

Telemarketing Registration and Do Not Call Registry

(June 2018)

New York State
DEPARTMENT OF STATE
Division of Licensing Services

www.dos.ny.gov

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Telemarketing and Consumer Fraud and Abuse Prevention Act

Article 26, General Business Law

Section

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General Business Law

§399-pp. Telemarketing and Consumer Fraud and Abuse Prevention Act.

1. Legislative findings and declaration. The legislature finds and declares that the prevention of deceptive and unfair practices in association with telemarketing is in the public interest and subject to the authority of appropriate political subdivisions of the State for the purpose of protecting the public against fraud, deception and other abuses. The legislature intends that the Federal Telemarketing and Consumer Fraud and Abuse Prevention Act (P.L. 103-297) be fully enforceable by appropriate State and local enforcement officials.

The legislature further declares that additional requirements applicable to the telemarketing industry not present in the Federal statute are necessary to protect residents of the State and others from telemarketing abuses. The legislature therefore intends that provisions in this section which differ from the aforementioned Federal Act and other New York State laws regulating telemarketing be construed whenever reasonable as providing additional protections to victims of telemarketing fraud.

2. Definitions. As used in this section, the following terms shall have the following meanings:

- a. "Applicant" means a person seeking a certificate of registration or to renew a certificate of registration under this section.
- b. "Customer" means any person who is or may be required to pay for or to exchange consideration for goods and services offered through telemarketing.
- c. "Goods or services" means any goods or services, and shall include any real property or any tangible or intangible personal property or services of any kind.
- d. "Investment opportunity" means anything tangible or intangible, that is offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.
- e. "Person" means any natural person, association, partnership, firm, corporation and its affiliates or subsidiaries or other business entity.
- f. "Premium" means anything offered or given, independent of chance, to customers as an incentive to purchase or otherwise contract for goods or services offered through telemarketing.
- g. "Principal" means any person participating in or responsible for the management of a telemarketer's business, whether or not the position is compensated, including but not limited to an owner in the case of a sole proprietorship, an officer, director or stockholder holding more than ten percent of the outstanding stock in the case of a corporation, a partner in the case of a partnership, and a manager or member in the case of a limited liability company.
- h. "Prize" means anything offered or purportedly offered and given or purportedly given to a person by chance. For purposes of this definition, chance exists if a person is

guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

- i. "Prize promotion" means a sweepstakes or other game of chance or an oral or written, express or implied representation that a person has won, has been selected to receive or is eligible or may be eligible to receive a prize or purported prize.
- j. "Telemarketer" means any person, who, for financial profit or commercial purposes in connection with telemarketing, either initiates, or initiates and receives telephone calls to or from a customer when the customer is in this State or any person who directly controls or supervises the conduct of a telemarketer. For the purposes of this section, "commercial purposes" shall mean the sale or offer for sale of goods and services.
- k. "Telemarketing" means any plan, program or campaign which is conducted to induce 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 customer is located within the State at the time of the call. Telemarketing does not include the solicitation of sales through any media other than by telephone calls.
- l. "Secretary" shall mean the Secretary of State.
- m. "Department" shall mean the Department of State.

3. Registration of telemarketers.

- a. No person shall act as a telemarketer without first having received a certificate of registration from the secretary as provided in this section. Employees of telemarketers shall be exempt from the requirements of this paragraph and paragraph b of this subdivision.
- b. No person required to register pursuant to paragraph a of this subdivision shall act as a telemarketer without holding a valid certificate of registration from the secretary as provided in this section.
- c. Any applicant shall file with the department an application for a certificate of registration in such form and containing such information as the secretary shall prescribe, including the following:
 - (1) the applicant's name, address and telephone number;
 - (2) each business name under which the applicant engages in or intends to engage in telemarketing, if such name is different than the applicant's;
 - (3) the complete street address and primary telephone number of each location, designating the principal location, from which the applicant engages in or intends to engage in telemarketing, including each location at which mail will be received by or on behalf of the applicant, and identifying any such location that is a post office box or mail drop;
 - (4) the name, address and telephone number of each principal of the business;
 - (5) whether the applicant or any principal thereof has been convicted or plead guilty to or is being prosecuted by indictment or information for racketeering, violations of Telemarketing Registration and Do Not Call Registry / Page 3

securities laws, or a theft offense of any state, or the United States;

(6) whether any injunction or judgment has been entered into against the applicant or any principal, or such applicant or principal has entered into a settlement agreement, assurance of discontinuance, consent decree or any similar instrument in any civil action involving theft, racketeering, embezzlement, conversion, misappropriation of property, fraud, or deceptive, unfair, illegal or unconscionable trade practices, and whether any civil action involving such practices is currently pending, to the extent not inconsistent with any existing court orders; and
(7) whether the license to engage in any business, trade or profession of the applicant or any principal thereof has been refused, suspended or revoked in any jurisdiction.

