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1850 M Street NW
12th Floor
Washington, DC 20036
(202) 326-6000
www.naag.org

August 2, 2022

Honorable April Tabor, Acting Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex B)
Washington, DC 20580

**Re: Telemarketing Sales Rule (16 C.F.R. Part 310—NPRM)
(Project No. R411001)**

Dear Secretary Tabor:

The Attorneys General of North Carolina, Ohio, Pennsylvania, with the Attorneys General of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin, and Wyoming (“State Attorneys General”), in response to a Notice of Proposed Rulemaking (“Notice”) published in the Federal Register, 87 FR 33677 (June 3, 2022), hereby submit comments on the Federal Trade Commission’s (“FTC”) proposed amendments to the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

I. INTRODUCTION

In its Notice, the FTC seeks comment on proposed amendments to the TSR that would: (1) require telemarketers and sellers to maintain additional records of their telemarketing activities, (2) prohibit material misrepresentations and false or misleading statements in business to business (“B2B”) telemarketing transactions, and (3) add a new definition for the term “previous donor.”¹ According to the Notice, these proposed

¹ Notice at 33677.

amendments will be necessary to protect consumers and small businesses from abusive and/or deceptive telemarketing practices.²

The undersigned State Attorneys General, officials charged with enforcing state laws protecting consumers from unfair and/or deceptive business practices, including abusive and/or deceptive telemarketing practices,³ offer the following comments, respectfully set forth as follows.

II. RECORDKEEPING

As set forth in the Notice, the FTC has not made substantial changes to the TSR's recordkeeping requirements since the TSR was promulgated in 1995, despite making substantial amendments to the TSR over the last 25 years to address the rise in unwanted calls.⁴ Section 310.5(a) of the TSR generally requires telemarketers and sellers to keep the following records for a two-year period: (1) any substantially different advertisement, including telemarketing scripts; (2) lists of prize recipients, customers and the goods or services they purchased, and telemarketing employees directly involved in sales or solicitations; and (3) all verifiable authorizations or records of express informed consent or express agreement.⁵ Recognizing that the current recordkeeping requirements no longer adequately meet the needs of

² *Id.*

³ *See, e.g.*, Alaska Unfair Trade Practices and Consumer Protection Act, AS 45.50.471, *et seq.*; Arizona Consumer Fraud Act, A.R.S. section 44-1521, *et seq.*; Ark. Code. Ann. 4-88-101 *et seq.*; California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*; C.R.S. § 6-1-101 *et seq.*; Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.*; Florida Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*; Iowa Consumer Frauds Act, Iowa Code § 714.16; Louisiana Unfair Trade Practices and Consumer Protection Law, La. R.S. 51:1401 *et seq.*; Maine Unfair Trade Practices Act, 5 M.R.S. § 205-A *et seq.*; Maryland Consumer Protection Act, Md. Code Ann., Com. Law §§ 13-101 through 13-501; and Maryland Telephone Solicitations Act, Md. Code Ann., Com. Law §§ 14-2201 through 14-2205; MA Consumer Protection Act, Mass. Gen. Laws ch. 93A, sec. 2, and MA Telemarketing Solicitations Law, Mass. Gen. Laws ch. 159C, sec. 8(a); Michigan Home Solicitation Sales Act, Mich. Comp. Laws § 445.111 *et seq.*; Michigan Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*; Minn. Stat. §§ 325D.44, 325E.26, *et seq.*, and 325F.69; Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1 *et seq.*; Neb. Rev. Stat. § 59-1601 *et seq.*; Neb. Rev. Stat. § 87-301 *et seq.*; Nev. Rev. Stat. Ch. 598; N.J.S.A. 56:8-119 to -135; N.H. Rev. Stat. Ann. 358-A; NMSA 1978 §§ 57-12-1 to -26 (1967, as amended through 2019); New York Executive Law § 63(12) and General Business Law §§ 349 and 350; North Carolina's Unfair or Deceptive Trade Practices Act, N.C.G.S. §§ 75-1.1, *et seq.*; Unlawful Sales or Advertising Practices, N.D.C.C. § 51-15-01 *et seq.*; Oregon Unlawful Trade Practices Act, O.R.S. § 646.605 (2021); Pennsylvania Telemarketer Registration Act, 73 P.S. § 2245(a)(9) (prohibiting engaging in any deceptive or abusive telemarketing acts or practices in violation of the TSR); R.I. Gen. Laws §§ 6-13.1-1 to -11; Wyo. Stat. Ann. § 40-12-105.

