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(As Passed by the Senate)

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

BILL SUMMARY

- Requires the Attorney General to provide for a do-not-call registry for residential telephone subscribers, either by directly developing, operating, and maintaining the registry or by accepting a national do-not-call registry maintained by a federal agency.
- If the Attorney General chooses to develop a registry, authorizes the Attorney General to contract with a private entity for its operation and maintenance.
- For a registry operated by the Attorney General or a contractor, requires telephone solicitors to pay a reasonable fee to obtain a copy of or access to it, and provides that the fees must be used to pay costs of registry development, operation, and maintenance.
- Prohibits a telephone solicitor or its representative from (1) making an unsolicited telephone solicitation to a telephone number more than 90 days after the number appears on the registry, (2) making a telephone solicitation call other than between the hours of 8 a.m. and 9 p.m. local time at the subscriber's location, and (3) subject to certain exceptions, abandoning a telephone solicitation call by failing to connect the call to a live person within two seconds after the completed greeting by the answering party.
- Requires a telephone solicitor to (1) maintain its own do-not-call list of persons who request not to be called on behalf of a particular entity, (2) promptly disclose the solicitor's name, entity on whose behalf the call is

made, and any goods or services being sold, and (3) if using a prerecorded or artificial message player, include a toll-free number that the called party can call in order to be placed on the solicitor's do-not-call list.

- Generally prohibits the possession, disclosure, or use of any registry, do-not-call list, or information in connection with a telephone number on the registry or list or the associated subscriber for any purpose other than complying with the bill's requirements, applicable federal law, or a lawful order or subpoena.
- Requires local telephone directory providers to include in their directories a notice describing the registry and do-not-call lists maintained by telephone solicitors and procedures for having a telephone number placed on the registry or list.
- Provides for investigation and enforcement by the Attorney General of the bill's requirements and prohibitions and the rules adopted by the Attorney General to implement the bill.
- Requires a court to impose a civil penalty for a violation of the court's order in an action brought by the Attorney General or for a violation of the bill's requirements or prohibitions or a rule adopted by the Attorney General, and creates a Telephone Solicitation Protection Fund in the state treasury as repository of civil penalties.
- Provides for a private cause of action for injunctive relief or monetary damages or both for any residential telephone service subscriber who has received a prohibited telephone solicitation call.

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CONTENT AND OPERATION

Background

State level

Currently, nothing in Ohio statutes specifically prevents the receipt of unwanted calls by residential telephone subscribers other than a prohibition that applies to transmissions to fax machines in certain instances.¹ To the extent a telephone solicitation is a "consumer transaction" or a "home solicitation," it is subject to the Ohio Consumer Sales Practices Act (R.C. 1345.01 to 1345.13) or the Ohio Home Solicitation Sales Act (R.C. 1345.21 to 1345.28). Both acts specify what constitutes an unfair or deceptive sales practice, provide for private remedies for consumers, and give enforcement authority to the Attorney General. Additionally, certain telephone solicitors are subject to the state's Telemarketing Fraud Law.²

Federal level

There are two federal statutes that regulate telemarketing in some manner. Specifically, the Telemarketing and Consumer Fraud and Abuse Prevention Act,

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.

² R.C. Chapter 4719.

enforced by the Federal Trade Commission (FTC), and the Telephone Consumer Protection Act, 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.³ As part of its rulemaking authority, the FTC has enacted the Telemarketing Sales Rule.⁴ The Telemarketing Sales Rule provides for the establishment of a national do-not-call list and prohibits telemarketers, with certain exceptions, from calling any person who is included on the list. Both the FTC and state officials have enforcement authority with respect to the Telemarketing Sales Rule. Funding for the national do-not-call list was recently appropriated through the passage of the Consolidated Appropriations Resolution (2003). The FTC expects the national do-not-call list to be fully functional by September.⁵

The Telephone Consumer Protection Act grants the FCC authority to regulate certain telemarketing practices.⁶ Currently, 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.⁷

Do-not-call registry

Development and maintenance

The bill requires the Attorney General to provide for a do-not-call registry (hereafter, "registry") for the benefit of residential telephone service subscribers by means of either of the following at the Attorney General's discretion and with reasonable public notice (R.C. 4719.28):

(1) Beginning January 1, 2004, the Attorney General is required to develop and thereafter operate and maintain a registry, either in-house or through a contractor.