- d. Upon receipt of the completed application for registration and required fee, and unless such certificate of registration has been denied as provided in subdivision five of this section, the secretary shall issue and deliver to the applicant a certificate in such form and manner as the secretary shall prescribe, but which must set forth the applicant's name, business address, and the effective term of the registration. A registration certificate issued or renewed under the provisions of this section shall entitle a person to act as a registered telemarketer for a period of two years from the effective date of the registration.
- e. Any registration granted under this section may be renewed by the secretary upon application by the holder thereof, in such form as the secretary may prescribe. The secretary shall have the authority to assign staggered expiration dates for licenses at the time of renewal. If the assigned date results in a term that exceeds two years, the applicant shall pay an additional pro-rata adjustment together with the fee prescribed in paragraph f of this subdivision.
- f. Each application for a certificate of registration shall be accompanied by a fee of \$500, which shall not be refundable.
- g. The fees collected pursuant to this subdivision shall be deposited to the credit of the business and licensing services account established pursuant to the provisions of section 97-y of the State Finance Law.
- h. Any person holding a certificate of registration shall be required to provide notice of any change in the information required of applicants by this section, in such form and manner, and within such time period as the secretary shall prescribe.
- i. No person required to be registered under this subdivision shall be entitled to enforce any agreement or seek any consideration or any other payment for goods and services offered through telemarketing unless such person is in compliance with this subdivision and subdivision 4 of this section.
- j. The secretary shall prescribe rules and regulations to administer this subdivision and subdivision 4 of this section.

4. Bonding of telemarketers.

- a. Any applicant shall, at the time of any original application for a certificate of registration, file with the secretary, in the form and amount as prescribed in this subdivision and satisfactory to the secretary:
 - (1) a bond with a corporate surety, from a company authorized to do business in this State; or
 - (2) an irrevocable letter of credit or a certificate of deposit from a New York State or federally chartered bank, trust company, savings bank or savings and loan association qualified to do business in New York State and insured by the Federal Deposit Insurance Corporation.
- b. Such bond, letter of credit, or certificate of deposit shall be maintained for three years from the date the telemarketer ceases telemarketing, or three years from the date the certificate of registration terminates, whichever is earlier.
- c. The principal sum of the bond, letter of credit, or certificate of deposit shall be \$25,000, which shall be maintained until the period specified in paragraph b of this subdivision, subject to paragraph g of this subdivision.
- d. The bond, letter of credit or certificate of deposit shall be payable in favor of the people of the State of New York for the benefit of any customer injured as a result of a violation of this section, pursuant to a determination of any court of competent jurisdiction pursuant to this section, or article 10-b of the Personal Property Law.
- e. The aggregate liability of the surety upon the bond or the banking organization upon the letter of credit or certificate of deposit to all persons for all breaches of the conditions of the bond shall in no event exceed the amount of the bond, letter of credit or certificate of deposit.
- f. The bond, letter of credit or certificate of deposit shall not be canceled, revoked, diminished or terminated except after notice to, and with the consent of, the secretary at least 45 days in advance of such cancellation, revocation, or termination. Unless the bond is replaced by another bond, letter of credit or certificate of deposit in conformity with this subdivision prior to the expiration of the 45 day period, the registration of the telemarketer shall be treated as terminated as of the cancellation, revocation or termination of the bond.
- g. The registration of the telemarketer shall be treated as terminated as of the date the amount of the bond, letter of credit or certificate of deposit falls below the amount required by this subdivision.
- h. Any change in ownership of a telemarketer shall not release, cancel or terminate liability under this subdivision under any bond, letter of credit, or certificate of deposit filed for any telemarketer as to any customer who was injured as a result of a violation of this section or article 10-b of the Personal Property Law while such bond, letter of credit or certificate of deposit was in effect unless such transferee, purchaser, successor or assignee of such telemarketer obtains a bond, letter of credit or certificate of deposit under this subdivision for the benefit of such customer. Nothing in this paragraph shall be construed to authorize any telemarketer to cancel any bond, letter of credit, or certificate of deposit where such cancellation is not otherwise authorized by this subdivision.

