Lisa Sandberg *Legislative Service Commission*

Sub. H.B. 312

124th General Assembly
(As Passed by the House)

Reps. Goodman, Seitz, Jolivette, Jones, Hagan, Metzger, Kearns, Collier, Hollister, Lendrum, Setzer, Webster, Damschroder, Carmichael, Gilb, Husted, Carano, Beatty, Metelsky, Patton, Distel, S. Smith, Coates, Perry, Willamowski, Sulzer, Womer Benjamin, Latta, Manning, Jerse, Core, Schmidt, Calvert, Salerno, Niehaus, D. Miller, McGregor, Wolpert, Reidelbach, Schneider, Cirelli, Mason, Koziura, Seaver, Latell, Schaffer, Otterman, Boccieri, R. Miller, Krupinski, White, Allen, Ogg, Faber, Callender, Williams, Olman, Redfern, Hartnett, Britton, Fessler, Driehaus, Buehrer, Woodard, Peterson, Flowers, Grendell, DeBose

BILL SUMMARY

- Prohibits a telephone solicitor from intentionally blocking or intentionally authorizing or causing to be blocked the disclosure of the telephone number from which a telephone solicitation is made.

- Makes a violation of that prohibition an unfair or deceptive act or practice in violation of the Consumer Sales Practices Law, grants a person injured by the violation the same relief otherwise available to a consumer for violations of existing provisions of that Law, and grants the Attorney General the same powers and remedies to enforce the bill's provisions as are otherwise available in the enforcement of the existing provisions of that Law.

- Expands the prohibitions in the Telephone Solicitors Law to specifically prohibit a telephone solicitor not specifically exempted from that Law from intentionally blocking or intentionally authorizing or causing to be blocked the disclosure of the telephone number from which a telephone solicitation is made (a felony of the fifth degree and an unfair or deceptive act or practice in violation of the Consumer Sales Practices Law by operation of existing law).

CONTENT AND OPERATION

Background law

The Telephone Solicitors Law prohibits any person from acting as a telephone solicitor without first having obtained a certificate of registration or registration renewal from the Attorney General. R.C. 4719.01 to 4719.18 and 4719.99 prescribe the requirements and procedures for the registration of telephone solicitors, regulate the telephone solicitation practices of telephone solicitors, specify certain prohibitions and penalties, and provide for the enforcement of the prohibitions by the Attorney General.

Operation of the bill

New prohibition

The bill prohibits any "telephone solicitor" from intentionally blocking or intentionally authorizing or causing to be blocked the disclosure of the telephone number from which a "telephone solicitation" is made (R.C. 4719.21(B)). (See "***Definitions***," below.)

Remedies for violation of new prohibition

The bill provides that a violation of the above prohibition is an unfair or deceptive act or practice in violation of R.C. 1345.02 in the Consumer Sales Practices Law (see **COMMENT** 1). A person injured by a violation of the prohibition has a cause of action and is entitled to the same relief available to a consumer under that Law (see **COMMENT** 2). All powers and remedies available to the Attorney General to enforce the Consumer Sales Practices Law are available to the Attorney General to enforce the bill's prohibition (see **COMMENT** 3). (R.C. 4719.21(C).)

Prohibition in Telephone Solicitors Law

The Telephone Solicitors Law contains specified acts, practices, and omissions that a telephone solicitor that is not exempt from that Law is prohibited from doing. The bill expands those prohibitions to prohibit any telephone solicitor that is not exempt from that Law (see **COMMENT** 4) from intentionally blocking or intentionally authorizing or causing to be blocked the disclosure of the telephone number from which a telephone solicitation is made. (R.C. 4719.08(I).) A violation of this prohibition is a felony of the fifth degree (R.C. 4719.99--not in the bill). Additionally, engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in conduct that constitutes a violation of the prohibition is within the definition of "corrupt

activity," which may constitute the criminal offense of engaging in a pattern of corrupt activity if certain elements are present (see **COMMENT** 5) (R.C. 2923.31(I)(2)(a)--not in the bill).

A violation of this prohibition also is an unfair or deceptive act or practice in violation of the Consumer Sales Practices Law (R.C. 4719.14--not in the bill).

Remedies under Telephone Solicitors Law

The bill applies the following existing remedies to a violation of the prohibition set forth in the Telephone Solicitors Law.

