



Sub. S.B. 28*

125th General Assembly
(As Reported by S. Public Utilities)

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BILL SUMMARY

- Requires the Attorney General to provide for a do-not-call registry for residential telephone subscribers, either by directly developing 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 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 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 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)

** This analysis was prepared before the report of the Senate Public Utilities Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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 subscriber can call in order to be placed on the solicitor's do-not-call list.

- 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.
- Provides for a private cause of action for any residential telephone 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, 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

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.

³ 15 U.S.C. §§ 6101-6108.

⁴ 16 C.F.R. § 310.

(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

(R.C. 4719.28 and 4719.29)

The bill requires the Attorney General to provide for a do-not-call registry for the benefit of residential telephone subscribers. 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. Alternatively, the Attorney General may satisfy this requirement by accepting a national registry maintained by any federal agency.

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 and facsimile machine numbers, are to be listed on the registry. Residential telephone subscribers may request to have their telephone number placed on the registry without cost. Such 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 as is to be specified in 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 individual, group, business entity, or partnership 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.

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.

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 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 is not a public record.

Rules

(R.C. 4719.29 and 4719.32)

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. Specifically, the Attorney General must adopt rules (1) outlining 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) establishing the period of time a telephone number is to remain on the registry, and (3) prescribing the amount of the distribution fee.

The Attorney General may also adopt any other rules deemed necessary to carry out the bill's requirements.

Do-Not-Call Registry Fund

(R.C. 4719.29)

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 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.

Notice to telephone service subscribers

(R.C. 4719.31)

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 procedures for having a telephone number placed on the registry or list.

Telephone solicitor regulation

(R.C. 4719.25, 4719.26, and 4719.27)

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.⁸

Do-not-call list

The bill requires a telephone solicitor to maintain its own do-not-call list. The list is to contain the telephone numbers of residential telephone subscribers who have requested of the solicitor not to receive telephone solicitation calls on behalf of a particular entity for which the solicitor has made calls. The solicitor must place the number on the list at the time the request is made. The solicitor is prohibited from making 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 prohibition does not apply.

Leaving return number

The bill requires a telephone solicitor using a prerecorded or artificial message player for a telephone solicitation to include a toll-free number that the subscriber can call in order to be placed on the solicitor's do-not-call list.

Telephone solicitations

The bill prohibits any telephone solicitor or its representative from making 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 veteran 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.

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

⁸ Under the bill, a "telephone solicitor" is an individual, association, or business 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 solicitor's "representative" is an individual who is employed, appointed, or authorized by the solicitor to make telephone solicitations.

represents a price, quality, or availability of goods or services, or is used to induce the person to purchase goods or services. Any telephone solicitation other than one that is made in connection with an established business relationship is considered unsolicited. 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 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,⁹ or (3) a financial transaction between the called party and the entity.¹⁰

Restricted hours

Under the bill, a telephone solicitor may make a telephone solicitation call to a residential telephone service subscriber only between the hours of 8 a.m. and 9 p.m. local time at the subscriber's location.

Abandoning calls

The bill prohibits a telephone solicitor 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:

⁹ *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.*

¹⁰ *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. Additionally, the bill provides that an established business relationship exists if there was a financial transaction between the called party and the entity within the 18 months immediately preceding the telephone solicitation.*

(1) The telephone solicitor uses technology that ensures abandonment of no more than 5% of all answered calls, measured per day per calling campaign;¹¹

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

(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 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 maintains records indicating compliance with the do-not-call list requirements.

Disclosure

Before a telephone solicitor 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 goods or services 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.

Prohibited uses of registry or list

(R.C. 4719.30)

The bill prohibits any person from possessing, disclosing, or using any registry for any purpose other than complying with the bill's requirements, applicable federal law, or a lawful court order. This prohibition also applies to any do-not-call list maintained by a telephone solicitor, and to any information received in connection with a number on the registry or list or with the associated

¹¹ The bill requires the Attorney General, by rule, to adjust this percentage so that it is consistent with any applicable federal regulation.

subscriber. Any person who violates this prohibition is guilty of a felony of the fifth degree.

Notwithstanding this prohibition, a telephone solicitor may share any information it receives in connection with its own list to the entity on whose behalf it makes telephone solicitations. A telephone solicitor may also share such information with any other entity with the express consent of the subscriber. The bill requires the solicitor to retain the consent for at least a year after sharing the information. 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.¹²

This prohibition does not apply to the Attorney General if the purpose of such possession, disclosure, or use is to develop, operate, or maintain the registry, enforce the bill's requirements, or comply with a court order. Additionally, this prohibition does not apply to any contractor utilized by the Attorney General 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, or comply with a court order.

Enforcement

(R.C. 4719.33, 4719.34, 4719.35, 4719.36, and 4719.38)

Attorney General investigations

The bill authorizes the Attorney General to investigate any alleged violation of the bill's requirements if the Attorney General has reason to believe such violations occurred. In conducting such investigations, the Attorney General may administer oaths, issue subpoenas, adduce evidence, and designate representatives if the matter to be inspected is outside Ohio. For matters inspected outside the state, the person subpoenaed is required to pay the Attorney General's reasonable and necessary expenses incurred during the examination. No person, however, shall be 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.

If a person subpoenaed 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, injunction, or other relief.

¹² *The bill defines "affiliate" as a business entity that controls, is controlled by, or is under common control with another business entity.*

If a person refuses to testify on the grounds that the testimony may incriminate the person, the bill authorizes the Attorney General to seek a court order requiring the person to testify. Subject to exceptions for perjury or damages caused to subscribers, a person required to testify, after asserting a privilege against self-incrimination, shall not be subject to criminal proceedings on the basis of the testimony.

Civil actions

If the Attorney General has reasonable cause to believe that a person has violated the bill's requirements, the bill authorizes the Attorney General to bring an action to obtain a declaratory judgment, a temporary restraining order, or an injunction. 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 a residential telephone subscriber for damages caused by a 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 can make appropriate orders, including appointment of a receiver, for attachment of assets, to recover actual or statutory damages for residential telephone 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 can assess the receiver's expenses against the violator.

Additionally, the Attorney General may seek, and the court shall impose, a civil penalty for each violation of the bill's requirements. The civil penalty shall be between \$500 and \$2,000 for each separate violation. (Each call in violation of the bill constitutes a separate violation.)

Telephone Solicitation Protection Fund

The bill creates the Telephone Solicitation Protection Fund in the state treasury. Civil penalties collected by the Attorney General 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 collected by the Attorney General on behalf of a residential telephone subscriber shall be deposited in the fund only if it cannot be restored to the subscriber within five years.



Other remedies

Any violation of the bill by a telephone solicitor 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.¹³ 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 residential telephone subscriber that has received a prohibited telephone call to bring a private cause of action. The subscriber may seek injunctive relief or monetary damages or both. The amount of the monetary damages shall be for 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.

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

Affirmative defense

(R.C. 4719.37)

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, 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.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-06-03	p. 103
Reported, S. Public Utilities	---	---

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¹³ *The Consumer Sales Practices Act is codified in sections 1345.01 to 1345.13 of the Revised Code.*

