this State.
- (c) Goods and services means any goods and services, including any real property or any tangible personal property, and services of any kind.
 - (1) The term goods shall be the same as defined under section 2-105 of the New York Uniform Commercial Code.

- (2) The term services shall be defined as the duty, labor, obligation, act, or commitment to be rendered by one person to another for profit, whereby the telemarketer offers, seeks to offer, or contracts to offer any performance of labor or other such act for the benefit of the consumer, or at the consumer's direction or authority.
- (d) 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.
- (e) Telemarketer means any person who, for financial profit or commercial purposes in connection with telemarketing, makes a telemarketing sales call to a consumer in this State or any person who directly controls or supervises the conduct of a telemarketer. Telemarketer shall also include any person, firm, or corporation acting as an agent or representative of such telemarketer. For purposes of this paragraph, commercial purposes shall mean the sale or offer for sale of goods and services. Charitable organizations as defined in section 171-a(1) of the Executive Law and registered pursuant to section 172 of the Executive Law, religious corporations as defined in section 2 of the Religious Corporations Law, political parties as defined in section 1-104(3) of the Election Law, and political committees as defined in section 14-100(1) of the Election Law, are deemed not able to conduct any act or activity for commercial purposes and are deemed not to be operating for financial profit for purposes of these regulations.
- (f) Telemarketing means any plan, program or campaign which is initiated by a telephone call to a consumer or a message left on a telephone answering machine or voice mail system of a consumer, conducted to induce or encourage payment or the exchange of any other consideration for any goods or services by use of one or more telephones and which involves more than one telephone call by a telemarketer in which the consumer receiving such call or message is located within the State at the time of the call. Telemarketing does not include the solicitation of sales through media other than by telephone calls.
- (g) Telemarketing sales call means a telephone call made by a telemarketer or by any outbound telephone calling technology that delivers a prerecorded message either to a consumer or to their voicemail or answering machine service for the purpose of encouraging the purchase or rental of, or investment in property, goods or services, or inducing payment or the exchange of any other consideration for any goods or services, where the consumer's receiving device is a telephone.

21 NYCRR Part 4603 Enforcement

Section 4603.1 Violations.

- (a) No telemarketer or seller may make or cause to be made any unsolicited telemarketing sales call to any consumer more than thirty-one (31) days after the telephone number appears on the National Do-Not-Call Registry, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B). Each call to a telephone number shall be deemed a separate occurrence for purposes of the penalty and enforcement provisions of these regulations.
- (b) No telemarketer or seller shall engage in telemarketing at any time other than between 8:00 a.m. and 9:00 p.m. local time unless the consumer has given his or her express consent to the call at a different time.
- (c) At the beginning of each telemarketing sales call telemarketers shall provide, in a clear and coherent manner, using words with common and everyday meanings, all of the following information: (1) the telemarketer's name and the person, firm or corporation on whose behalf the solicitation is being made, if other than the telemarketer; (2) the purpose of the telephone call; and (3) the identity of the goods or services for which a fee will be charged.
- (d) 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.

4603.2 Exceptions.

- (a) Unsolicited telemarketing sales call means any telemarketing sales call other than a call made:
 - (1) in response to an express written or verbal request of the specific customer called; or
 - (2) in connection with an established business relationship, which has not been terminated by either party, unless such customer has stated to the telemarketer or the telemarketer's agent that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer.
- (b) Established business relationship shall mean a prior or existing relationship formed by a voluntary two-way communication between a consumer and a telemarketer with or without an exchange of consideration, on the basis of the consumer's purchase or transaction with the telemarketer within the 18 months immediately preceding the date of the telephone call or on the basis of the consumer's inquiry or application regarding

products or services offered by the telemarketer within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

- (c) Person shall mean any natural person, association, partnership, firm, corporation, and its affiliates or subsidiaries or other business entity.

4603.3 Safe harbor provisions.

A person (which includes an entity, corporation, or other telemarketer) shall not be held liable for violating these regulations if the person can demonstrate, by clear and convincing evidence, that:

- (a) the person has obtained a version of the National "Do-Not-Call" Registry from the Federal Trade Commission no more than thirty-one (31) days prior to the date any telemarketing call is made, pursuant C.F.R. Section 310.4(6)(i)(b)(iii)(B), and as a part of the person's routine business practice, it has established, implemented, and updated written policies and procedures related to the requirements of these regulations prior to the date any telemarketing call is made;
- (b) the person has trained all personnel conducting telemarketing sales calls in the requirements of these regulations;
- (c) the person maintains records demonstrating compliance with this section and the requirements of these regulations; and
- (d) any subsequent unsolicited telemarketing sales call is the result of an error.