³ 15 U.S.C. §§ 6101-6108.

⁴ 16 C.F.R. § 310.

⁵ *Statement of Timothy J. Muris, Federal Trade Commission Chairman*, <http://www.ftc.gov/opa/2003/02/dncstatement.htm>.

⁶ 47 U.S.C. § 227.

⁷ 47 C.F.R. § 64.1200.

(2) Alternatively, the Attorney General may satisfy this requirement by accepting a national registry established and maintained by any federal agency, including, but not limited to, a registry maintained pursuant to the FTC's Telemarketing Sales Rule.⁸ Beginning on the effective date of such acceptance, all the duties, authority, remedies, and penalties provided in the bill apply with respect to the registry. The registration of telephone numbers and purging of registered telephone numbers must occur as provided in the applicable federal law. (R.C. 4719.28.)

The registry, if operated by the Attorney General or a contractor, is to be maintained in a secured electronic database. Only residential telephone numbers of subscribers who request to be listed, including wireless telephone service and facsimile machine numbers, are to be listed on the registry in accordance with procedures prescribed by rules adopted by the Attorney General and described below in "Rules."

Residential telephone subscribers may request to have their telephone number placed on, or subsequently removed from, the registry without cost. The procedures in the Attorney General's rules must provide that requests may be made by mail, through the internet, or by way of a toll-free telephone number. Once on the registry, a number is to remain on it for a period of time that is to be specified in the rules adopted by the Attorney General. (If the Attorney General accepts a federal registry, the bill specifies that the registering of telephone numbers and purging of registered numbers is to occur as provided in the applicable federal law.)

Any person (defined as an individual, group, corporation, unincorporated association, business entity, or partnership (R.C. 4719.25(C))) may request that a copy of, or access to, the registry be made available. The request must be in accordance with procedures prescribed by rules adopted by the Attorney General. The requestor must also pay a reasonable distribution fee. The bill specifies that the registry also must be made available in printed form.

Under the bill, the registry developed, operated, and maintained by the Attorney General or a contractor is not a public record. Additionally, any information received or maintained by the Attorney General or the contractor for the purpose of the registry in connection with a telephone number or subscriber is not a public record. (R.C. 4719.28(A) and 4719.29(A), (B), and (D).)

⁸ 16 C.F.R. § 310.

Rules

If the Attorney General chooses to develop and operate a registry, in-house or through a contractor, the Attorney General is required to adopt certain rules pursuant to the Administrative Procedure Act. The bill requires the Attorney General to adopt the rules required by R.C. 4719.29. That section refers to the following procedures and other items prescribed by rules adopted under R.C. 4719.32: (1) procedures for having a telephone number placed on the registry, for removing a number from the registry, and for requesting a copy of or access to the registry, (2) the period of time a telephone number is to remain on the registry, and (3) the amount of the distribution fee.

The Attorney General may also adopt any other rules deemed necessary to carry out the bill's requirements. (R.C. 4719.29(B) and 4719.32.)

Do-Not-Call Registry Fund

The bill creates the Do-Not-Call Registry Fund in the state treasury. All distribution fees charged for copies of, or access to, the registry are to be paid to the Attorney General and deposited in the state treasury to the credit of the fund. The fund is to be used to pay costs associated with the development, operation, and maintenance of the registry, including any costs arising under a contract authorized by the bill. (R.C. 4719.29(C).)

Notice to telephone service subscribers

The bill requires any company that provides a local telephone directory to a telephone service subscriber in Ohio to include a notice in the directory pertaining to the registry. The notice is to describe the registry provided for by the Attorney General as well as the lists maintained by each telephone solicitor (see below under "**Do-not-call list**"). The bill also requires that the notice contain complete information on procedures for having a residential telephone number included on the registry or list. (R.C. 4719.31.)

