



Sub. S.B. 28

125th General Assembly
(As Passed by the General Assembly)

Sens. Spada, Hagan, Blessing, Austria, Miller, Goodman, Brady, DiDonato, Coughlin, Schuring, Robert Gardner, Armbruster, Fingerhut, Jacobson, Hottinger, Randy Gardner, Dann, Roberts, Mallory, Fedor, Amstutz, Carnes, Herington, Prentiss

Reps. Widener, Seitz, Core, Willamowski, Allen, Aslanides, Book, Brown, Buehrer, Callender, Calvert, Carmichael, Chandler, Clancy, Collier, DeBose, Distel, Domenick, Driehaus, C. Evans, D. Evans, Faber, Flowers, Gibbs, Gilb, Grendell, Hagan, Hartnett, Hoops, Hughes, Husted, Jolivette, Kearns, Kilbane, Latta, Martin, Mason, McGregor, Miller, Niehaus, Olman, S. Patton, T. Patton, Perry, Peterson, Raga, Raussen, Reidelbach, Schlichter, Schmidt, Schneider, Setzer, Skindell, G. Smith, S. Smith, D. Stewart, Sykes, Taylor, Trakas, Ujvagi, Wagner, Walcher, Webster, Widowfield, Wolpert, Woodard, Yates, Young

Effective date: *

ACT SUMMARY

- Specifically prohibits any seller or telemarketer from engaging in any act or practice in violation of any provision of the federal Telemarketing and Consumer Fraud and Abuse Prevention Act, the federal Telephone Consumer Protection Act of 1991, any amendment or reenactment of either of those Acts, any rule adopted pursuant to either of the Acts, or any amendment of that rule.
- Authorizes the Attorney General (the AG) to investigate any alleged violation of any provision of the federal act or rule described in the preceding dot point and, for purposes of the investigation, to administer oaths, subpoena witnesses, adduce evidence, and require the production

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

of any relevant matter, and specifies the rights and duties of persons subpoenaed by the AG.

- Authorizes the AG to suspend the investigation to permit the person being investigated to cease and desist from any suspected violation of the applicable federal act or rule or to terminate an investigation upon acceptance of a written assurance of voluntary compliance from a person who is suspected of such a violation.
- Generally authorizes the AG to bring in the appropriate court of common pleas in Ohio or in the appropriate district court of the United States, but not in both courts, a civil action for injunctive relief or damages, or both, pursuant to the federal act or rule, on behalf of Ohio residents subjected to telemarketing acts or practices in violation of the act, and prevents the AG from pleading a violation of both the act and the applicable federal act or rule in the action.
- In an action instituted by the AG as described above, permits the recovery of damages or civil penalties that do not exceed any maximum allowable amounts specified in the applicable federal act or rule and permits that recovery under the act or the applicable federal act or rule, but not under both the act and the federal act or rule.
- Requires the AG, in any proceedings under the act, to recognize any exemptions recognized by the Federal Communications Commission (FCC) under the Telephone Consumer Protection Act of 1991, any amendment or reenactment of that Act, any rule adopted pursuant to that Act, or any amendment of that rule.
- During the pendency of a civil action instituted by or behalf of the Federal Trade Commission (FTC) or the FCC for a violation of an applicable federal act or rule, prohibits the AG from instituting any civil action against any defendant named in the FTC or FCC complaint for any violation alleged in that complaint.
- If a civil action is instituted by or on behalf of the FTC or FCC as described in the preceding dot point, the civil action is litigated to its conclusion, and the FTC or FCC recovered damages or civil penalties or obtained relief, prohibits the AG from instituting any civil action under the act for any violation within the same time period that is alleged in the

FTC or FCC action and in which the FTC or FCC recovered the damages or civil penalties or obtained the relief.

- Creates the Telephone Solicitation Protection Fund in the state treasury into which any civil penalties imposed under the act are to be deposited to be used to pay the costs of the Office of the AG in investigating any violation of, and in enforcing, the above described federal acts or rules or the act.

CONTENT AND OPERATION

Background

State level

The continuing 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 (the AG). 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 AG. One of the prohibitions in the Telephone Solicitors Law is against any telephone solicitor that is not exempt from that Law 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)).

