

H. B. 2452

(By Delegate T. Campbell)

[Introduced January 13, 2011; referred to the
Committee on the Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by
adding thereto a new article, designated §46A-6M-101, §46A-6M-
102, §46A-6M-103, §46A-6M-104, §46A-6M-105, §46A-6M-106, §46A-
6M-107, §46A-6M-108, §46A-6M-109, §46A-6M-110, §46A-6M-111,
§46A-6M-112, §46A-6M-113, §46A-6M-114, §46A-6M-115, §46A-6M-
116, §46A-6M-117, §46A-6M-118, §46A-6M-119, §46A-6M-120, §46A-
6M-121 and §46A-6M-122, all relating to prohibiting the use of
prerecorded or synthesized voice messages; regulating
automatic dialing and announcing devices; establishing a do-
not-call list; providing for private enforcement; regulation
by the Attorney General; providing civil penalties; allowing
prevailing party to receive costs, fees and attorney fees; and
providing for the disposition of fees, penalties and
recoveries.

Be it enacted by the Legislature of West Virginia:

1 That the Code of West Virginia, 1931, as amended, be amended
2 by adding thereto a new article, designated §46A-6M-101, §46A-6M-
3 102, §46A-6M-103, §46A-6M-104, §46A-6M-105, §46A-6M-106, §46A-6M-
4 107, §46A-6M-108, §46A-6M-109, §46A-6M-110, §46A-6M-111, §46A-6M-
5 112, §46A-6M-113, §46A-6M-114, §46A-6M-115, §46A-6M-116, §46A-6M-
6 117, §46A-6M-118, §46A-6M-119, §46A-6M-120, §46A-6M-121 and §46A-
7 6M-122, all to read as follows:

8 **ARTICLE 6M. TELEPHONE SOLICITATION OF CONSUMERS.**

9 **§46A-6M-101. Definitions.**

10 In this article, unless the context or subject matter
11 otherwise requires, the terms have the meanings as follows:

12 (1) "Automatic dialing-announcing device" means a device that
13 selects and dials telephone numbers and that, working alone or in
14 conjunction with other equipment, disseminates a prerecorded or
15 synthesized voice message to the telephone number called.

16 (2) "Caller" means a person, corporation, firm, partnership,
17 association, or legal or commercial entity that attempts to
18 contact, or that contacts, a subscriber in this state by using a
19 telephone or a telephone line.

20 (3) "Caller identification service" means a telephone service
21 that permits telephone subscribers to see the telephone number of
22 incoming telephone calls.

23 (4) "Established business relationship" means a relationship
24 between a seller and consumer based on a free trial newspaper

1 subscription or on the consumer's purchase, rental, or lease of the
2 seller's goods or services or a financial transaction between the
3 consumer and seller, within the twenty-four months immediately
4 preceding the date of a telemarketing call.

5 (5) "Message" means any telephone call, regardless of its
6 content.

7 (6) "Subscriber" means a person who has subscribed to
8 residential telephone services from a telephone company or the
9 other persons living or residing with the subscribing person, or a
10 person who has subscribed to wireless or mobile telephone services.

11 (7) "Telephone solicitation" means any voice communication
12 over a telephone line for the purpose of encouraging charitable
13 contributions, or the purchase or rental of, or investment in,
14 property, goods, services or merchandise, including as defined in
15 section 103 of this article, whether the communication is made by
16 a live operator, through the use of an automatic dialing-announcing
17 device, or by other means. Telephone solicitation does not include
18 communications:

19 (a) To any subscriber with that subscriber's prior express
20 written request, consent, invitation, or permission.

21 (b) By or on behalf of any person with whom the subscriber has
22 an established personal or business relationship.

23 (c) By or on behalf of a charitable organization that is
24 exempt from federal income taxation under Section 501 of the

1 Internal Revenue Code, but only if the following applies:

2 (I) The telephone call is made by a volunteer or employee of
3 the charitable organization; and

4 (II) The person who makes the telephone call immediately
5 discloses the following information upon making contact with the
6 consumer:

7 (A) The person's true first and last name; and

8 (B) The name, address, and telephone number of the charitable
9 organization.

