

## WEBSTER, CHAMBERLAIN & BEAN, LLP | NONPROFIT ALERT

June 5, 2019

### MISSISSIPPI TELEPHONE SOLICITATION ACT

#### Introduction

Charities registered to solicit contributions in Mississippi recently received a notice from the Secretary of State's office, alerting them to new registration requirements under the Mississippi Telephone Solicitation Act. A copy of the notice is reprinted at the end of this Alert. We have received questions about this notice from many clients. This Alert responds to those questions.

#### Summary

Effective July 1, 2019, newly enacted legislation requires charities (whether calling for themselves or contracting with a business (a professional solicitor) to have telephone solicitations made on their behalf, to register with the Mississippi Public Service Commission ("PSC"). This registration is separate from, and in addition to, the annual charitable solicitation registrations that charities and professional solicitors must file with the Mississippi Secretary of State. **On its face, the legislation applies not only to large-scale telemarketing campaigns, but also to individual phone calls from, e.g., a charity's executive director to a single individual who is not a current donor.**

The new rules do not generally apply to fund-raising counsel, who, in Mississippi, are prohibited from soliciting on behalf of their charitable clients.

#### Prior law

The Mississippi Telephone Solicitation Act, Miss. Code §77-3-701 *et seq.*, regulates telephone solicitations to recipients in Mississippi. To date, it has applied only to voice communications *over telephone lines*—

for the purpose of:

- (i) Encouraging the purchase or rental of, or investment in, property; or
- (ii) Soliciting a sale of any consumer goods or services, or an extension of credit for consumer goods or services.

These definitions do not include telephone solicitations of charitable contributions, and so the Act does not apply to them (until July 1, 2019).

## What changed?

On April 16, 2019, Governor Bryant signed S.B. 2821, which enacted two significant changes to the Act:

1. It expands the communications media subject to the Act to include text messages and communications made over cellular networks; and
2. It adds to the list of covered “telephone solicitations,” those made for the purposes of—
  - (iii) Soliciting any other item of value, pecuniary or otherwise, regardless of whether a sales presentation is made; or
  - (iv) Soliciting a charitable contribution of money or property.

## Which organizations may be required to register?

Because any nonprofit organization may be “soliciting any . . . item of value,” or “soliciting a charitable contribution,” all organizations (including churches or other religious organizations) making such solicitations by telephone or text messages are required to register, regardless of whether they are exempt under §501(c)(3), (c)(4), or any other paragraph of §501(c), unless one of the two exemptions below applies.

### Exemptions

The Act has two exemptions that may benefit many charities that are otherwise telephone solicitors.<sup>1</sup> First, it does not apply to any volunteers calling to solicit a contribution on behalf of a charity registered to solicit contributions in Mississippi.

The Act also does not apply to any telephone solicitor who “solicits a consumer with whom he has an established business relationship.” For this purpose, an “established business relationship” is

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a consumer, with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the consumer, which relationship is currently existing or was terminated within six (6) months of the telephone solicitation; . . .

An open question is when an “existing business relationship” with a donor ends. Does it end six months after the last contribution was made? After some other period of time has elapsed without a contribution being made? When the donor has failed to respond to some number of personal, mail, e-mail, or telephone appeals? The Commission’s General Counsel has indicated that if a charity makes only an annual appeal, the PSC may consider the “existing business relationship” to last for a year, without regard to the fact that the last gift was more than six months before the call in question.

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<sup>1</sup> The Act includes other exemptions that generally apply only to particular kinds of commercial businesses.

A second open question is whether a charity controlled by a trade association or professional society that is exempt under §501(c) may have an “existing business relationship” with members of the controlling organization.

Accordingly, if calls are made *exclusively* to donors who responded (*e.g.*, within the last six months) to a solicitation, or the charity has some other relationship with the recipient, *e.g.*, a vendor or beneficiary, the telephone solicitor would not be subject to the requirements set forth below.

These exemptions are limited, in that if a charity makes any calls that are not described in one of the exemptions, it must register, even though it makes some calls to which the Act does not apply.