Continuing law also prohibits any telephone solicitor (including those exempt from the Telephone Solicitors 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. The law makes a violation of that prohibition an unfair or deceptive act or practice in violation of the Consumer Sales Practices Law and grants the AG the same powers and remedies to enforce its provisions as are otherwise available in the enforcement of the Consumer Sales Practices Law. (R.C. 4719.21.)

Nothing in continuing Ohio statutes specifically prevents the making of unwanted calls to residential telephone subscribers other than a prohibition that applies to transmissions to fax machines in certain instances.¹ To the extent a

¹ R.C. 4931.55 prohibits a person from transmitting an advertisement to a facsimile device unless that person has the recipient's permission or there exists a pre-existing business relationship between the sender and the recipient.

telephone solicitation is a "consumer transaction" or a "home solicitation," it is subject to the Ohio Consumer Sales Practices Law (R.C. 1345.01 to 1345.13) or the Ohio Home Solicitation Sales Law (R.C. 1345.21 to 1345.28). Both Laws specify what constitutes an unfair or deceptive sales practice, provide for private remedies for consumers, and give enforcement authority to the AG.

Federal level

There are two federal statutes that regulate telemarketing in some manner: the Telemarketing and Consumer Fraud and Abuse Prevention Act, enforced by the Federal Trade Commission (FTC), and the Telephone Consumer Protection Act of 1991, enforced by the Federal Communications Commission (FCC).

The Telemarketing and Consumer Fraud and Abuse Prevention Act grants the FTC broad rulemaking authority to prohibit deceptive or abusive telemarketing acts or practices.² As part of its rulemaking authority, the FTC has enacted the Telemarketing Sales Rule.³ The Telemarketing Sales Rule provides, in part, for the establishment of a national "do-not-call registry" and prohibits telemarketers, with certain exceptions, from calling any person who is included on the registry. Both the FTC and state officials have enforcement authority with respect to the Telemarketing Sales Rule. Funding for the national do-not-call registry was appropriated through the passage of the Consolidated Appropriations Resolution (2003). (See **COMMENT.**)

The Telephone Consumer Protection Act of 1991 grants the FCC authority to regulate certain telemarketing practices.⁴ The FCC requires individual telemarketers to maintain their own lists of consumers who do not wish to receive calls. These requests by consumers must be honored for ten years.⁵ The FCC, in coordination with the FTC, has established a national "do-not-call registry" for consumers who wish to avoid unwanted telemarketing calls.⁶ The national registry supplements the company-specific list described in the preceding sentence.

² 15 U.S.C. 6101-6108.

³ 16 C.F.R. Part 310.

⁴ 47 U.S.C. 227.

⁵ 47 C.F.R. 64.1200.

⁶ 47 C.F.R. 64.1200, as amended (see 68 F.R. 44144).

Prohibition and definitions

The act prohibits any "seller" or "telemarketer" from engaging in any act or practice in violation of any provision of a federal act or rule. The act defines "federal act or rule" as the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Telephone Consumer Protection Act of 1991, any amendment or reenactment of either of those Acts, any rule adopted or issued pursuant to either of those Acts, or any amendment of that rule. The act also provides that the terms that are used in the act have the same meanings as in the applicable federal act or rule. (R.C. 109.87(A) and (B)(1).)

Recognition of federal exemptions

The act requires the AG, in any proceedings under the act as described below, to recognize any exemptions recognized by the FCC under the Telephone Consumer Protection Act of 1991, any amendment or reenactment of that Act, any rule adopted or issued pursuant to that Act, or any amendment of that rule (R.C. 109.87(B)(2)).

Investigation by the AG

Under the act, if the AG, as a result of complaints or the AG'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 a federal act or rule, the AG may investigate the alleged violation. For purposes of such an investigation, the AG may administer oaths, subpoena witnesses, adduce evidence, and require the production of any relevant matter. If the matter to be produced is located outside Ohio, the AG may designate any representative, including any official of the state in which the matter is located, to inspect the matter on the behalf of the AG. The person subpoenaed may make the matter available to the AG at a convenient location within the state or pay the reasonable and necessary expenses for the AG or the AG's representative to examine the matter at the place where it is located, provided that those expenses are not be charged to a party that subsequently is not found to have engaged in a violation of any provision of a federal act or rule. (R.C. 109.87(C)(1) and (2).)