⁴ Notice at 33679–80.

⁵ 16 C.F.R. § 310.5(a).

the law enforcement officials charged with protecting consumers,⁶ the FTC proposes to amend the TSR to require sellers and telemarketers to retain the following types of information:

1. a copy of each unique prerecorded message;
2. call detail records of telemarketing campaigns;
3. records sufficient to show a seller has an established business relationship with a consumer;
4. records sufficient to show a consumer is a previous donor to a particular charitable organization;
5. records of the service providers that a telemarketer uses to deliver outbound calls;
6. records of a seller or charitable organization's entity-specific do-not-call registries; and
7. records of the FTC's DNC registry that were used to ensure compliance with the TSR.⁷

A. Section 310.5(a)(1)—Substantially Different Advertising Materials and Each Unique Prerecorded Message

Section 310.5(a)(1) of the TSR currently requires sellers and telemarketers to keep records of “all substantially different advertising, brochures, telemarketing scripts, and promotional materials.” The FTC’s proposed amendments to this section would also require sellers and telemarketers to keep a copy of each unique prerecorded message that they use in telemarketing, including each call that a telemarketer makes using soundboard technology.⁸ In addition, the FTC’s proposed amendments will clarify that each substantially different advertisement, brochure, script, promotional material, and each unique robocall, constitutes one “record,” and will expressly recognize that a “failure to keep one substantially different version of such records is one violation of the TSR.”⁹ Furthermore, the proposed amendments would require telemarketers or sellers to keep such records for five years from the date that the record is no longer used in telemarketing.¹⁰

The State Attorneys General support this proposed amendment to the TSR, and further support that such records be kept for the proposed five-year period. The State Attorneys General do not believe that these new requirements, including the five-year retention period, would impose substantial burdens on sellers and telemarketers. As the FTC recognized in its Notice,

⁶ Notice at 33680.

⁷ *Id.* at 33684.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

“[t]echnological advancements have . . . reduced the burden and costs of recordkeeping,”¹¹ with electronic storage costing no more than a fraction of a dollar per gigabyte.¹² The small cost of retaining this information is more than offset by its value to law enforcement. The representations in telemarketers’ or sellers’ advertisements are often at the heart of enforcement actions alleging deceptive and unfair trade practices. Requiring that these materials be preserved for five years from the date they are no longer in use is necessary to ensure that essential evidence remains available to law enforcement.

B. Section 310.5(a)(2)—Call Detail Records

The State Attorneys General share the same frustrations as those experienced by the FTC in investigating and bringing enforcement actions against those engaged in illegal telemarketing.¹³ As we have stated before, the practice of having to issue multiple subpoenas to multiple voice providers in the call path to get access to data that is automatically generated for every call initiated, accepted, and routed to every provider in the normal course of business is “time-consuming and frequently fruitless.”¹⁴ The proliferation of “spoofing” has further exacerbated law enforcement efforts.¹⁵ In many cases, state law enforcement, like federal law enforcement, face the predicament that relevant call detail records and other crucial information are not retained with any regularity, no longer exist, or are otherwise not available for law enforcement purposes.¹⁶

The State Attorneys General agree with the FTC’s conclusion that sellers and telemarketers “are in the best position to have information about their telemarketing calls.”¹⁷ Currently, the TSR does not require sellers or telemarketers to keep relevant records of their telemarketing activities, including call detail records, the nature of specific telemarketing campaigns (including the use of robocalls and differentiating between outbound and inbound telemarketing), and records that link a particular telemarketing campaign to a set of call detail records.

To assist law enforcement in determining whether a telemarketer and/or seller is complying with the TSR, the FTC proposes to amend the TSR to add Section 310.5(a)(2), which will require the retention of call detail records.¹⁸ Further, according to the proposed amendment, for each call that a telemarketer/seller places or receives, such call detail record shall include: (1) the calling

¹¹ *Id.* at 333680.

¹² *Id.* at 33685 n.95 (citing Gartner, Inc. “IT Key Metrics Data 2020: Infrastructure Measures – Storage Analysis.” Gartner December 18, 2019).

¹³ *See* Notice at 33680 (primary hurdles to enforcement include identifying telemarketer/seller and obtaining relevant call detail records).

¹⁴ *Id.* at 33682 (citing NAAG Comment Letter (#00117) (Nov. 24, 2014), at 11-12); *see* Telemarketing Sales Rule Regulatory Review 16 C.F.R. Part 310, Project R411001.