Investigation by Attorney General. If the Attorney General, as a result of complaints or the Attorney General's own inquiries, has reason to believe that a person has engaged, is engaging, or is preparing to engage in a violation of any provision of the Telephone Solicitors Law or any rule adopted under that Law, the Attorney General may investigate the alleged violation. For purposes of the investigation, the Attorney General may administer oaths, subpoena witnesses, adduce evidence, and require the production of any book, document, record, or other relevant matter, subject to sanctions specified in that Law. (R.C. 4719.11(A) and (B)--not in the bill.)

Injunctive and other relief. Whenever it appears that a person has violated, is violating, or is about to violate a provision of the Telephone Solicitors Law, the Attorney General may bring an action in a court of common pleas to enjoin the alleged violation. Upon a showing of a violation, the court must grant a temporary restraining order, preliminary injunction, or permanent injunction without bond. The court may impose a civil penalty of not more than $5,000 for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction. The court may issue an order for the reimbursement of a purchaser for any loss that results from a violation of a provision of the Telephone Solicitors Law, for the appointment of a referee or receiver, for the sequestration of assets, or for any other appropriate relief. The court may award the Attorney General all costs together with all expenses of the Attorney General's investigation and reasonable attorney's fees incurred in the prosecution of the action.

In an action brought by the Attorney General to enforce the Telephone Solicitors Law or a rule adopted under any of its provisions, the Attorney General may request, and the court must impose, a civil penalty of not less than $1,000 nor more than $25,000 for each violation of specified provisions, including the prohibition under the bill, that the court finds the telephone solicitor or salesperson committed. (R.C. 4719.12--not in the bill.)

Criminal proceedings. The Attorney General may initiate criminal proceedings under the Telephone Solicitors Law by presenting evidence of criminal violations to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violations, or at the request of the prosecuting attorney, the Attorney General may proceed in the prosecution with all the rights, privileges, and powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries. These powers of the Attorney General are in addition to any other applicable powers of the Attorney General. (R.C. 4719.13(A) and (B)--not in the bill.)

Civil actions by purchasers. A purchaser injured by a violation of a provision of the Telephone Solicitors Law or a rule adopted under that Law may bring a civil action against the telephone solicitor or salesperson who committed the violation for damages in a court of common pleas and may apply to the court for an order enjoining the violation.[1] Upon the purchaser's showing that the telephone solicitor or salesperson has committed a violation, the court must grant an injunction, temporary restraining order, or other appropriate relief. If a court awards damages, the court must award damages in an amount that is not less than the amount that the purchaser paid to the telephone solicitor or salesperson and must order the telephone solicitor or salesperson to pay reasonable attorney's fees and court costs to the purchaser. The court may award the purchaser punitive or exemplary damages upon the purchaser's showing that the telephone solicitor or salesperson knowingly committed an act or practice that violated a provision of the Telephone Solicitors Law. An action as described in this paragraph must be brought within two years after the date of the telephone solicitation upon which the action is based. (R.C. 4719.15--not in the bill.)

Cumulative and concurrent remedies. The powers, remedies, and penalties as described above are in addition to any other power, remedy, or penalty provided by law. The remedies and powers available to the Attorney General are cumulative and concurrent, and the exercise of one remedy or power by the Attorney General does not preclude or require the exercise of any other remedy or power. (R.C. 4719.16(A) and (B)--not in the bill.)

Definitions

The bill uses existing definitions of the following terms for the new prohibition in the bill (R.C. 4719.21(A)):

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[1] *"Purchaser" means a person that is solicited to become or does become financially obligated as a result of a telephone solicitation (R.C. 4719.01(A)(5)--not in the bill).*

"Telephone solicitor" means a person that engages in telephone solicitation directly or through one or more salespersons either from a location in Ohio or from a location outside Ohio to persons in Ohio. "Telephone solicitor" includes, but is not limited to, an owner, operator, officer, or director of, partner in, or other individual engaged in the management activities of, a business. (R.C. 4719.01(A)(8)--not in the bill.)

"Telephone solicitation" means a communication to a person that meets both of the following criteria: (a) the communication is initiated by or on behalf of a telephone solicitor or by a salesperson and (b) the communication either represents a price or the quality or availability of goods or services or is used to induce the person to purchase "goods or services," including, but not limited to, inducement through the offering of a "gift, award, or prize" (R.C. 4719.01(A)(7)--not in the bill). "Goods or services" means any real property or tangible or intangible personal property, or services of any kind provided or offered to a person, including, but not limited to, advertising, labor performed for the benefit of a person, personal property intended to be attached to or installed in any real property, regardless of whether it is so attached or installed, timeshare estates or licenses, and extended service contracts (R.C. 4719.01(A)(4)--not in the bill). "Gift, award, or prize" means anything of value that is offered or purportedly offered, or given or purportedly given by chance, at no cost to the receiver and with no obligation to purchase goods or services; "chance" includes a situation in which a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telephone solicitor does not identify the specific item that the person will receive (R.C. 4719.01(A)(3)--not in the bill).