4603.4 Enforcement.

- (a) When the New York State Department of State 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, the New York State Department of State 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 New York State Department of State 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 New York State Department of State may petition a court of competent jurisdiction to enforce the subpoena and such sanctions as the court may direct.
- (b) Upon allegation(s) of non-compliance with applicable law, or upon its own initiative, the New York State Department of State may conduct an inquiry as to the sufficiency of any alleged violations. If the New York State Department of State, finds any grounds to indicate that a violation(s) may have occurred, the New York State Department of State may, as the public interest

demands, send a notice of apparent liability to the alleged violator seeking a response.

- (c) The New York State Department of State shall mail a copy of the notice of apparent liability to the last known business address of the alleged violator. Mailing of the notice shall be deemed receipt thereof.
- (d) The alleged violator shall respond to the notice not later than thirty-five (35) days from the date the New York State Department of State mailed such notice.
- (e) The New York State Department of State will evaluate such response, conduct a review based on the evidence before it, and provide notice of its decision to the alleged violator within sixty (60) days of receipt of the response. Mailing of the decision shall be deemed receipt thereof.
- (f) If the alleged violator disputes the New York State Department of State decision, such violator may file an administrative appeal with the New York State Department of State by requesting in writing an administrative hearing, within ten (10) days of receipt of the decision. The administrative hearing shall be subject to Article 3 of the State Administrative Procedure Act (SAPA) and 19 NYCRR Part 400 with the exception of the appeal provisions set forth in 19 NYCRR 400.2 (j), (k) and (l).
- (g) If the alleged violator does not file an administrative appeal by requesting a hearing in writing within ten (10) days of receipt of such decision, the initial decision of the New York State Department of State is deemed the final decision and the alleged violator shall remit to the New York State Department of State a fine payable to the "New York State Department of State, Division of Consumer Protection" as set out in the initial decision of the New York State Department of State, within (10) days of receipt of the initial decision of the New York State Department of State. An aggrieved party shall have the right to challenge the final agency determination by filing a petition pursuant to Article 78 of the Civil Practice Law and Rules.
- (h) If an administrative appeal is properly filed, the New York State Department of State shall stay any fine pending the decision of such appeal.
- (i) Any facts or evidence received by the New York State Department of State may be used in any proceeding and shall be afforded appropriate consideration by the presiding officer. All evidence shall be kept in the custody of the presiding officer.
- (j) Where it is determined after the administrative hearing that the alleged violator has violated one or more provisions of these regulations, the presiding officer may assess a fine not to exceed eleven thousand dollars (\$11,000) for each violation.
- (k) If the alleged violator requests an administrative appeal pursuant to subdivision (f) of this section and an administrative hearing is held, the administrative

hearing decision shall constitute a final New York State Department of State decision. Violators shall remit to the New York State Department of State a fine payable to the "New York State Department of State, Division of Consumer Protection" as set out in the administrative hearing decision within ten (10) days of the receipt of such decision. An aggrieved party shall have the right to challenge the final agency determination by filing a petition pursuant to Article 78 of the Civil Practice Law and Rules.

- (l) If the alleged violator does not respond to the notice of apparent liability within thirty-five (35) days of receipt of the notice pursuant to subdivision (d) of this section, said notice of apparent liability shall constitute the final New York State Department of State decision. The alleged violator shall remit a fine payable to the "New York State Department of State, Division of Consumer Protection" as set out in the notice of apparent liability, within sixty (60) days from the date the New York State Department of State mailed such notice. An aggrieved party shall have the right to challenge the final agency determination by filing a petition pursuant to Article 78 of the Civil Practice Law and Rules.

21 NYCRR Part 4604 Construction

Section 4604.1 Separability clause, construction.

- (a) If any part or provision of these regulations or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in the controversy in which such judgment shall have been rendered. Such controversy or judgment shall not affect or impair the validity of the remainder of these regulations or the application thereof to other persons or circumstances.
- (b) For purposes of these regulations, any act or activity of the executive director of the agency, any person designated by him or her, or other such employee of the agency shall be deemed an act or activity of the agency.

Section 4604.2 Effective date.

These regulations shall take effect April 1, 2001.