10 (d) By or on behalf of any person whose exclusive purpose is
11 to poll or solicit the expression of ideas, opinions, or votes,
12 unless the communication is made through an automatic dialing-
13 announcing device in a manner prohibited by section 102 of this
14 article.

15 (e) By the individual soliciting without the intent to
16 complete, and who does not in fact complete, the sales presentation
17 during the call, but who will complete the sales presentation at a
18 later face-to-face meeting between the individual solicitor or
19 person who makes the initial call and the prospective purchaser.

20 (f) By or on behalf of a political party, candidate, or other
21 group with a political purpose.

22 **§46A-6M-102. Use of prerecorded or synthesized voice messages.**

23 A caller may not use or connect to a telephone line an
24 automatic dialing-announcing device unless the subscriber has

1 knowingly requested, consented to, permitted, or authorized receipt
2 of the message or the message is immediately preceded by a live
3 operator who obtains the subscriber's consent before the message is
4 delivered. This section and section 105 of this article do not
5 apply to a message from a Public Safety Agency notifying a person
6 of an emergency; a message from a school district to a student, a
7 parent, or an employee; a message to a subscriber with whom the
8 caller has a current business relationship; or a message advising
9 an employee of a work schedule.

10 **§46A-6M-103. Message requirements.**

11 When the message is immediately preceded by a live operator,
12 the operator must disclose at the outset of the message:

13 (1) The name of the business, firm, organization, association,
14 partnership, or entity for which the message is being made;

15 (2) The purpose of the message;

16 (3) The identity or kinds of goods or services the message is
17 promoting; and

18 (4) If applicable, the fact that the message intends to
19 solicit payment or commitment of funds.

20 **§46A-6M-104. Requirements on automatic dialing-announcing**
21 **devices.**

22 A caller may not use an automatic dialing-announcing device
23 unless the device is designed and operated so as to disconnect
24 within ten seconds after termination of the telephone call by the

1 subscriber. A caller may not use an automatic dialing-announcing
2 device that uses a random or sequential number generator unless the
3 equipment excludes calls to the following telephone numbers:

4 (1) Emergency telephone numbers, including 911, of any
5 hospital, medical physician, health care facility, ambulance or
6 emergency medical provider, fire protection facility, or law
7 enforcement agency.

8 (2) Any guest room or patient room of a hospital, health care
9 facility, elderly care home, or similar establishment.

10 (3) A paging service, a cellular telephone service, a
11 specialized mobile radio service, or any service for which the
12 called party is charged for the call.

13 (4) The telephone numbers maintained on a do-not-call list
14 established pursuant to section 109 of this article.

15 **§46A-6M-105. Time of day limit.**

16 A caller may not use an automatic dialing-announcing device
17 nor make any telephone solicitation before eight a.m. or after nine
18 p.m. at the telephone subscriber's location.

19 **§46A-6M-106. Prohibited telephone solicitations.**

20 A caller may not make or cause to be made any telephone
21 solicitation to the telephone line of any subscriber in this state
22 who, for at least thirty-one days before the date the call is made,
23 has been on the do-not-call list established and maintained or used
24 by the Attorney General under section 109 of this section or the

1 national do-not-call registry established and maintained by the
2 Federal Trade Commission under Title 16, Code of Federal
3 Regulations, Part 310.

4 **§46A-6M-107. Identification by caller.**

5 Any caller who makes a telephone solicitation to a subscriber
6 in this state shall immediately and clearly state at the beginning
7 of the call the caller's true first and last name, the caller's
8 telephone number, the caller's city and state of location, and the
9 name of the business on whose behalf the telephone solicitation is
10 made.

11 **§46A-6M-108. Interference with caller identification.**

12 A caller who makes a telephone solicitation to a subscriber in
13 this state may not knowingly use any method to block or otherwise
14 deliberately circumvent the subscriber's use of a caller
15 identification service.