¹⁵ Notice at 33680.

¹⁶ *Id.*

¹⁷ *Id.* at 33681.

¹⁸ *Id.* at 33684.

number, (2) the called number, (3) the time, date, and duration of the call, and (4) the disposition of the call (whether the call was answered, dropped, transferred, or connected).¹⁹ In addition, if the call was transferred, the record shall include the phone number or IP address that the call was transferred to, as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call.²⁰

The new Section 310.5(a)(2) will also require the retention of other records “that help identify the nature and purpose of each call, including:

1. the identity of the telemarketer who placed or received each call;
2. the seller or charitable organization for which the telemarketing call is placed or received;
3. the good, service, or charitable purpose that is the subject of the call;
4. whether the call is to a consumer or business, utilizes robocalls, or is an outbound call; and
5. the telemarketing script(s) and prerecorded message (‘robocall’) (if applicable) that was used in the call.²¹

Lastly, new section 310.5(a)(2) will require the retention of records regarding the caller ID transmitted if the call was an outbound call, including the name and phone number that was transmitted, and records of the telemarketer’s authorization to use the phone number and name that was transmitted.²²

The State Attorneys General support the FTC in amending the TSR to include the new Section 310.5(a)(2). By doing so, state and federal law enforcement will be able to better determine “whether the TSR applies to the calls in the telemarketing campaign and which particular sections of the TSR the seller and telemarketer must comply with for that particular telemarketing campaign.”²³ The State Attorneys General concur in the FTC’s conclusion that implementing this new provision should not be overly burdensome to telemarketers or sellers, since, as noted above, the cost of electronic storage is minimal, and telemarketers/sellers should be able to create such records “without much difficulty.”²⁴

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 33684–85.

²² *Id.* at 33685.

²³ *Id.*

²⁴ *Id.* at 33685 n.95.

Indeed, call detail records are usually generated and retained for billing purposes by the voice service providers who telemarketers/sellers contract with to provide outbound phone service. Telemarketers/sellers can often request these records at little or no additional expense from their contractual counterparties and can negotiate contracts which address this record retention requirement. State Attorneys General face significantly higher burdens in assembling call detail records, as they must first identify the voice service providers the telemarketers/sellers utilize, direct legal process to these entities, and often pay significant fees charged by voice service providers for researching and producing historical call detail records. Furthermore, call detail records are not always retained for sufficient periods by voice service providers as they are generally only needed for as long as the invoices for the underlying calls remain outstanding or subject to challenge. Requiring telemarketers/sellers to retain these records for a period of five years will help to ensure that they are available as evidence in potential enforcement actions.

Furthermore, the requirement that telemarketers/sellers retain information about transferred calls addresses an area where law enforcement frequently cannot obtain adequate records. Companies sometimes engage the services of third-party lead generators to obtain access to consumers who may be interested in purchasing the products or services they offer. Sometimes these lead generators, who are generally subject to the TSR, place illegal calls featuring prerecorded or artificially voiced messages to consumers who have not consented to receive them.²⁵ The prerecorded messages featured in these calls often request that a consumer press “1” to be transferred to the company who has purchased the lead and who will then attempt to complete a sale. These transferred calls often appear as separate inbound calls placed to the company that purchased the lead on call detail records compiled by the company’s voice service provider. Using call detail records alone to connect the lead generator’s initial outbound call to the transferred inbound call received by the company attempting to complete the sale is a difficult, technically demanding, and often impossible task. State Attorneys General support amending the TSR to require any telemarketer/seller who transfers or receives a transferred call to retain records of which calls were transferred and the phone number or IP address and company name of the party that received or initiated the transfer. This measure will greatly assist law enforcement in connecting illegal lead generation robocalls to the companies that profit from them.

Although the FTC indicated that such a requirement is unnecessary, the State Attorneys General continue²⁶ to advocate for an amendment to the TSR that would require sellers and telemarketers, if using negative option offers in their telemarketing calls, to retain a recording of the entire transaction and retain it for a period of time. Furthermore, if a consumer complains of unauthorized charges, and the company is not able to provide a recording of the phone call establishing the consumer’s affirmative consent to be charged, the consumer shall receive a full refund from the telemarketer or seller. Such a requirement would better protect consumers,

²⁵ See, e.g., *State of Ohio v. Aaron Michael Jones, et al.*, No. 2:22-cv-2700 (S.D. OH) (bringing claims, including claims under the TSR, against network of robocallers who placed illegal calls lead generation calls that were transferred to companies which marketed vehicle service contracts).

