

NEW YORK CODES, RULES AND REGULATIONS

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH OCTOBER 24, 2008 ***

TITLE 21. MISCELLANEOUS
CHAPTER LIV. STATE CONSUMER PROTECTION BOARD
PART 4602. GENERAL PROVISIONS

21 NYCRR Part 4602 Notes (2008)

Part 4602 Notes

Statutory authority: Executive Law §553; General Business Law §399-z; L. 2000, ch. 547

Added Part 4602 on 4/11/01; amended Part 4602 on 12/17/03.

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PART 4602. GENERAL PROVISIONS

21 NYCRR § 4602.1 (2008)

§ 4602.1 Authorization of transfer of telephone numbers to federal registry

(a) The Consumer Protection Board is authorized to have the national "do-not-call" registry, established, managed and maintained by the Federal Trade Commission pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B)*, (herein referred to as the national "do-not-call" registry), serve as the New York State "do not call" registry.

(b) Consumer telephone numbers listed on the New York State no telemarketing sales calls statewide registry will be transferred to the Federal Trade Commission for inclusion in its national "do not call" registry as established by 16 C.F.R. Section 310.4(b)(1)(iii)(B).

(c) The registry is open to all natural persons who: (1) reside in this state, and (2) have telephone service in this state that receives incoming calls.

* The text of 16 C.F.R. Part 310, which codifies 15 U.S.C. 6108, the Telemarketing and Consumer Fraud and Abuse Prevention Act, as amended, appears in the "Federal Register", Vol. 68, No. 19, January 29, 2003. Copies of the Rule are also available for public inspection and photocopying at the New York State Consumer Protection Board, 5 Empire State Plaza, Suite 2101, Albany, NY 12223.

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Repealed and added 4602.1 on 12/17/03; amended 4602.1 on 6/25/08.

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21 NYCRR § 4602.2 (2008)

§ 4602.2 Definitions

(a) Consumer means any natural person who: (1) resides in this state; and (2) has telephone service in this state that receives incoming calls. The term "customer" shall have the same meaning as the definition of "consumer" defined herein.

(b) Doing business in this state means conducting telephonic sales calls: (1) from any location within New York State; or (2) from a location outside of New York State to consumers residing and having a telephone number in this state.

(c) Goods and services means any goods and services, including any real property or any tangible personal property, and services of any kind. (1) The term "goods" shall be the same as defined under Section 2-105 of the New York Uniform Commercial Code. (2) The term "services" shall be defined as the duty, labor, obligation, act, or commitment to be rendered by one person to another for profit, whereby the telemarketer offers, seeks to offer, or contracts to offer any performance of labor or other such act for the benefit of the consumer, or at the consumer's direction or authority.

(d) Telemarketer means any person who, for financial profit or commercial purposes in connection with telemarketing, makes a telemarketing sales call to a consumer in this state or any person who directly controls or supervises the conduct of a telemarketer. Telemarketer shall also include any person, firm, or corporation acting as an agent or representative of such telemarketer. For purposes of this paragraph, commercial purposes shall mean the sale or offer for sale of goods and services. Charitable organizations as defined in §171-a(1) of the Executive Law and registered pursuant to §172 of the Executive Law, religious corporations as defined in §2 of the Religious Corporations Law, political parties as defined in §1-104(3) of the Election Law, and political committees as defined in §14-100(1) of the Election Law, are deemed not able to conduct any act or activity for "commercial purposes" and are deemed not to be operating for financial profit for purposes of these regulations.

(e) Telemarketing means any plan, program or campaign which is initiated by a telephone call to a consumer or a message left on a telephone answering machine or voice mail system of a consumer, conducted to induce or encourage payment or the exchange of any other consideration for any goods or services by use of one or more telephones and which involves more than one telephone call by a telemarketer in which the consumer receiving such call or message is located within the state at the time of the call. Telemarketing does not include the solicitation of sales through media other than by telephone calls.

(f) Telemarketing sales call means a telephone call made by a telemarketer to a consumer for the purpose of encouraging the purchase or rental of, or investment in property, goods or services, or inducing payment or the exchange of any other consideration for any goods or services, where the consumer's receiving device is a telephone.

Section statutory authority: Uniform Commercial Code, § 2-105; Executive, § 171-A, § 172; Religious Corporations, § 2; Election Law, § 1-104, § 14-100

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Added 4602.6 on 4/11/01; renumbered 4602.6 to be 4602.2 on 12/17/03; amended 4602.2 on 6/25/08.

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PART 4603. ENFORCEMENT

21 NYCRR Part 4603 Notes (2008)

Part 4603 Notes

Statutory authority: Executive Law §553; General Business Law §399-z; L. 2000, ch. 547

Added Part 4603 on 4/11/01.

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PART 4603. ENFORCEMENT

21 NYCRR § 4603.1 (2008)

§ 4603.1 Violations

No telemarketer or seller may make or cause to be made any unsolicited telemarketing sales call to any consumer more than thirty-one (31) days after the telephone number appears on the national do-not-call registry, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B). Each call to a telephone number shall be deemed a separate occurrence for purposes of the penalty and enforcement provisions of these regulations.

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Added 4603.1 on 4/11/01; amended 4603.1 on 6/25/08.

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21 NYCRR § 4603.2 (2008)

§ 4603.2 Exceptions

(a) Unsolicited telemarketing sales call means any telemarketing sales call other than a call made: (1) in response to an express written or verbal request of the specific customer called; (2) in connection with an established business relationship, which has not been terminated by either party, unless such customer has stated to the telemarketer or the telemarketer's agent that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer; or (3) to an existing customer, unless such customer has stated to the telemarketer or the telemarketer's agent that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer.

