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Senator Gavarone

Cosponsors: Senators Manning, Blackshear, Cirino, Craig, DeMora, Hicks-Hudson, Ingram, Johnson, O'Brien, Patton, Reineke, Reynolds, Roegner, Romanchuk, Timken, Weinstein

To amend section 109.87 of the Revised Code to make changes to the telemarketing law.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 109.87 of the Revised Code be amended to read as follows:

Sec. 109.87. (A)(1) Unless otherwise defined in this section, the terms that are used in this section have the same meanings as in the applicable federal act or rule.

(2) As used in this section:

(a) "Federal act or rule" means the "Telemarketing and Consumer Fraud and Abuse Prevention Act," 108 Stat. 1545 to 1551, 15 U.S.C. 6101 to 6108, the "Telephone Consumer Protection Act of 1991," 105 Stat. 2395, 47 U.S.C. 227, 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.

(b) ~~"Voice service provider" means any entity originating, carrying, or terminating voice calls through time-division multiplexing, voice over internet protocol, including~~

~~interconnected or one-way voice over internet protocol, or commercial mobile radio service.~~

~~(c)~~ "Voice service" means any service that is interconnected with the public switched telephone network, directly or as an intermediary, and that furnishes voice communications to an end user using resources from the North American numbering plan or any successor to the North American numbering plan adopted by the federal communications commission under the Communications Act of 1934, 47 U.S.C. 251(e)(1), and includes both of the following:

(i) A transmission from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

(ii) Without limitation, any service that enables real-time, two-way voice communications, including any service that requires internet protocol-compatible customer premises equipment out-bound calling, whether or not the service is one-way or two-way voice over internet protocol.

~~(d)(i) "Text message" means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a ten-digit telephone number or N-1-1 service code and includes a short message service and a multimedia message service.~~

~~(ii) "Text message" does not include a real-time, two-way voice or video communication or a message sent over an internet protocol-enabled messaging service to another user of the same messaging service, except a message described in division (A)(2)(d)(i) of this section.~~

~~(e) "Text messaging service" means a service that enables~~

~~the transmission or receipt of a text message, including a service provided as part of or in connection with a voice service.~~

(B)(1) No person, entity, merchant, seller, or telemarketer shall engage in any act or practice in violation of any provision of a federal act or rule.

(2)(a) No person shall provide substantial assistance or support to any person, entity, merchant, seller, or telemarketer when that person knows or consciously avoids knowing that the other person, entity, merchant, seller, or telemarketer is engaged in any act or practice that violates any provision of a federal act or rule.

(b) For purposes of division (B)(2)(a) of this section, "substantial assistance or support" does not include the provision of a voice service to a third party by a ~~voice service provider if one or more~~ person that is any of the following ~~is true~~:

(i) ~~The voice service provider is not designated as a non-cooperative~~ Operating as an incumbent local exchange carrier ~~by the consortium registered with the federal communications commission pursuant to 47 C.F.R. 64.1203~~, as defined in section 4927.01 of the Revised Code.

(ii) ~~The network of the voice service provider does not originate the voice service or text messaging service~~Operating as a telephone company or wireless service provider that is certified or registered, as applicable, with the public utilities commission pursuant to section 4927.05 of the Revised Code.

(iii) ~~The network of the voice service provider is not the~~

~~first domestic provider handling the voice service or text messaging service that originates outside of the United States~~Operating as an eligible telecommunications carrier designated by rule by the public utilities commission pursuant to section 4927.04 of the Revised Code.

(iv) An issuer of a class of securities registered under section 12 of the "Securities Exchange Act of 1934," 15 U.S.C. 78l, including any subsidiary entity in which the issuer owns, either directly or indirectly through one or more intermediaries, more than seventy-five per cent of the ownership, voting, or similar interests then outstanding.

(3) The attorney general, in any proceedings under this section, shall recognize any exemptions recognized by the federal communications commission under the "Telephone Consumer Protection Act of 1991," 105 Stat. 2395, 47 U.S.C. 227, any amendment or reenactment of that act, any rule adopted or issued pursuant to that act, or any amendment of that rule.

(C)(1) If the attorney general, as a result of complaints or the attorney general's own inquiries, has reason to believe that a person has engaged, is engaging, or is preparing to engage in a violation of this section or any provision of a federal act or rule, the attorney general may investigate the alleged violation. For purposes of an investigation under division (C)(1) of this section, the attorney general may administer oaths, subpoena witnesses, adduce evidence, and require the production of any relevant matter.

(2) If the matter to be produced under division (C)(1) of this section is located outside this state, the attorney general 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 attorney general. The person subpoenaed may make the matter available to the attorney general at a convenient location within the state or pay the reasonable and necessary expenses for the attorney general or the attorney general's representative to examine the matter at the place where it is located, provided that those expenses shall not be charged to a party that subsequently is not found to have engaged in a violation of this section or any provision of a federal act or rule.

(3) A person subpoenaed under division (C)(1) of this section may 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 this state 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 twenty days after the service of the subpoena.