One or both of these exemptions will ordinarily exempt local church congregations from registration with the PSC. However, other religious organizations must register unless they qualify for an exemption, even if they are exempt from registering with the Mississippi Secretary of State to solicit contributions generally.

### **Telephone solicitor requirements**

Under the Act and rules adopted by the PSC, a charity that is soliciting for itself, or that has contracted with another business to make calls on its behalf, is the “telephone solicitor.” All telephone solicitors must register with the PSC (and renew the registration annually) before making any telephone solicitation, or permitting any telephone solicitation to be made on its behalf. As part of its registration, each telephone solicitor must—

- Identify and provide information about any company, *e.g.*, a professional solicitor, with which it has contracted to make telephone solicitations to residents in Mississippi;
- Post a \$50,000 bond;
- Subscribe to the Mississippi Do-Not-Call List for an annual \$1,000 fee for two contracted companies, and \$500 for each additional contracted company. Solicitors must update their no-call lists at least monthly;
- Not take any action to “spoof” the numbers they are calling from, or to block any caller ID information, and sign an affidavit that they and any contracted company are not doing so;
- Maintain for at least six months call logs showing each number called, ad the date and time of each call, and if the caller is a contracted company, the name of its client; and
- A list, updated within five days of any change, of all telephone numbers from which telephone solicitations will be made to Mississippians.

Each caller must “announce clearly, at the beginning of each call, his or her name, the company he or she represents, the company's Commission assigned solicitor registration number, and the purpose of the call.”

Calls may be made only between 8 am and 8 pm “Central Standard Time,” Monday through Saturday, except holidays. (The PSC’s General Counsel has said that the PSC will interpret the

time limits to mean 8 am to 8 pm “Central Time,” without regard to whether it is “Standard” or “Daylight Savings” time.)

Telephone solicitors and their contracted companies are prohibited from calling numbers on the Do-Not-Call List.

### **Additional information**

In an informal conversation, the General Counsel for the PSC indicated that the Commission, which has broad regulatory authority, is considering a tiered structure, under which charities with less than \$100,000 in revenue would not have to register, and would also pay a smaller fee for access to the Do-Not-Call List. However, no announcement about this will be made before June 10<sup>th</sup>.

### **Penalties**

The PSC may impose “civil penalties” of up to \$10,000 per violation, with each call being a separate violation.

### **Comments**

The new requirements imposed on charities may be unduly burdensome for charities using telephone calls to solicit new and lapsed donors, and for that reason, may be subject to challenge under the First Amendment. In addition, the numerous exceptions that apply to other kinds of businesses may cause the law to violate the Due Process and/or Equal Protection clauses of the Fifth and Fourteenth Amendments.

The new rules apply to large scale telemarketing programs conducted using professional solicitors. On their face, they also require registration by *any* charity that makes *any* telephone solicitation to *any* prospective donor, or any lapsed donor with whom it no longer has an existing business relationship. For example, consider an animal shelter forced to take in an unusually large number of dogs because of a hurricane or tornado. The Executive Director quickly calls 10 local leaders, five of whom have not previously donated to the shelter, asking for gifts to help the shelter care for the dogs. If the shelter had not previously registered, it could be subject to fines of up to \$50,000.

Although it seems unlikely that the PSC would learn of individual calls described in the preceding paragraph, or that if it did, it would pursue the issue beyond a slap on the wrist, charities should not assume those results.

### **Source documents**

The Mississippi Telephone Solicitation Act, as in effect before July 1, 2019, is at <https://law.justia.com/codes/mississippi/2017/title-77/chapter-3/article-15/>. Section 5 of S.B. 2821 repealed the prior repeal of the Act that would have been effective July 1, 2021.

S.B. 2821 (amending the Act), as signed by Governor Bryant, is at <http://billstatus.ls.state.ms.us/documents/2019/pdf/SB/2800-2899/SB2821SG.pdf>.