Rights and duties of person subpoenaed

The act permits a person who is subpoenaed as described above to file a motion to extend the day on which the subpoena is to be returned or to modify or quash the subpoena, for good cause shown, in the Court of Common Pleas of Franklin County or of the county in Ohio in which the person resides or in which the person's principal place of business is located. The person may file the motion not later than 20 days after the service of the subpoena.

A person subpoenaed as described above must comply with the terms of the subpoena unless the parties agree to modify the terms of the subpoena or unless the court has modified or quashed the subpoena, extended the day on which the subpoena is to be returned, or issued any other order with respect to the subpoena prior to the day on which the subpoena is to be returned. If a person fails without lawful excuse to testify or to produce relevant matter pursuant to a subpoena, the AG may apply to the court of common pleas of the county in which the person subpoenaed resides or in which the person's principal place of business is located for an order that compels compliance with the subpoena.

If an individual subpoenaed as described above refuses to testify or to produce relevant matter pursuant to the subpoena on the ground that the testimony or matter may incriminate the individual, the AG may request the court to order the individual to provide the testimony or matter. With the exception of a prosecution for perjury or a civil action for damages under the act as described in "Civil remedies," below, an individual who complies with a court order to provide testimony or matter, after asserting a privilege against self-incrimination to which the individual is entitled by law, must not be subjected to a criminal proceeding or a civil penalty or forfeiture on the basis of the testimony or matter required to be disclosed or testimony or matter discovered through that testimony or matter required to be disclosed. (R.C. 109.87(C)(3), (4), and (5).)

Other investigation powers

The act authorizes the AG to do either of the following in relation to an investigation as described above (R.C. 109.87(C)(6)):

(1) During an investigation, afford the person who is the subject of the investigation, in a manner considered appropriate to that person, an opportunity to cease and desist from any suspected violation of any provision of a federal act or rule. The AG may suspend the investigation during the period that the AG permits the person to cease and desist from that suspected violation. The suspension of the investigation or the affording of an opportunity to cease and desist does not prejudice or prohibit any further investigation by the AG under the act.

(2) Terminate an investigation upon acceptance of a written assurance of voluntary compliance from a person who is suspected of a violation of any provision of a federal act or rule. The acceptance of such an assurance may be conditioned upon an undertaking to reimburse or to take other appropriate corrective action with respect to identifiable telephone service subscribers who are damaged by an alleged violation of any provision of a federal act or rule. An assurance of compliance given by a person under the above provision is not evidence of a violation of any provision of a federal act or rule. The AG, at any time, may reopen an investigation terminated by the acceptance of an assurance of

voluntary compliance, if the AG believes that further proceedings are in the public interest. Evidence of a violation of an assurance of voluntary compliance is *prima-facie* evidence of an act or practice in violation of the applicable provision of a federal act or rule if the evidence is presented after the violation in a civil action brought as described in "**Civil remedies**," below. An assurance of voluntary compliance may be filed with the court and if approved by the court, entered as a consent judgment in the action.

Nature of procedures

The act provides that the procedures that are available to the AG in exercising the AG's investigative powers are cumulative and concurrent, and the exercise of one procedure by the AG does not preclude or require the exercise of any other procedure (R.C. 109.87(C)(7)).

Civil remedies

The act provides that if, by the AG's own inquiries or as a result of complaints or an investigation conducted as described above, the AG has reasonable cause to believe that a person has engaged or is engaging in a violation of any provision of the act or of a federal act or rule, the AG, subject to the provisions described in "**Restrictions**," below, may bring in the appropriate court of common pleas of Ohio or in the appropriate district court of the United States, but not in both courts, a civil action against the alleged violator for injunctive relief or a civil action against the alleged violator for damages, or both, pursuant to the federal act or rule, on behalf of the residents of Ohio who have been subjected to telemarketing acts or practices in violation of the act. The AG may bring the action under the act's provisions or under the applicable federal act or rule, but the AG cannot plead a violation of both the act and the applicable federal act or rule in the action.