5. Refusal to issue, suspension, and revocation of registration.

a. The secretary, or any person deputized or so designated by him or her may deny the application of any person for a certificate of registration, refuse to issue a renewal thereof, suspend or revoke such certificate or in lieu thereof assess a fine not to exceed \$1,000 per violation, if he or she determines that such applicant, or any of its principals:

(1) has made a material false statement or omitted a material fact in connection with an application under this section;

(2) was the former holder of a certificate of registration issued hereunder which the secretary revoked, suspended, or refused to renew;

(3) has failed to furnish satisfactory evidence of good character, reputation and fitness;

(4) with respect to the applicant, is not the true owner of the telemarketer, except in the case of a franchise;

(5) is in violation of or has violated any of the following statutes and the regulations thereunder, as such statutes and regulations may from time to time be amended:

(a) this section;

(b) article 10-b of the Personal Property Law;

(c) the act of congress entitled the "Telemarketing and Consumer Fraud and Abuse Prevention Act" (P.L. 103-297);

(6) has been convicted or plead guilty to or is being prosecuted by indictment or information for racketeering, violations of securities laws, or a theft offense of this State, or the United States;

(7) has had any injunction or judgment entered against him or her in any civil action, or such applicant or principal has entered into a settlement agreement, assurance of discontinuance, consent decree or any similar instrument involving theft, racketeering, embezzlement, conversion, misappropriation of property, fraud or deceptive, unfair, illegal or unconscionable trade practices;

(8) has had a license or registration to engage in any business, occupation or profession suspended or revoked in any jurisdiction which may impact upon the applicant's fitness for registration under this section; or

(9) has committed, or is committing deceptive, unfair, illegal or unconscionable trade practices in violation of the laws of this or any other state or the United States.

b. Any proceeding conducted pursuant to paragraph a of this subdivision shall be subject to the State Administrative Procedure Act.

6. Deceptive telemarketing acts and practices.

a. It shall be unlawful for any telemarketer to directly or indirectly engage in the following conduct:

(1) fail to furnish a copy of the certificate of registration at the request of any interested party;

(2) present or attempt to present, as their own, the registration certificate of another;

(3) give false or misleading information;

(4) misrepresent himself or herself to be registered;

(5) use or attempt to use a registration certificate which has been revoked, suspended or is otherwise not valid;

(6) advertise telemarketing services without having a valid certificate of registration under this section;

(7) represent in any manner that his or her registration constitutes approval or endorsement of any governmental agency;

(8) assist or support any person when the telemarketer or any identified employee knew or should have known that the person was engaged in an act or practice in violation of this section or article 10-b of the Personal Property Law;

(9) request a fee in advance to remove adverse information or modify adverse information to improve a person's credit history or credit record;

(10) except for an attorney engaged in the practice of law, request or receive payment in advance from a person to recover or otherwise aid in the return of money or any other item lost by the customer in a prior telemarketing transaction;

(11) obtain or submit for payment a check, draft, or other form of negotiable paper drawn on a person's checking, savings, share, or similar account, without that person's express written authorization;

(12) procure the services of any professional delivery, courier or other pickup service to obtain receipt or possession of a customer's payment, unless the goods or services are delivered with the reasonable opportunity to inspect before any payment is collected; or

(13) misrepresent, directly or by implication, that a premium is a prize.

b. Telemarketers shall provide all of the following information, in a clear and coherent manner using words with common and everyday meanings, when making a telemarketing call:

(1) at the beginning of the call and prior to any request by the caller of the customer to release or disclose any of the customer's personal or financial information, including but not limited, to the customer's name, address, credit card, checking account or other financial account number or information:

(a) that the purpose of the telephone call is to offer goods or services for which a fee will be charged or to provide an investment opportunity, whichever is the case;

(b) the telemarketer's name and the person on whose behalf the solicitation is being made if other than the telemarketer; and

(c) the identity of the goods or services for which a fee will be charged;

(2) the cost of the goods or services that are the subject of the call;

(3) in any prize promotion, the odds of being able to receive the prize, and if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion; and the no purchase/no payment method of participating in the prize promotion

with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate; and all material costs or conditions to receive or redeem a prize that is the subject of the prize promotion.