The PSC rules implementing the Act are at <https://www.psc.ms.gov/sites/default/files/Documents/Rules.pdf>. They have not been amended to

reflect the provisions of S.B. 2821, but may be amended this month to reflect the changes in the law and any new rules the Commission may adopt to implement S.B. 2821.

The telephone solicitor registration and other forms required to comply with the Act are at <https://www.psc.ms.gov/nocall/forms>. These forms may also be amended to reflect the provisions of S.B. 2821 and any new rules. Although the forms are available online, they must be downloaded, completed, and mailed to the PSC. There is no “online registration,” as such.

**Action**

Charities and professional solicitors should either limit telephone calls to Mississippi residents to current donors, or register as telephone solicitors as soon as reasonably possible, and *before* July 1<sup>st</sup>. A charity that does not register before July 1<sup>st</sup> should suppress calls to prospective or 6-month lapsed donors until its registration has been filed.

We will update you with additional information as it becomes available.

If you have any questions, or would like our assistance with registering, please contact us.

\* \* \* \*

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**Disclaimer:** This article is for informational purposes only, and does not provide legal advice, nor does it create an attorney-client relationship with any reader.

**The following notice was sent by the Mississippi Secretary of State on Monday, June 3<sup>rd</sup>:**

**From:** "Mississippi Secretary of State" <[mssos@service.govdelivery.com](mailto:mssos@service.govdelivery.com)>

**Date:** June 3, 2019 at 11:55:58 AM EDT

**To:**

**Subject:** Mississippi Telephone Solicitation Act

**Reply-To:** [mssos@service.govdelivery.com](mailto:mssos@service.govdelivery.com)



June 3, 2019

Dear Mississippi Charities:

The purpose of this letter is to inform you that important changes to the Mississippi Telephone Solicitation Act ("the Act") may affect certain aspects of your organization's operation.

The Act gives Mississippians the ability to opt out of receiving unwanted telephone calls and text messages from telephone solicitors by placing their telephone number on the Mississippi Do-Not-Call List. The Act requires telephone solicitors to purchase the Do-Not-Call List, maintained by the Mississippi Public Service Commission, each year and ensure that no one on that list receives a telephone solicitation from them.

How has the Act changed?

In the past, the calls charitable organizations made seeking donations did not generally meet the definition of a "telephone solicitation" as used in the Act, and as a result, those sorts of calls were exempt. However, a recent change in the law mandates that beginning July 1, 2019, such calls may be covered under the provisions of the Act. As a result, your organization may need to take additional steps to comply with the Act before placing any fundraising calls or text messages.

One of the major changes to the Act covers paid telephone solicitors, and those organizations that utilize paid telephone solicitors. Existing law already exempts organizations that only utilize volunteers to conduct fundraising activity through telephone solicitations and/or text messages. Moving forward, organizations that utilize paid telephone solicitors or paid staff to place telephone calls or send text messages seeking a charitable contribution or sale will be covered by the Act, and could be subject to the penalties found therein for violating the Act.

Failure to register and/or calling consumers on the list can result in the Public Service Commission issuing fines of up to Ten Thousand Dollars (\$10,000) for each violation, so we strongly encourage you to register before making any calls or sending text messages designed for fundraising purposes.

What are the next steps?

In order to comply with the Act, paid telephone solicitors and organization [sic] utilizing paid telephone solicitors (including staff members) must register with the Public Service Commission as a telemarketer, purchase the Do-Not-Call database, and post a bond. Without these steps, the law forbids your charity from making any telephone solicitations to any consumer at all in the state. The Act forbids calling or texting numbers listed on the Do-Not-Call list to solicit a donation or make a sale.

Thank you for all you do in Mississippi. We ask that you continue your good work with respect for those who have signed up to be on the Do-Not-Call List. Please visit the Public Service Commission's website to register on July 1 at [www.pcs.ms.gov](http://www.pcs.ms.gov) or by calling (601) 961-5432.

Sincerely,

Brandon Presley, Chairman, Public Service Commission

Delbert Hosemann, Secretary of State