²⁶ Notice at 33685 n.94 (citing State Attorneys General Comment (#0082-0012), Advance Notice of Proposed Rulemaking Concerning the Use of Prenotification Negative Option Plans, 84 FR 52393 (Oct. 2, 2019)).

including seniors and other vulnerable populations, from unscrupulous telemarketers/sellers who could manipulate their records to reflect that the consumer assented to the offer.

C. Section 310.5(a)(5)—Established Business Relationship

The State Attorneys General support the FTC’s amendment to the TSR which will require sellers or telemarketers to retain, for a five-year period, records that demonstrate the seller or telemarketer has an established business relationship (“EBR”) with a consumer. Specifically, the seller or telemarketer must retain a record of the name and last known phone number of the consumer, the date the consumer submitted an inquiry or application regarding the seller’s goods or services, and the goods or services inquired about.²⁷ In addition, if the EBR formed as a result of a financial transaction within 18 months of the telemarketing call, the sellers or telemarketers will be required to retain a record of the date of the financial transaction establishing the EBR.²⁸ The FTC succinctly recognized, this requirement will not impose a significant burden on sellers or telemarketers because they must already collect and use this information to ensure they are complying with the requirements of the affirmative defense as defined by Section 310.2(q)(2) of the TSR.²⁹

D. Section 310.5(a)(6)—Previous Donor

The State Attorneys General support the FTC’s amendment to the TSR that would require telemarketers to retain, for a five-year period, records establishing a consumer is a previous donor to a particular non-profit charitable organization.³⁰ This amendment is akin to the new proposed EBR requirements, and does not impose any undue burdens on telemarketers.

E. Section 310.5(a)(9)—Other Service Providers

The State Attorneys General support the FTC’s amendment to the TSR that would require sellers and telemarketers to keep records of all service providers, including but not limited to voice providers, autodialers, sub-contracting telemarketers, and soundboard technology platforms, that the telemarketer uses to deliver outbound calls in each telemarketing campaign.³¹ In addition, for each entity that has a business relationship with the seller or telemarketer, the seller or telemarketer must keep records of any applicable contracts, the date the contract was signed and the time period the contract is in effect.³²

²⁷ *Id.* at 33685.

²⁸ *Id.* at 33685 n.96.

²⁹ *Id.* at 33685.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The State Attorneys General agree with the FTC’s conclusion that such information is “necessary to determine whether any other entities assisted and facilitated” violations of the TSR.³³ Furthermore, the State Attorneys General concur in the FTC’s assessment that such a requirement, including the requirement that such records be kept for a five-year period from the date the contract expires or the date the telemarketing activity ceases, is not overly burdensome, because such records are already kept in the ordinary course of the telemarketer’s or seller’s business.³⁴

F. Sections 310.5(a)(10) & (11)—DNC and Entity-Specific DNC

The FTC proposes to amend the TSR to include two new provisions requiring telemarketers and sellers to maintain for five years records related to the entity-specific do-not-call (“DNC”) registry³⁵ and the FTC’s DNC Registry. For the entity-specific DNC registry, the FTC proposes requiring telemarketers and sellers to retain records of: (1) the consumer’s name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call, (5) the date the DNC request was made, and (6) the good or service being offered for sale or the charitable purpose for which the contributions are being solicited.³⁶ For the FTC’s DNC Registry, the FTC proposes requiring telemarketers or sellers to keep records of every version of the FTC’s DNC Registry the telemarketer or seller downloaded to ensure compliance with the TSR.³⁷

The State Attorneys General support the FTC in amending the TSR to include these two new requirements, and agree with its assessment that it does not impose a substantial burden on the telemarketer or seller. As stated in the Notice, sellers and telemarketers already keep such records in the ordinary course of their businesses to avail themselves of the TSR’s safe harbor provisions at Sections 310.4(b)(3)(iii) and (b)(3)(iv).³⁸ As with the other new requirements, the only change is the obligation for sellers and telemarketers to retain such records for five years. Such requirements are common-sense approaches that aid law enforcement in their investigations, and ensure that relevant information is available to law enforcement when needed.

III. MODIFICATION OF EXISTING RECORDKEEPING REQUIREMENTS

A. Time Period to Keep Records

The State Attorneys General support the FTC’s proposed amendment that telemarketers and sellers must keep records for a period of five years from the date the record is made, except for Sections 310.5(a)(1) and (a)(9), which require retention of records for five years from the date

³³ *Id.* at 33685–86.