7. Abusive telemarketing acts or practices. It shall be unlawful for any telemarketer to:

- a. threaten, intimidate or use profane or obscene language;
- b. engage in conduct or behavior a reasonable person would deem to be abusive or harassing;
- c. initiate a telemarketing call to a person, when that person has stated previously that he or she does not wish to receive solicitation calls from that telemarketer provided, however that nothing in this section shall be construed to prohibit a telemarketer from telemarketing goods, services or investment opportunities to any customer of any affiliate, subsidiary or parent of such telemarketer;
- d. engage in telemarketing to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time, at the called person's location; or
- e. make a false, deceptive or misleading statement in regard to the requirements of subdivision 6 of this section to a customer, or to engage in any deceptive or unfair act or practice in association with telemarketing.

8. Recordkeeping requirements.

- a. All telemarketers shall keep for a period of 24 months from the date the record is produced records of all financial transactions, written notices, disclosures and acknowledgments, including but not limited to:
 - (1) records of calls resulting in a promise by the customer to pay or otherwise exchange consideration for goods and services, including but not limited to the name and last known address of each customer, the goods or services selected, the date such goods were shipped or provided and the quantity provided, the amount charged by the company for the goods or services provided (including all other related fees or charges of any kind, including shipping and handling fees), and the amount actually paid by the customer for the goods and services provided;
 - (2) the name and last known address of each prize recipient and the prize awarded having a value of \$25 or more; and
 - (3) the name, any fictitious name used, the last known home address and telephone number, and the job title for all current and former employees directly involved in telephone sales; provided, however, that if the telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee.
- b. A telemarketer may keep the records required by paragraph a of this subdivision in any form, and in the manner, format, or place as they keep such records in the ordinary course of business.
- c. In the event of any dissolution or termination of the telemarketer's business, a representative of the telemarketer shall maintain all records as required under this subdivision, which shall be the person required to maintain such records in the event of dissolution or

termination under rules and regulations issued under the act of congress entitled the "Telemarketing and Consumer Fraud and Abuse Prevention Act" (P.L. 103-297), or any person designated by the telemarketer. In the event of any sale, assignment or other change of ownership of the telemarketer's business, the successor or assignee shall maintain all records required by this subdivision. In any case in which this paragraph applies, the telemarketer shall provide notice to the secretary, in the form and manner designated by the secretary of the disposition of such records within 30 days of the dissolution, termination, sale, assignment or change of ownership.

9. Waiver. Any waiver of the provisions of this section by any customer shall be unenforceable and void.

10. Exemptions.

- a. The following persons shall be exempt from the registration and bonding requirements set forth in subdivisions 3 and 4 of this section:
 - (1) the State, municipalities of the State, or any department or division of the State or such municipalities;
 - (2) the United States or any of its departments, agencies or divisions;
 - (3) colleges, universities and other institutions authorized by the regents of the University of the State of New York or comparable body in any other state or jurisdiction, to grant degrees, including licensed private schools and any registered business schools regulated by article 101 of the Education Law;
 - (4) a person, which has been operating for at least three years a retail business establishment in this State under the same name as that used in connection with telemarketing, and both of the following occur on a continuing basis:
 - (a) either products are displayed and offered for sale or services are offered for sale and provided at the business establishment; and
 - (b) a majority of the person's business involves buyers' obtaining such products or services at the person's location;
 - (5) any not-for-profit corporation as defined in section 102 of the Not-For-Profit Corporation Law and charitable organizations.
- b. The following acts or practices are exempt from the requirements of this section:
 - (1) telephone calls made by a telemarketer, collection agency or attorney engaged in the practice of law for the exclusive purpose of collecting a legal debt owed, in accordance with the applicable provisions of the Federal Fair Debt Collection Practices Act (15 U.S.C. S1692 et. seq.);
 - (2) telephone calls in which the sale, lease or other agreement for goods or services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by a telemarketer, or a meeting between a telemarketer and customer;
 - (3) telephone calls that are received by a telemarketer initiated by a customer that are not the result of any solicitation by such telemarketer; and

(4) telephone calls between a telemarketer and any for-profit business, except calls involving the retail sale of nondurable office or cleaning supplies.

c. The following acts or practices are exempt from the requirements of paragraph b of subdivision 6 of this section.