Telephone solicitor regulation

The bill establishes the following requirements and prohibitions for telephone solicitors, and provides that the entity on whose behalf a solicitation is made is also liable for any violations.⁹

⁹ Under the bill, a "telephone solicitor" is a person (see definition, above) that engages in telephone solicitations directly or through one or more representatives, either from a location in Ohio or from a location outside Ohio to persons in Ohio. A telephone

Do-not-call list

The bill prohibits a telephone solicitor from failing to maintain or cause to be maintained its own do-not-call list. The list is to contain the telephone numbers of all residential telephone subscribers who have requested of the solicitor or representative not to receive telephone solicitation calls on behalf of a particular entity for which the solicitor or representative has made calls. The solicitor or representative must record the request and place the number on the list at the time the request is made. The solicitor or representative is prohibited from making or causing to be made any telephone solicitation calls on behalf of that entity to a telephone number on the list for a period of ten years after the subscriber requests placement on the list. For calls made necessary by an emergency affecting public health or safety, the above prohibition and other provisions do not apply. Regardless of who maintains the list, the entity on whose behalf the telephone solicitation is made is also liable for any violation of a requirement described in this and the following paragraphs. (R.C. 4719.27(A)(1), (2), and (4) and (B).)

Leaving return number

The bill requires a telephone solicitor or representative using a prerecorded or artificial message player for a telephone solicitation to include a toll-free number that the called party can call in order to be placed on the solicitor's do-not-call list. This requirement does not apply to a telephone call made necessary by an emergency affecting health or safety. (R.C. 4719.27(A)(3) and (4).)

Telephone solicitations

The bill prohibits any telephone solicitor or its representative from making or causing to be made an unsolicited telephone solicitation to a telephone number more than 90 days after the number appears on the most current version of the do-not-call registry. This prohibition, however, does not apply to unsolicited telephone solicitations made by or on behalf of organizations that represent past and present members of the armed forces or charity organizations that are granted tax-exempt status under section 501(c)(3) or (19) of the Internal Revenue Code and that are not affiliates of a for-profit entity. (R.C. 4719.26(A).)

For the bill's purposes, a "telephone solicitation" is any communication to a person initiated by or on behalf of a telephone solicitor or representative that represents a price, quality, or availability of goods or services, or is used to induce the person to purchase goods or services, including inducement through the

solicitor's "representative" is an individual who is employed, appointed, or authorized by the solicitor to make telephone solicitations. (R.C. 4719.25(D) and (F).)

offering of a gift, award, or prize. Any telephone solicitation other than one that is made in connection with an established business relationship with the called party is considered "unsolicited telephone solicitation." In instances where an established business relationship exists, the telephone solicitation will be considered unsolicited if the called party has, or has requested to have, its telephone number included on the do-not-call list maintained for the entity on whose behalf the telephone solicitation is made. An "established business relationship" between the entity on whose behalf a telephone solicitation is made and a called party exists based on (1) the called party's inquiry or application within the preceding three months regarding a product or service offered by the entity, (2) the called party's purchase, rental, or lease of goods or services from the entity,¹⁰ or (3) a financial transaction between the called party and the entity.¹¹ (R.C. 4719.25(B), (E), and (G).)

Restricted hours

Under the bill, a telephone solicitor or representative may make or cause to be made a telephone solicitation to a residential telephone service subscriber in Ohio only between the hours of 8 a.m. and 9 p.m. local time at the subscriber's location (R.C. 4719.26(B)).

Abandoning calls

With respect to an outbound telephone solicitation, the bill prohibits a telephone solicitor or representative from abandoning a telephone solicitation call by failing to connect the call to a live person within two seconds after the completed greeting by the answering party. This prohibition does not apply, however, if all of the following conditions are met (R.C. 4719.26(C)):

¹⁰ *The length of the relationship depends on whether or not financing is obtained to make the purchase, rental, or lease. If the called party obtains financing, the relationship terminates either 18 months after the finance agreement is executed or on the date on which the called party is no longer obligated under the agreement, whichever is later. If the called party does not obtain financing, the relationship terminates either 18 months after the purchase, rental, or lease agreement is executed or on the date on which the called party is no longer obligated under the agreement, whichever is later.*

¹¹ *Under the bill, an established business relationship brought about by a financial transaction between the called party and the entity terminates 18 months after the date on which the transaction was executed.*

(1) The telephone solicitor or representative uses technology that ensures abandonment of no more than 5% of all answered calls, measured per day per calling campaign;¹²

(2) The telephone solicitor or representative allows the telephone to ring for at least 15 seconds or four rings before disconnecting an unanswered call;

(3) If no live person is available to speak with the answering party within two seconds after the party's completed greeting, the telephone solicitor or representative promptly plays a recorded message that states the name and telephone number of the entity on whose behalf the call was placed. The bill prohibits the telephone number from being a "900" number or any other number for which charges exceed normal local or long-distance charges.

(4) The telephone solicitor or representative maintains records indicating compliance with the do-not-call list requirements.