On the motion of the AG or on its own motion, a court may impose a civil penalty for a violation of the provision of the act or of the federal act or rule that is the subject of the action. The amount of any award of damages made or civil penalty imposed under the act must not exceed any maximum allowable amount of damages or civil penalty that is specified in the applicable federal act or rule. An award of damages or civil penalties may be recovered under the act or under the applicable federal act or rule, but an award of damages or civil penalties cannot be recovered under both the act and the applicable federal act or rule. (R.C. 109.87(D)(1).)

Any civil action that the AG brings in a federal court as described above must comply with the applicable provisions of the federal act or rule the violation of which is the subject of the action (R.C. 109.87(E)).



Restrictions

The act provides the following restrictions on the authority of the AG to bring a civil action based upon an alleged violation of a federal act or rule (R.C. 109.87(D)(2) and (3)):

(1) If a civil action has been instituted by or on behalf of the FTC or the FCC for a violation of any provision of an applicable federal act or rule, the AG, during the pendency of that action, cannot institute any civil action as described in "**Civil remedies**," above, against any defendant that is named in the complaint in the civil action that has been instituted by or on behalf of the FTC or the FCC, whichever is applicable, for any violation that is alleged in that complaint.

(2) If a civil action that has been instituted by or on behalf of the FTC or the FCC for a violation of any provision of an applicable federal act or rule affecting the residents of Ohio is litigated to its conclusion and the FTC or FCC recovers an award of damages or civil penalties or obtains any relief under the applicable federal act or rule, the AG cannot institute any civil action as described in "**Civil remedies**," above, for any violation within the same time period that is alleged in the civil action that was instituted by or on behalf of the FTC or the FCC and in which the FTC or the FCC has recovered the damages or civil penalties or obtained the relief.

Telephone Solicitation Protection Fund

The act requires the AG to deposit any civil penalties that are imposed as described above in "**Civil remedies**," above, to the credit of the Telephone Solicitation Protection Fund, which the act creates in the state treasury, to be used to pay the costs of the Office of the AG in investigating any violation of, and in enforcing, any federal act or rule or the provisions of the act (R.C. 109.87(F)).

COMMENT

In *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 284 F.Supp.2d 1266 (Sept. 29, 2003), the United States District Court for Colorado addressed the validity and constitutionality of the FTC's amended Telemarketing Sales Rule, which created the federal do-not-call registry. By signing up for the registry, a consumer indicates that the consumer will not accept commercial calls by telemarketers. However, a consumer cannot use the list to prevent calls from charitable organizations or businesses with which the consumer has had an established business relationship. The Court determined that the registry is a significant-enough governmental intrusion and burden on commercial speech as to amount to a government restriction implicating the First Amendment. According to the Court, citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of*

New York (1980), 447 U.S. 557, 564-565, lawful and truthful commercial speech may be regulated if: (a) the government asserts a substantial interest in support of the regulation, (b) the government demonstrates that the restriction on commercial speech directly and materially advances that interest, and (c) the regulation is narrowly tailored. The Court found that the FTC's asserted interests in protecting privacy in the home and protecting consumers from deceptive and abusive telemarketing practices are substantial-enough government interests to justify regulating commercial speech. However, the Court found that the registry does not materially advance the FTC's interests in that it "creates a burden on one type of speech based solely on its content, without a logical, coherent privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech" (i.e. commercial and charitable speech). The Court held that the Rule failed the second part of the *Central Hudson* test and is unconstitutional under the First Amendment.

The District Court's decision is on appeal to the Court of Appeals for the 10th Circuit, which stayed the District Court's order upon a showing by the FTC of a substantial likelihood of success on the merits. *F.T.C. v. Mainstream Marketing Services, Inc.* (October 7, 2003), 345 F.3d 850.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-06-03	p. 103
Reported, S. Public Utilities	05-07-03	p. 318
Passed Senate (32-1)	05-07-03	pp. 321-322
Reported, H. Civil and Commercial Law	10-23-03	pp. 1146-1147
Passed House (92-1)	11-13-03	pp. 1182-1184
Senate concurred in House amendments (30-2)	12-02-03	pp. 1219-1220

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