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(As Reported by H. Civil & Commercial Law)

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BILL 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 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 bill, and prevents the

AG from pleading a violation of both the bill 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 bill or the applicable federal act or rule, but not under both the bill and the federal act or rule.
- Requires the AG, in any proceedings under the bill, 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 bill 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 bill 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 bill.

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Background

State level

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 (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)).

Current 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 existing 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: specifically, 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 1.**)

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 bill prohibits any "seller" or "telemarketer" from engaging in any act or practice in violation of any provision of a federal act or rule. The bill 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 bill also provides that the terms that are used in the bill have the same meanings as in the applicable federal act or rule. (R.C. 109.87(A) and (B)(1).) (See **COMMENT 2** and 3.)

Recognition of federal exemptions

The bill requires the AG, in any proceedings under the bill 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)). (See **COMMENT 4**.)

Investigation by the AG

Under the bill, 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 bill 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 bill 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 bill 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 bill.

(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 bill 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 bill 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 bill 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 bill. The AG may bring the action under the bill's provisions or under the applicable federal act or rule, but the AG cannot plead a violation of both the bill 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 bill 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 bill 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 bill or under the applicable federal act or rule, but an award of damages or civil penalties cannot be recovered under both the bill 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)). (See **COMMENT 5**.)



Restrictions

The bill 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 bill 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 bill 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 bill (R.C. 109.87(F)).

COMMENT

1. In *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, Civil Action No. 03 N 0184, ___ F.Supp.2d ___, 2003 WL 22232209 (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.

2. The Telemarketing Sales Rule (16 C.F.R. Part 310), adopted by the FTC to implement the Telemarketing and Consumer Fraud and Abuse Prevention Act, defines the following terms that are relevant to the bill's provisions (16 C.F.R. 310.2):

(z) Seller means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.

....

(bb) Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing

of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

H.R. 3161 of the 108th Congress (an Act to ratify the authority of the Federal Trade Commission to establish a do-not-call registry) (September 25, 2003), specifically authorized the FTC to implement and enforce a national do-not-call registry under 15 U.S.C. 6102(a)(3)(A)). The Act ratified the do-not-call registry provision of the Telemarketing Sales Rule (16 C.F.R. 310.4(b)(1)(iii)), which was promulgated by the FTC, effective March 31, 2003.

16 C.F.R. 310.3 specifies the prohibited deceptive telemarketing acts or practices. 16 C.F.R. 310.4, which specifies abusive telemarketing acts or practices, provides in subsection (a) of that section abusive conduct in general. 16 C.F.R. 310.4(b), (c), (d), and (e) contain the following provisions regarding pattern of calls, calling time restrictions, required oral disclosures in the sale of goods and services, and required oral disclosures in charitable solicitations:

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons

who do not wish to receive outbound telephone calls established to comply with § 310.4(b)(1)(iii);

(iii) Initiating any *outbound telephone call* to a person when:

(A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(i) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

(ii) has an *established business relationship* with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to §310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this

Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §§ 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than three (3) months prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent

of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

(iv) the seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.4(b)(4)(i)-(iii).

(c) Calling time restrictions. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls 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.

(d) Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or



payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) Required oral disclosures in charitable solicitations. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

- (1) The identity of the charitable organization on behalf of which the request is being made; and
- (2) That the purpose of the call is to solicit a charitable contribution.

(Footnotes omitted, emphasis added.)

The terms that are emphasized in the above quoted provisions are defined as follows (16 C.F.R. 310.2):

(n) Established business relationship means a relationship between a seller and a consumer based on:

- (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
- (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

.....

(u) Outbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

3. The Telephone Consumer Protection Act of 1991 requires the FCC to adopt regulations concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object (47 U.S.C. 227(c)(1)). These regulations, which are in 47 C.F.R. 64.1200, includes the following relevant definitions (47 C.F.R. 64.1200(f)):

(3) The term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

[Note to paragraph (f)(3): Paragraph 64.1200(f)(3) is stayed as of October 14, 2003, as it applies to the time limitations on facsimile advertisements. The Federal Communications Commission will publish a document in the Federal Register when the stay is lifted.]

....

(5) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(6) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(7) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

....

(9) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(10) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(11) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

The relevant prohibitions and restrictions in the FCC rule are as follows (47 C.F.R. 64.1200(a), (b), (c), (d), (e), (g), and (h)):

(a) No person or entity may:

.....

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call,

(i) Is made for emergency purposes,

(ii) Is not made for a commercial purpose,

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation,

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made, or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

.....

(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a

prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.

....

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number

or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(9) of this section, to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the



national do-not-call registry obtained from the administrator of the registry no more than three months prior to the date any call is made, and maintains records documenting this process; and

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

....

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to

wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

....

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

4. Under the Telephone Consumer Protection Act of 1991, "telephone solicitation" does not include a call or message: (1) to any person with that person's prior express invitation of permission, (2) to any person with whom the caller has an established business relationship, or (3) by a tax exempt nonprofit organization. (47 U.S.C.A. 227(a)(3).)



5. Both the Telemarketing and Consumer Fraud and Abuse Prevention Act and the Telephone Consumer Protection Act of 1991 recognize a private right of action for persons adversely affected by a violation of the Acts as provided in 15 U.S.C. 6104 and 47 U.S.C. 227(b)(3) and (c)(5). Both Acts also authorize enforcement of the Acts by state officials in 15 U.S.C. 6103 and 47 U.S.C. 227 as follows:

15 U.S.C. 6103

Sec. 6103. Actions by states

(a) In general

Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, the State, as *parens patriae*, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate.

(b) Notice

The State shall serve prior written notice of any civil action under subsection (a) or (f)(2) of this section upon the Commission and provide the Commission with a copy of its complaint, except that if it is not feasible for the State to provide such prior notice, the State shall serve such notice immediately upon instituting such action. Upon receiving a notice respecting a civil action, the Commission shall have the right (1) to intervene in such action, (2) upon so intervening, to be heard on all matters arising therein, and (3) to file petitions for appeal.

(c) Construction



For purposes of bringing any civil action under subsection (a) of this section, nothing in this chapter shall prevent an attorney general from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(d) Actions by Commission

Whenever a civil action has been instituted by or on behalf of the Commission for violation of any rule prescribed under section 6102 of this title, no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) or (f)(2) of this section against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

....

(f) Actions by other State officials

(1) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State.

(2) In addition to actions brought by an attorney general of a State under subsection (a) of this section, such an action may be brought by officers of such State who are authorized by the State to bring actions in such State on behalf of its residents.

47 U.S.C. 227

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to



residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

....

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

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

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