³⁴ *Id.* at 33686.

³⁵ Also known as ‘internal do-not-call list.’

³⁶ Notice at 33686.

³⁷ *Id.*

³⁸ *Id.*

such records are no longer in use.³⁹ The State Attorneys General agree with the FTC’s justification that given “the additional complexities of identifying the telemarketer and seller responsible for particular telemarketing campaigns and gathering the necessary evidence,” two years is no longer a sufficient amount of time for law enforcement to fully complete investigations of non-compliance.⁴⁰ In addition, and as stated previously throughout these Comments, sellers and telemarketers will not face a substantial burden in retaining records as contemplated by these new provisions, as the cost of data storage is decreasing.⁴¹

B. Section 310.5(a)(3)—Prize Recipients

The State Attorneys General support the FTC’s amendment to the TSR, which will require sellers and telemarketers to retain, along with a prize recipients name, the last known telephone number and last known physical or email address for each prize recipient.⁴² The State Attorneys General agree with the FTC’s assessment that such a requirement reflects current business practices in communicating with customers, and does not present an undue burden, as telemarketers and sellers likely keep such information in the regular course of their business.⁴³

C. Section 310.5(a)(4)—Customer Records

In conjunction with the new requirement that telemarketers and sellers keep records of each consumer with whom a seller intends to assert an EBR, the FTC proposes to modify Section 310.5(a)(4) to require sellers or telemarketers to keep records of the date that the customer purchases the good or service.⁴⁴ This new provision would supplement the already existing requirement that sellers or telemarketers retain the name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services.⁴⁵ In addition, the FTC also proposes requiring sellers or telemarketers to retain records of the customer’s last known telephone number, and last known physical address or email address.

The State Attorneys General support this new requirement, as it will provide law enforcement with more relevant information in their investigations. State Attorneys General often contact consumers who may have been the victim of unfair and deceptive trade practices and rely on the information these consumers provide to successfully enforce consumer protection statutes. Furthermore, the State Attorneys General agree with the FTC’s assessment that these new requirements would not present a substantial burden, as sellers/telemarketers likely already keep records of this information in the ordinary course of business.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 16 C.F.R. § 310.5(a)(3).

D. Section 310.5(a)(8)—Records of Consent

For each consumer from whom a seller or telemarketer states it has obtained consent, the FTC proposes to amend the TSR to require sellers or telemarketers to maintain records of the customer's name and phone number, a copy of the consent requested in the same manner and format that it was presented to that consumer, a copy of the consent provided, the date the consumer provided the consent, and the purpose for which the consent was given and received.⁴⁶

While the State Attorneys General support this amendment to the TSR, we would encourage the FTC to go further, and require that in all circumstances where telemarketers or sellers request consent verbally, the telemarketers or sellers must obtain and retain a recording of the conversation. As with recordings of negative option offers, such a requirement would better protect consumers from unscrupulous sellers/telemarketers that would simply enter written data in their system that consumers provided consent, when in fact they did not. In addition, such a requirement should not present a substantial burden, as the cost of data storage is decreasing.

E. Section 310.5(c)—Violation of Recordkeeping Provisions

The State Attorneys General support the FTC amending the TSR to provide that a failure to keep each required record constitutes a separate violation of the TSR.⁴⁷ Such a requirement is another common-sense approach in deterring deceptive telemarketers/sellers from harming consumers.

F. Section 310.5(e)—Compliance Obligations

The last new recordkeeping requirement the FTC proposes to add to the TSR concerns the allocation of recordkeeping responsibilities between telemarketers and sellers. Currently, the TSR designates which obligations fall upon each entity. If amended, the TSR would require that if the seller and telemarketer fail to allocate recordkeeping obligations between themselves, the responsibility for complying with this section of the TSR would fall upon both parties. The State Attorneys General support this amendment, and agree that it should aid in preventing disputes over recordkeeping responsibilities.

IV. MODIFICATION OF B2B EXEMPTION

The FTC proposes to narrow the B2B exemption to require B2B telemarketing calls to comply with Section 310.3(a)(2)'s prohibition on misrepresentation and Section 310.3(a)(4)'s prohibition on false or misleading statements.⁴⁸ The State Attorneys General support this amendment, as misrepresentations and false or misleading statements, in any form, are harmful to

⁴⁶ Notice at 33687.

⁴⁷ *Id.*

⁴⁸ *Id.*

trade and commerce in general.⁴⁹ In addition, the business landscape has changed in the last two decades, with many individuals, including those employed in so-called ‘gig economy’ jobs, conducting private and business calls with the same phone number.