Disclosure

Before a telephone solicitor or representative requests any financial information or conveys to a solicitation's answering party any substantive information about a prize, good, or service, the bill requires the solicitor or its representative to promptly state the solicitor's or representative's true name and the name of the entity for whom the call is being placed, state that the purpose of the call is to effect a sale, and identify any good or service being sold. Rather than a true name, the bill also allows the solicitor or representative to state a fictitious name, but only if the fictitious name is provided to the entity on whose behalf the solicitation is made. The entity must maintain a record of any such fictitious names for a period of time to be prescribed by the Attorney General by rule. (R.C. 4719.26(D).)

Liability of entity

The bill provides that the entity on whose behalf a telephone solicitation is made is also liable for a violation described above in "**Telephone solicitations**," "**Restricted hours**," "**Abandoning calls**," and "**Disclosure**" (R.C. 4719.26(E)).

¹² The bill requires the Attorney General, by rule, to adjust this percentage so that it is consistent with any applicable federal regulation.

Prohibited uses of registry or list

The bill prohibits any person from possessing, disclosing, or using, including for the purpose of selling, renting, or leasing, any registry for any purpose other than complying with the bill's requirements, applicable federal law, or a lawful court order or subpoena directing disclosure or use. This prohibition also applies to any do-not-call list maintained by a telephone solicitor, and to any information received or maintained in connection with a number on the registry or list or with the associated subscriber. Any person who violates this prohibition is guilty of a felony of the fifth degree. (R.C. 4719.30(A)(1) and (D).)

Notwithstanding this prohibition, a telephone solicitor or representative may disclose or forward to or share with the entity on whose behalf it makes telephone solicitations any information it receives or maintains in connection with a number on its own list or with the associated subscriber. A telephone solicitor may also disclose or forward such information or share it with any other entity with the express written or recorded consent of the subscriber. The bill requires the solicitor or representative to retain the consent for at least a year after last sharing the information pursuant to the consent. Additionally, the bill does not prohibit a person from sharing a do-not-call list or registry with an affiliate for purposes of complying with the bill's requirements, provided that the sharing also complies with any applicable federal law.¹³ (R.C. 4719.30(A)(2) and (C).)

This prohibition does not apply to the possession, disclosure, or use by the Attorney General or any employee of the Office of the Attorney General in the course of that employment if its purpose is to develop, operate, or maintain the registry, enforce the bill's requirements, comply with a lawful court order or subpoena directing disclosure or use, or pursue an action described below under "Civil actions." Additionally, this prohibition does not apply to any contractor utilized by the Attorney General or any agent or employee of the contractor in the course of that agency or employment if the purpose of the possession, disclosure, or use is to develop, operate, and maintain the registry, assist the Attorney General in enforcing the bill's requirements, comply with a lawful court order or subpoena directing disclosure or use, or assist the Attorney General in the pursuit of an action described below under "Civil actions." (R.C. 4719.30(B).)

¹³ The bill defines "affiliate" as a business entity that controls, is controlled by, or is under common control with another business entity (R.C. 4719.25(A)).

Enforcement

Attorney General investigations

The bill authorizes the Attorney General to investigate any alleged violation of the bill's requirements or rule adopted by the Attorney General if the Attorney General, as a result of complaints or the Attorney General's inquiries, has reason to believe that a person has engaged, is engaging, or is preparing to engage in such violation. In conducting such investigations, the Attorney General may administer oaths, issue subpoenas, adduce evidence, require the production of any book, document, record, or other relevant matter, and designate representatives if the matter to be produced and inspected is outside Ohio. The person subpoenaed may make the matter available to the Attorney General at a convenient location within Ohio or pay the reasonable and necessary expenses for the Attorney General or representative to examine the matter at the place where it is located. No person, however, is required to pay any expenses of the Attorney General if the person is not subsequently found to have violated the bill's prohibitions or requirements or a rule of the Attorney General. The Attorney General may respond to similar requests from officials of other states.

A subpoenaed person, for good cause shown, may file a petition to extend the day for the return of the subpoena or to modify or quash the subpoena in the court of common pleas of Franklin County or of the county in which the person resides or the person's principal place of business is located. The person may file the petition at any time before the day of its return or within 20 days after service of the subpoena, whichever is the shorter period. (R.C. 4719.33(A), (B), and (C).)