(4) A person subpoenaed under division (C)(1) of this section shall 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 attorney general 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.

(5) If an individual subpoenaed under division (C)(1) of

this section 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 attorney general 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 division (D)(1) of this section, 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, shall 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.

(6) In conducting an investigation under this section, the attorney general shall not publicly disclose the identity of persons, entities, merchants, sellers, or telemarketers investigated or the facts developed in the investigation unless this information has become a matter of public record in enforcement proceedings or if those being investigated have consented in writing to public disclosure.

(7) In conducting an investigation under this section, the attorney general shall cooperate with state and local officials of other states and officials of the federal government in the administration of comparable laws and regulations.

(8) The attorney general may do either of the following:

(a) During an investigation under division (C) of this section, 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 this section or any provision of a federal act or

rule. The attorney general may suspend the investigation during the period that the attorney general 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 shall not prejudice or prohibit any further investigation by the attorney general under division (C) of this section.

(b) Terminate an investigation under division (C) of this section upon acceptance of a written assurance of voluntary compliance from a person who is suspected of a violation of this section or any provision of a federal act or rule. The acceptance of an assurance under division (C)(8)(b) of this section 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 this section or any provision of a federal act or rule. An assurance of compliance given by a person under division (C)(8)(b) of this section is not evidence of a violation of this section or any provision of a federal act or rule. The attorney general, at any time, may reopen an investigation terminated by the acceptance of an assurance of voluntary compliance, if the attorney general 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 this section or the applicable provision of a federal act or rule if the evidence is presented after the violation in a civil action brought under division (D)(1) of this section. 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.

(9) The procedures that are available to the attorney general under division (C) of this section are cumulative and

concurrent, and the exercise of one procedure by the attorney general does not preclude or require the exercise of any other procedure.

(D)(1) If, by the attorney general's own inquiries or as a result of complaints or an investigation conducted under division (C) of this section, the attorney general has reasonable cause to believe that a person has engaged or is engaging in a violation of any provision of this section or of a federal act or rule, the attorney general, subject to division (D)(3) or (4) of this section, may bring in the appropriate court of common pleas of this state 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, damages, and civil penalties pursuant to the federal act or rule, on behalf of the residents of this state who have been subjected to acts or practices in violation of this section. The attorney general may bring the action under this section or under the applicable federal act or rule, but the attorney general shall not plead a violation of both this section and the applicable federal act or rule in the action.

(2) On the motion of the attorney general or on its own motion, a court may impose a civil penalty of five hundred dollars for each violation of the provision of this section or of the federal act or rule that is the subject of the action. If the court finds the defendant willfully or knowingly committed the violation, the court may impose a civil penalty of one thousand five hundred dollars for each violation of the provision of this section or of the federal act or rules that is the subject of the action. An award of damages or civil penalties may be recovered under this section or under the applicable federal act or rule, but an award of damages or civil

penalties shall not be recovered under both this section and the applicable federal act or rule.

(3) If a civil action has been instituted by or on behalf of the federal trade commission or the federal communications commission for a violation of any provision of an applicable federal act or rule, the attorney general, during the pendency of that action, shall not institute any civil action under division (D)(1) of this section against any defendant that is named in the complaint in the civil action that has been instituted by or on behalf of the federal trade commission or the federal communications commission, whichever is applicable, for any violation that is alleged in that complaint.

(4) If a civil action that has been instituted by or on behalf of the federal trade commission or the federal communications commission for a violation of any provision of an applicable federal act or rule affecting the residents of this state is litigated to its conclusion and the federal trade commission or the federal communications commission recovers an award of damages or civil penalties or obtains any relief under the applicable federal act or rule, the attorney general shall not institute any civil action under division (D)(1) of this section for any violation within the same time period that is alleged in the civil action that was instituted as described in division (D)(4) of this section and in which the federal trade commission or federal communications commission has recovered the damages or civil penalties or obtained the relief.

(5) No action may be brought by the attorney general under this section for damages or a civil penalty more than five years after the occurrence of the violation.

(E) Any civil action that the attorney general brings in a

federal court under division (D)(1) of this section shall comply with the applicable provisions of the federal act or rule the violation of which is the subject of the action.

(F) The attorney general shall deposit any civil penalties that are imposed under division (D)(2) of this section to the credit of the telemarketing fraud enforcement fund created under section 4719.17 of the Revised Code, to be used to pay the costs of the office of the attorney general in investigating any violation of, and in enforcing, any federal act or rule or this section or for any other purpose as set forth under section 4719.17 of the Revised Code.

(G) A violation of division (B)(1) or (2) of this section that involves a consumer transaction as defined in section 1345.01 of the Revised Code shall be considered an unfair or deceptive act or practice in violation of section 1345.02 of the Revised Code. All powers and remedies available to the attorney general to enforce sections 1345.01 to 1345.13 of the Revised Code are available to the attorney general to enforce this section.

Section 2. That existing section 109.87 of the Revised Code is hereby repealed.