16 **§46A-6M-109. Establishment of do-not-call list - Federal Trade**
17 **Commission do-not-call registry.**

18 The Attorney General shall establish and maintain a list of
19 telephone numbers of subscribers who object to receiving telephone
20 solicitations. The Attorney General may fulfill the requirements
21 of this section by contracting with an agent for the establishment
22 and maintenance of the list or by using the national do-not-call
23 registry established and maintained by the Federal Trade Commission
24 under 16 C.F.R., Part 310.

1 The Attorney General may adopt rules governing the
2 establishment, distribution, and operation of the do-not-call list,
3 as the Attorney General deems necessary and appropriate to fully
4 implement the provisions of this article, in addition to the
5 following provisions:

6 (a) Any subscriber may contact the Attorney General or the
7 Attorney General's agent and give notice, in the manner prescribed
8 by the Attorney General, that the subscriber objects to receiving
9 telephone solicitations. The Attorney General shall add the
10 telephone number of any subscriber who gives notice of objection to
11 the list maintained pursuant to this section;

12 (b) Any notice given by a subscriber under this section is
13 effective for five years unless revoked by the subscriber. Any
14 subsequent notices given by the same subscriber related to a
15 different telephone number are separate from the original notice.

16 (c) The Attorney General shall allow subscribers to give
17 notice under this section by mail, telephone, or electronically.

18 (d) The Attorney General shall establish the procedures by
19 which a person wishing to make telephone solicitations may obtain
20 access to the list. To the extent practicable, those procedures
21 shall allow for access to paper or electronic copies of the list.

22 (e) The Attorney General may include in the list established
23 under this section subscribers who live in West Virginia and are
24 included in the national do-not-call registry established and

1 maintained by the Federal Trade Commission under 16 C.F.R., Part
2 310. The Attorney General may provide to the Federal Trade
3 Commission the telephone numbers of West Virginia subscribers who
4 are in the Attorney General's do-not-call list or who have
5 otherwise notified the Attorney General of the subscriber's
6 objection to receiving telephone solicitations for inclusion in the
7 national do-not-call registry.

8 (f) A person or entity desiring to make telephone
9 solicitations shall pay a fee, payable to the Attorney General, for
10 access to, or for paper or electronic copies of, the list
11 established under this section. The fee for acquisition of the
12 list may not exceed \$200 per quarter, or \$800 per year.

13 Notwithstanding any other provision of this article, the
14 Attorney General may designate the national do-not-call registry
15 established and maintained by the Federal Trade Commission under 16
16 C.F.R., Part 61, as the state do-not-call list.

17 **§46A-6M-110. Release of information.**

18 Information contained in the list established under section
19 109 of this article may not be used for any purposes except
20 compliance with this article or in a proceeding or action under
21 this article. The information contained in the list is an exempt
22 record as defined in chapter twenty-nine-b of this code.

23 **§46A-6M-111. Private enforcement.**

24 Any person who receives a telephone solicitation or message in

1 violation of this article may bring an action to enjoin such
 2 violation, or for damages, or both. The court may award the
 3 plaintiff the plaintiff's actual damages or damages up to \$2,000
 4 for each violation, whichever is greater. The court may award the
 5 plaintiff costs, expenses, and reasonable attorney's fees. This
 6 section does not limit any other claims the person may have against
 7 the caller.

8 **§46A-6M-112. Limitation of actions.**

9 No action or proceeding may be brought under this article:

10 (1) More than one year after the person bringing the action
 11 knew or should have known of the alleged violation; or

12 (2) More than one year after the termination of any proceeding
 13 or action by the Attorney General, whichever is later.

14 **§46A-6M-113. Powers of the Attorney General - Remedies -**

15 **Injunction - Other relief.**

16 When it appears to the Attorney General that a person has
 17 engaged in, or is engaging in, any practice declared to be unlawful
 18 by this article, the Attorney General, in enforcing this article,
 19 has all powers provided in this article and may seek all remedies
 20 in this article.