A subpoenaed person must comply with the terms of the subpoena unless, prior to the date for return specified in the subpoena or as extended, the court orders otherwise. If a person subpoenaed or required to produce relevant matter fails to comply without lawful excuse, the Attorney General is authorized to apply to a common pleas court for relief. Such relief may be in the form of a contempt order, injunctive relief to restrain the person from engaging in conduct that constitutes the violation or to preserve or restore the status quo, or other relief.

If an individual refuses to testify or to produce relevant matter on the grounds that the testimony or matter may incriminate the individual, the bill authorizes the Attorney General to seek a court order requiring the person to provide the testimony or matter. Subject to exceptions for perjury or damages caused to subscribers, 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, is not subject to criminal proceedings on the basis of the testimony or matter required to be disclosed or matter discovered through the testimony or matter.

If a person violates a court order issued as described above, the court must treat the violation as a violation of an injunction issued as described below under "Civil actions." (R.C. 4719.33(D), (E), and (F).)

Civil actions

If the Attorney General has reasonable cause to believe that a person has engaged or is engaging in a violation of the bill's requirements or prohibitions or a rule of the Attorney General, the bill authorizes the Attorney General to bring an action to obtain a declaratory judgment, a temporary restraining order, or an injunction. If the Attorney General shows by a preponderance of the evidence that the person has violated or is violating the requirement, prohibition, or rule, the court must issue a temporary restraining order or preliminary or permanent injunction without bond. The bill requires a court to impose a civil penalty of not more than \$5,000 for each day of violation of any such order or injunction.

The bill also authorizes the Attorney General to bring a civil action on behalf of residential telephone service subscribers for damages caused by the violation. No such action may be brought, however, more than two years after the occurrence of the violation.

The bill provides that on motion of the Attorney General and without bond, the court may make appropriate orders, including appointment of a receiver, for attachment of assets, to recover actual or statutory damages for residential telephone service subscribers or to grant other appropriate relief including reasonable attorney's fees and costs. If a violation is proven in an action for damages, the court must award each subscriber the greater of \$200 or the amount of actual monetary loss, plus court costs and attorney's fees. In addition, the court may assess the receiver's expenses against the violator.

Additionally, the Attorney General may seek, and the court must impose, a civil penalty for each violation of the bill's requirements or prohibitions or a rule of the Attorney General. The civil penalty is not less than \$500 nor more than \$2,000 for each separate violation. (Each call in violation of the bill, each possession, disclosure, or use in violation of the bill, and each violation of a provision of a rule adopted by the Attorney General constitutes a separate violation.) (R.C. 4719.34(A), (B), and (C).)

Telephone Solicitation Protection Fund

The bill creates the Telephone Solicitation Protection Fund in the state treasury. Civil penalties ordered pursuant to the bill are to be deposited in the fund and used to pay the Attorney General's costs in enforcing the bill's requirements. Money or property recovered by the Attorney General on behalf of a residential

telephone subscriber must be deposited in the fund only if it cannot with due diligence be restored to the subscriber within five years. (R.C. 4719.34(D).)

Other remedies

Any violation of the bill or a rule of the Attorney General by a telephone solicitor or representative that is also a supplier under the Ohio Consumer Sales Practices Act is considered an unfair or deceptive act or practice in violation of that Act.¹⁴ (R.C. 4719.35.) A "supplier" is any seller, lessor, assignor, franchiser, or other person engaged in the business of effecting or soliciting consumer transactions.

The bill also authorizes any person that has received a prohibited telephone call to bring a private action. The subscriber may seek injunctive relief or monetary damages or both. The amount of the monetary damages is the actual monetary loss or \$200, whichever is greater, plus court costs and attorney's fees. No such action may be brought, however, more than two years after the occurrence of the violation. (R.C. 4719.36.)

The bill stipulates that the powers, remedies, and penalties it provides are in addition to any other power, remedy, or penalty provided by law (R.C. 4719.38).

Affirmative defense

The bill provides that it is an affirmative defense in an action or proceeding brought against an entity on whose behalf a telephone solicitation is made for violating the bill's requirements or prohibitions, that the entity established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the bill's requirements or prohibitions (R.C. 4719.37).

HISTORY

ACTION	DATE	JOURNAL ENTRY
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¹⁴ *The Consumer Sales Practices Act is codified in sections 1345.01 to 1345.13 of the Revised Code.*