COMMENT

1. The general prohibition in R.C. 1345.02 prohibits any supplier from committing an unfair or deceptive act or practice in connection with a consumer transaction. Without limiting the scope of that general prohibition, an act or practice of a supplier in representing any of the matters specified in R.C. 1345.02(B) is deceptive. (R.C. 1345.02(A) and (B)--not in the bill.)

2. If a violation is an act prohibited by R.C. 1345.02, the consumer may, in an individual action, rescind the transaction or recover the consumer's damages. Any consumer also may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates the Consumer Sales Practices Law. The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply: (a) the consumer complaining of the act or practice has brought or maintained an action that is groundless, and the consumer filed or maintained the

action in bad faith or (b) the supplier has knowingly committed an act or practice that violates that Law. (R.C. 1345.09(A), (D), and (F)--not in the bill.)

3. The Attorney General has the power to conduct an investigation if, by the Attorney General's own inquiries or as a result of a complaint, the Attorney General has reasonable cause to believe that a person has engaged or is engaging in an act or practice that violates the Consumer Sales Practices Law. For this purpose, the Attorney General may administer oaths, subpoena witnesses, adduce evidence, and require the production of relevant matter. During an investigation, the Attorney General may afford a supplier an opportunity to cease and desist from any suspected violation, and suspend the investigation. The Attorney General may terminate an investigation upon acceptance of a written assurance of voluntary compliance from a supplier who is suspected of the violation. (R.C. 1345.06(A), (B), and (F)--not in the bill.)

If the Attorney General, by the Attorney General's own inquiries or as a result of complaints, has reasonable cause to believe that a supplier has engaged or is engaging in an act or practice that violates the Consumer Sales Practices Law, and that the action would be in the public interest, the Attorney General may bring any of the following: (a) an action to obtain a declaratory judgment that the act or practice violates R.C. 1345.02 or (b) an action, with notice as required by Civil Rule 65, to obtain a temporary restraining order, preliminary injunction, or permanent injunction to restrain the act or practice. On motion of the Attorney General, or on its own motion, the court may impose a civil penalty of not more than $5,000 for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction, if the supplier received notice of the action. On motion of the Attorney General and without bond, the court may make appropriate orders, including appointment of a referee or a receiver, for sequestration of assets, to reimburse consumers found to have been damaged or to grant other appropriate relief. The remedies available to the Attorney General are cumulative and concurrent, and the exercise of one remedy by the Attorney General does not preclude or require the exercise of any other remedy. (R.C. 1345.07(A)(1) and (2), (B), and (H)--not in the bill.)

4. A telephone solicitor is *exempt* from the provisions of the Telephone Solicitors Law if the telephone solicitor is any one of the following (R.C. 4719.01(B)--not in the bill):

(a) A person engaging in a telephone solicitation that is a one-time or infrequent transaction not done in the course of a pattern of repeated transactions of a like nature;

(b) A person engaged in telephone solicitation solely for religious or political purposes; a charitable organization, fund-raising counsel, or professional

solicitor in compliance with the registration and reporting requirements of the Charitable Organizations Law; or any person or other entity exempt from filing a registration statement under that Law;

(c) Generally, a person that makes a telephone solicitation involving a home solicitation sale and that makes the sales presentation and completes the sale at a later, face-to-face meeting between the seller and the purchaser rather than during the telephone solicitation;

(d) A licensed securities, commodities, or investment broker, dealer, investment advisor, or associated person when making a telephone solicitation within the scope of the person's license;

(e) A person primarily engaged in soliciting the sale of a newspaper of general circulation;

(f) An issuer, or its subsidiary, that has a class of securities to which specified criteria apply; or an issuer, or its subsidiary, that formerly had a class of securities that met those criteria if the issuer, or its subsidiary, has a net worth in excess of $100 million, files or its parent files with the Securities and Exchange Commission an S.E.C. form 10-K, and has continued in substantially the same business since it had a class of securities that met the criteria;

(g) A person soliciting a transaction regulated by the Commodity Futures Trading Commission, if the person is registered or temporarily registered for that activity with the Commission under federal law and the registration or temporary registration has not expired or been suspended or revoked;

(h) A person soliciting the sale of any book, record, audio tape, compact disc, or video, if the person allows the purchaser to review the merchandise for at least seven days and provides a full refund within 30 days to a purchaser who returns the merchandise or if the person solicits the sale on behalf of a membership club operating in compliance with regulations adopted by the Federal Trade Commission;