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

(c) Existing customer shall mean a prior or existing relationship formed by a voluntary two-way communication between a consumer and a telemarketer with or without an exchange of consideration, on the basis of the consumer's purchase or transaction with the telemarketer within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the consumer's inquiry or application regarding products or services offered by the telemarketer with the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(d) Person shall mean any natural person, association, partnership, firm, corporation, and its affiliates or subsidiaries or other business entity.

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Added 4603.2 on 4/11/01; amended 4603.2 on 6/25/08; amended 4603.2(a) on 4/12/06.

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21 NYCRR § 4603.3 (2008)

§ 4603.3 Safe harbor provisions

A person (which includes an entity, corporation, or other telemarketer) shall not be held liable for violating these regulations if the person can demonstrate, by clear and convincing evidence, that: (1) the person has obtained a version of the national "do-not-call" registry from the Federal Trade Commission no more than thirty-one (31) days prior to the date any telemarketing call is made, pursuant C.F.R. Section 310.4(6)(i)(iii)(B), and as a part of the person's routine business practice it has established and implemented written policies and procedures related to the requirements of these regulations; (2) the person has trained all personnel conducting telemarketing sales calls in the requirements of these regulations; (3) the person maintains records demonstrating compliance with this section and the requirements of these regulations in response to a notice from the board of alleged "do-not-call" violations; and (d) any subsequent unsolicited telemarketing sales call is the result of an error.

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Added 4603.3 on 4/11/01; amended 4603.3 on 2/21/07; amended 4603.3 on 6/25/08.

21 NYCRR § 4603.4

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21 NYCRR § 4603.4 (2008)

§ 4603.4 Enforcement

(a) Upon allegation(s) of non-compliance with applicable law, or upon its own initiative, the board may conduct an inquiry as to the sufficiency of any alleged violations. If the board finds any grounds to indicate that a violation(s) may have occurred, the board may, as the public interest demands, send a notice of apparent liability to the alleged violator seeking a response.

(b) The board shall mail a copy of the notice of apparent liability to the last known business address of the alleged violator. Mailing of the notice shall be deemed receipt thereof.

(c) The alleged violator shall respond to the notice not later than thirty-five (35) days from the date the board mailed such notice.

(d) The board will evaluate such response, conduct a review based on the evidence before it, and provide notice of its decision to the alleged violator within sixty (60) days of receipt of the response. Mailing of the decision shall be deemed receipt thereof.

(e) If the alleged violator disputes the board decision, such violator may file an administrative appeal with the board by requesting in writing an administrative hearing, within ten (10) days of receipt of the decision. The administrative hearing shall be subject to Article 3 of the State Administrative Procedure Act ("SAPA").

(f) If the alleged violator does not file an administrative appeal by requesting a hearing in writing within ten (10) days of receipt of such decision, the initial decision of the board is deemed the final board decision and the alleged violator shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the initial decision of the board, within ten (10) days of receipt of the initial decision of the board.

(g) If an administrative appeal is properly filed, the board shall stay any fine pending the decision of such appeal.

(h) During the hearing proceeding, the board may establish evidentiary rebuttable presumption(s).

(i) Any facts or evidence received by the board may be used in any proceeding and shall be afforded appropriate consideration by the presiding officer. All evidence shall be kept in the custody of the presiding officer.

(j) Where it is determined after the administrative hearing that the alleged violator has violated one or more provisions of these regulations, the presiding officer may assess a fine not to exceed eleven thousand dollars (\$ 11,000) for each violation.

(k) If the alleged violator requests an administrative appeal pursuant to paragraph (e) of this section and an administrative hearing is held, the administrative hearing decision shall constitute a final board decision. Violators shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the administrative hearing decision within ten (10) days of the receipt of such decision.

(l) If the alleged violator does not respond to the notice of apparent liability within thirty-five (35) days of receipt of the notice pursuant to paragraph (c) of this section, said notice of apparent liability shall constitute the final board decision. The alleged violator shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the notice of apparent liability, within sixty (60) days from the date the board mailed such notice.

Statutory authority: Executive Law § 553; General Business Law § 399-z; L. 2000, ch. 547

Added 4603.4 on 4/11/01; amended 4603.4 on 6/25/08; amended 4603.4(a) on 3/23/05.

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PART 4604. CONSTRUCTION

21 NYCRR Part 4604 Notes (2008)

Part 4604 Notes

Statutory authority: Executive Law §553; General Business Law §399-z; L. 2000, ch. 547

Added Part 4604 on 4/11/01.

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21 NYCRR § 4604.1 (2008)

§ 4604.1 Separability clause, construction

(a) If any part or provision of these regulations or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to the part, provision, or application directly involved in the controversy in which such judgment shall have been rendered. Such controversy or judgment shall not affect or impair the validity of the remainder of these regulations or the application thereof to other persons or circumstances.

(b) For purposes of these regulations, any act or activity of the executive director of the agency, any person designated by him or her, or other such employee of the agency shall be deemed an act or activity of the agency.

Statutory authority: Executive Law § 553; General Business Law §399-z; L. 2000, ch. 547

Added 4604.1 on 4/11/01.

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PART 4604. CONSTRUCTION

21 NYCRR § 4604.2 (2008)

§ 4604.2 Effective date

These regulations shall take effect April 1, 2001.

Statutory authority: Executive Law § 553; General Business Law §399-z; L. 2000, ch. 547

Added 4604.2 on 4/11/01.