V. CONCLUSION

The undersigned State Attorneys General thank the Federal Trade Commission for the opportunity to provide Comments on its proposed amendments to its Telemarketing Sales Rule. We are hopeful such amendments will enable efficient and effective investigations by both the Commission and our State agencies, who are all on the front lines in combatting consumer harms caused by abusive and/or deceptive telemarketers and sellers.

Respectfully Submitted By Forty-Three (43) State Attorneys General:



Josh Stein
North Carolina Attorney General



Dave Yost
Ohio Attorney General



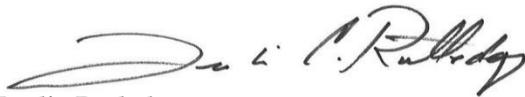
Josh Shapiro
Pennsylvania Attorney General



Treg R. Taylor
Alaska Attorney General



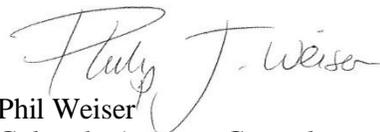
Mark Brnovich
Arizona Attorney General



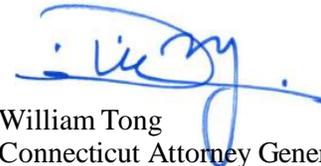
Leslie Rutledge
Arkansas Attorney General



Rob Bonta
California Attorney General



Phil Weiser
Colorado Attorney General

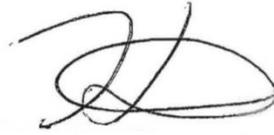


William Tong
Connecticut Attorney General

⁴⁹ *Id.* at 33683 n.72 (Better Business Bureau 2018 survey reveals that tech support scams and imposter scams harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing).



Kathleen Jennings
Delaware Attorney General



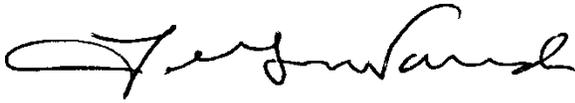
Karl Racine
District of Columbia Attorney General



Christopher M. Carr
Georgia Attorney General



Holly T. Shikada
Hawaii Attorney General



Lawrence Wasden
Idaho Attorney General



Kwame Raoul
Illinois Attorney General



Tom Miller
Iowa Attorney General



Derek Schmidt
Kansas Attorney General



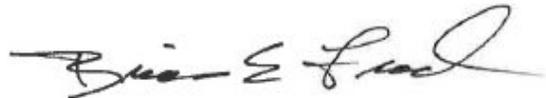
Daniel Cameron
Kentucky Attorney General



Jeffery Laundry
Louisiana Attorney General



Aaron M. Frey
Maine Attorney General



Brian Frosh
Maryland Attorney General



Maura Healey
Massachusetts Attorney General



Dana Nessel
Michigan Attorney General



Keith Ellison
Minnesota Attorney General



Lynn Fitch
Mississippi Attorney General



Douglas Peterson
Nebraska Attorney General



Aaron D. Ford
Nevada Attorney General



John M. Formella
New Hampshire Attorney General



Matthew J. Platkin
Acting New Jersey Attorney General



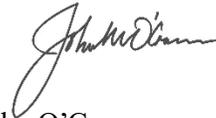
Hector Balderas
New Mexico Attorney General



Letitia James
New York Attorney General



Drew H. Wrigley
New North Dakota Attorney General



John O'Connor
Oklahoma Attorney General



Ellen Rosenblum
Oregon Attorney General



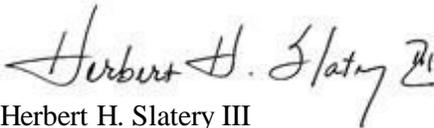
Peter F. Neronha
Rhode Island Attorney General



Alan Wilson
South Carolina Attorney General



Mark Vargo
South Dakota Attorney General



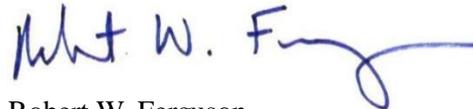
Herbert H. Slatery III
Tennessee Attorney General



Susanne Young
Acting Vermont Attorney General



Jason Miyares
Virginia Attorney General



Robert W. Ferguson
Washington Attorney General

Joshua L. Kaul
Joshua L. Kaul
Wisconsin Attorney General

Bridget Hill
Bridget Hill
Wyoming Attorney General