(i) A supervised financial institution or its subsidiary;

(j) An insurance company, association, or other organization that is licensed or authorized to conduct business in Ohio by the Superintendent of Insurance, when soliciting within the scope of its license or authorization, or a licensed insurance broker, agent, or solicitor when soliciting within the scope of the person's license;

(k) A person soliciting the sale of services provided by a cable television system operating under authority of a governmental franchise or permit;

(l) A person soliciting a business-to-business sale under which any of specified conditions are met;

(m) A person that, not less often than once each year, publishes and delivers to potential purchasers a catalog that complies with certain requirements;

(n) A political subdivision or instrumentality of the United States, this state, or any state of the United States;

(o) A college or university or any other public or private institution of higher education in Ohio;

(p) A public utility or a retail natural gas supplier, if the utility or supplier is subject to regulation by the Public Utilities Commission, or the affiliate of the utility or supplier;

(q) A travel agency or tour promoter that is registered in compliance with Ohio law, when soliciting within the scope of the agency's or promoter's registration;

(r) A person that solicits sales through a television program or advertisement that is presented in the same market area no fewer than 20 days per month or offers for sale no fewer than ten distinct items of goods or services; and offers to the purchaser an unconditional right to return any good or service purchased within a period of at least seven days and to receive a full refund within 30 days after the purchaser returns the good or cancels the service;

(s) A person that, for at least one year, has been operating a retail business under the same name as that used in connection with telephone solicitation and certain requirements occur on a continuing basis; an affiliate of that type of person that meets specified requirements; or a person that, for a period of less than one year, has been operating a retail business in Ohio under the same name as that used in connection with telephone solicitation, if certain requirements are met;

(t) A person who performs telephone solicitation sales services on behalf of other persons and to whom any of specified requirements applies;

(u) A person that is a licensed real estate salesperson or broker, when soliciting within the scope of the person's license;

(v) A publisher that solicits the sale of the publisher's periodical or magazine of general, paid circulation, or a person that solicits a sale of that nature on behalf of a publisher under a written agreement directly between the publisher and the person; or a publisher that solicits the sale of the publisher's periodical or magazine of general, paid circulation, or a person that solicits a sale of that nature

as authorized by a publisher under a written agreement directly with a publisher's clearinghouse if the person is an Ohio resident for more than three years and initiates all telephone solicitations from Ohio and the person conducts the solicitation and sale in compliance with a Federal Trade Commission regulation;

(w) A person that solicits the sale of food or the sale of products of horticulture, if the person does not intend the solicitation to result in, or the solicitation actually does not result in, a sale that costs the purchaser an amount greater than $500;

(x) A funeral director licensed pursuant to Ohio law, when soliciting within the scope of that license and if certain conditions apply;

(y) A person, or affiliate thereof, licensed to sell or issue Ohio instruments designated as travelers checks pursuant to the law licensing transmitters of money;

(z) A person that solicits sales from its previous purchasers and meets specified requirements;

(aa) An institution defined as a home health agency in Ohio law, that conducts all telephone solicitation activities according to certain telemarketing sales rules adopted by the Federal Trade Commission and engages in telephone solicitation only within the scope of the institution's certification, accreditation, contract with the Department of Aging, or status as a home health agency, and that meets any of specified requirements;

(bb) A person licensed to provide a hospice care program by the Department of Health, when conducting telephone solicitations within the scope of the person's license and according to certain telemarketing sales rules adopted by the Federal Trade Commission.

5. A person generally commits the offense of engaging in a "pattern of corrupt activity" (see definition below) if any of the following applies (R.C. 2923.32(A)--not in the bill):

(a) The person is employed by, or associated with, any enterprise and conducts or participates in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

(b) The person, through a pattern of corrupt activity or the collection of an unlawful debt, acquires or maintains, directly or indirectly, any interest in, or control of, any enterprise or real property.

(c) The person knowingly has received any proceeds derived, directly or indirectly, from a pattern of corrupt activity or the collection of any unlawful debt,

and uses or invests, directly or indirectly, any part of those proceeds, or any proceeds derived from the use or investment of any of those proceeds, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

"Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern must occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity. (R.C. 2923.31(E)--not in the bill.)

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	06-26-01	p.	709
Reported, H. Civil & Commercial Law	01-30-02	p.	1349
Re-referred, H. Rules & Reference	02-12-02	p.	1386
Re-reported, H. Civil & Commercial Law	02-27-02	p.	1471
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