(1) telephone calls pertaining to a renewal or continuation of an existing or prior contractual relationship or the continuation of an established business relationship between a customer and any telemarketer, provided that the telemarketer discloses any material changes in the terms and conditions of the prior contract, except for calls made by a telemarketer in which the telemarketer or any of its principals has previously engaged in any act or practice described in subparagraphs (1), (2), (5), (6), (7) and (8) of paragraph a of subdivision 5 of this section; and

(2) unsolicited telephone calls made by the telemarketer for the purpose of overall efforts to develop new business that include other methods and techniques intended to identify and communicate with potential customers provided however that for all transactions which are incidental to the call and result in the exchange of goods and services the telemarketer shall disclose 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 identity of the goods or services for which a fee will be charged; and

(c) the cost of the goods or services that are the subject of the call.

10-a. The following persons are exempt from the fee and bonding requirements set forth in paragraph f of subdivision three and subdivision four of this section: A person engaged in a business or occupation which is licensed, registered, chartered, certified or incorporated with or by any state or federal agency. Provided, however, any person not licensed, registered, chartered, certified or incorporated with any New York state or federal agency, shall submit evidence to the secretary of state, in a form and manner to be prescribed by the secretary, of any license, registration, charter, certification or incorporation issued by an agency or governmental entity in this or any other state.

11. Enforcement.

a. Every violation of this section shall be deemed a deceptive act and practice subject to enforcement under article 22-a of this chapter. In addition, the district attorney, county attorney, and the corporation counsel shall have concurrent authority to seek the relief in paragraph b of this subdivision, and all civil penalties obtained in any such action shall be retained by the municipality or county.

b. In every case where the court shall determine that a violation of this section has occurred, it may impose a civil penalty of not less than \$1,000 nor more than \$2,000 for each violation. Such penalty shall be in addition to the denial of registration or renewal, suspension of registration or revocation of registration or assessment of a fine authorized by subdivision 5 of this section.

c. Any person who contracts with a telemarketer for telemarketing services and has actual knowledge that the telemarketer is acting in violation of this section shall be deemed to be in violation of this section, unless such person takes reasonable measures to prevent and correct any conduct that violates this section.

d. Nothing in this section shall be construed to restrict any right which any person may have under any other statute or the common law.

12. Criminal penalties. Any person who is convicted of knowingly violating paragraph a or b of subdivision 3 of this section, or subparagraph (2), (3), (4) or (5) of paragraph a of subdivision 6 of this section shall be guilty of a class B misdemeanor. Any person who is convicted of knowingly violating subparagraph (11) or (12) of paragraph a of subdivision 6 of this section shall be guilty of a class A misdemeanor.

13. Separability clause; construction. If any part or provision of this section 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 operations to the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this section or the application thereof to other persons or circumstances.

§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 opinion feature" means, if 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 a 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, 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 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 reasons 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.

Personal Property Law

§444 Restoration of down payment.

1. Within 30 days after a telephone sale has been cancelled, the seller shall recredit the buyer's charge account.

3. If the seller refuses within the period prescribed by subdivision one of this section to return all payments made by the buyer, he shall be liable to the buyer for the said payments and if the buyer is successful in his action therefor or appeal thereon, the court shall award him \$100 and may award reasonable attorney's fees and costs, in addition to such payments. In addition to such an action, such payments and the \$100 amount may be recovered from any telemarketer maintaining a bond pursuant to subdivision 4 of section 399-pp of the General Business Law, or the surety or bank, trust company, savings bank or savings and loan association in an action on the bond. Nothing in the preceding sentence shall authorize the awarding of attorney's fees and costs against the surety, bank, trust company or savings and loan association.

RULES and REGULATIONS TITLE 19 NYCRR ENFORCEMENT

PART 221

§221.1 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.

§221.2 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.

§221.3 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 to C.F.R. Section 310.4(6)(i)(b)(iii), 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.

§221.4 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 no later than thirty-five (35) days from the date of 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. 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) During the hearing proceeding, the New York State Department of State may establish evidentiary rebuttable presumptions(s).

(j) 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.

(k) 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.

(l) 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.

(m) If the alleged violator does not respond to the notice of apparent liability within thirty-five (35) days of the 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.