21 **§46A-6M-114. Cease and desist orders.**

22 When it appears to the Attorney General that a person has
 23 engaged in, or is engaging in, any practice declared to be unlawful
 24 by this article or by any rule or order of the Attorney General

1 issued under this article, the Attorney General, without notice and
2 hearing, may issue any cease and desist order which the Attorney
3 General deems necessary or appropriate in the public interest,
4 including if any person fails or refuses to file any statement or
5 report, or obey any subpoena issued by the Attorney General under
6 this article. A person aggrieved by an order issued under this
7 article may request a hearing before the Attorney General if a
8 written request is made within ten days after the receipt of the
9 order. An adjudicative proceeding under this article must be
10 conducted in accordance with article one, chapter twenty-nine-a of
11 this code, unless otherwise specifically provided herein.

12 **§46A-6M-115. Civil penalties in an adjudicative proceeding.**

13 When it appears to the Attorney General that a person has
14 engaged in, or is engaging in, any practice declared to be unlawful
15 by this article or by any rule or order of the Attorney General
16 issued under this article, the Attorney General may impose by order
17 and collect a civil penalty against any person found in an
18 adjudicative proceeding to have violated any provision of this
19 article, or any rule or order adopted under this article, in an
20 amount not more than \$2,000 for each violation of this article or
21 any rule or order adopted under this article. The Attorney General
22 may bring an action in circuit court to recover penalties under
23 this section.

24 **§46A-6M-116. Costs recoverable in adjudicative proceeding -**

1 **Hearing costs.**

2 If the Attorney General prevails in an adjudicative proceeding
3 pursuant to section 114 or 115 of this article, the Attorney
4 General may assess the party failing to prevail for all
5 adjudicative proceeding and hearing costs, including reasonable
6 attorney's fees, investigation fees, costs, and expenses of any
7 investigation and action brought under the provisions of this
8 article.

9 **§46A-6M-117. Civil penalties in court proceeding.**

10 The court may award the Attorney General civil penalties of
11 not more than \$2,000 per violation of this article.

12 **§46A-6M-118. Costs recoverable in court proceeding.**

13 The Attorney General is entitled to an award of reasonable
14 attorney's fees, investigation fees, costs, and expenses of any
15 investigation and action brought under the provisions of this
16 article.

17 **§46A-6M-119. Separate violations - Nonexclusive remedies and**
18 **penalties.**

19 For each remedy or penalty under this article or otherwise
20 provided by law, each telephone solicitation or message
21 constitutes a separate violation for purposes of an adjudicative
22 proceeding or an action in circuit court. The remedies, duties,
23 prohibitions, and penalties of this article are not exclusive and
24 are in addition to all other causes of action, remedies, and

1 penalties otherwise provided by law.

2 **§46A-6M-120. Caller identification service nonliability.**

3 No provider of caller identification service may be held
4 liable for violations of this article committed by other persons or
5 entities.

6 **§46A-6M-121. Disposition of fees, penalties and recoveries.**

7 All fees, penalties, and recoveries of attorney's fees,
8 investigation fees, costs, and expenses collected pursuant to this
9 article shall be retained by the Attorney General for enforcement
10 of this article, including to pay costs, expenses, and attorney's
11 fees and salaries incurred in the operation of the Attorney
12 General's Consumer Protection and Antitrust Division. However, the
13 Attorney General shall deposit any excess funds not required for
14 enforcement of this article in the General Revenue Fund of the
15 state.

16 **§46A-6M-122. Venue.**

17 The Attorney General or a plaintiff in a private enforcement
18 action may bring an action pursuant to this article in either the
19 county of the telephone subscriber's residence or Kanawha County.

NOTE: The purpose of this bill is to regulate unsolicited recorded telephone calls and provide for the establishment of a state "Do-Not-Call" list to protect consumers from telephone solicitors.

This article is new; therefore, it has been completely

underscored.