

LEGISLATIVE BILL 469

Approved by the Governor April 28, 1999

Introduced by Crosby, 29; Hudkins, 21; Janssen, 15; Jones, 43;
Dw. Pedersen, 39; C. Peterson, 35; Preister, 5; Thompson, 14

AN ACT relating to telemarketing; to adopt the Telemarketing and Prize Promotions Act; to provide a penalty; and to provide severability.
Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 13 of this act shall be known and may be cited as the Telemarketing and Prize Promotions Act.

Sec. 2. For purposes of the Telemarketing and Prize Promotions Act:

(1) Consumer means an actual or prospective purchaser, lessee, or recipient of consumer goods or services bought primarily for use for personal, family, or household purposes;

(2) Consumer goods or services means any tangible personal property, merchandise, or services normally used for personal, family, or household purposes and not for resale or for use or consumption in trade or business;

(3) Consumer telephone call means a call made by a seller for the purpose of soliciting a sale of any consumer goods or services to the person called, for the purpose of soliciting an extension of credit for consumer goods or services to the person called, or for the purpose of obtaining information that may be used for the direct solicitation of a sale of consumer goods or services to the person called or an extension of credit for such purposes;

(4) Prize means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. Prize does not include an item offered in a promotion for a book, recording, video, multimedia, or similar club in compliance with 16 C.F.R. 425 or a continuity plan or single sale of merchandise or service where there is no minimum purchase required;

(5) Prize promotion means (a) sweepstakes or other game of chance or (b) an oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize;

(6) Seller means any person or organization who individually or through salespersons initiates unsolicited consumer telephone calls in order to (a) sell, lease, or rent consumer goods or services, (b) offer gifts or prizes with the intent to sell, lease, or rent consumer goods or services, or (c) represent to a consumer that the consumer has won or will receive a prize by telephonic means or by written notice sent through the mail in which the goods and services and all the material terms of the transaction are not fully described and which require that the consumer contact the seller by telephone to learn about or initiate the transaction. Seller does not include a telecommunications company as defined in section 86-802 when the company is offering telecommunications services of any kind which are subject to the verification provisions of the Telephone Consumer Slamming Prevention Act or 47 C.F.R. 64.1100 through 64.1190;

(7) Solicitor means any person who is not the seller of goods and services offering a prize promotion who represents to an individual that the individual has won or will receive a prize;

(8) Sponsor means any person on whose behalf a solicitor gives a prize but who is not the seller of goods and services offering a prize promotion;

(9) Unsolicited consumer telephone call means a consumer telephone call other than a call made:

(a) In response to an express request of the person called;

(b) Primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such a call;

(c) To any person with whom the seller has a clearly established business relationship; or

(d) By a magazine or newspaper publisher or such publisher's agent or employee in connection with such publisher's business; and

(10) Verifiable retail value means the price at which the solicitor or sponsor can demonstrate that a substantial number of prizes have been sold within the prior twelve months by a person other than the solicitor in the trade area in which the prize notice is given, or no more than one and one-half times the amount the solicitor or sponsor paid for the prize.

Sec. 3. A seller may not obtain or submit for payment a check,

draft, or other form of negotiable paper drawn on a consumer's checking, savings, share, or similar account, without that consumer's express verifiable authorization. Such authorization shall be deemed verifiable if any of the following means are employed:

(1) Express written authorization by the consumer, which may include the consumer's signature on the negotiable instrument;

(2) Express oral authorization which is tape recorded and made available upon request to the consumer's financial institution or to the consumer and which evidences clearly both the consumer's authorization of payment for the goods and services that are the subject of the sales offer and the consumer's receipt of all of the following information:

(a) The date of the check, draft, or other form of negotiable paper;

(b) The amount of the check, draft, or other form of negotiable paper;

(c) The payor's name;

(d) The number of check, draft, or negotiable paper payments, if more than one;

(e) A telephone number for consumer inquiry that is answered during normal business hours; and

(f) The date of the consumer's oral authorization; or

(3) Written confirmation of the transaction, sent to the consumer prior to submission for payment of the consumer's check, draft, or other form of negotiable paper that includes:

(a) All of the information contained in subdivision (2) of this section; and

(b) The procedures by which the consumer can obtain a refund from the seller in the event the confirmation is inaccurate.

Sec. 4. (1) In addition to any other right to revoke an offer:

(a) The consumer obligated for any part of the purchase price may cancel the telephone sale until midnight of the fifth business day after the day on which the consumer has received written notice from the seller notifying the consumer of his or her right to cancel the telephone sale. Written notice shall include all of the information included in subdivision (2) of section 3 of this act and the procedures by which a consumer may obtain a refund; and

(b) The seller shall disclose the refund policy to the consumer orally by telephone, in writing with advertising or promotional material, or with delivery of the products or services, and shall issue a refund within thirty days after the date on which the seller receives returned merchandise or notice of cancellation. A seller who discloses in writing that a sale is made or provided "satisfaction guaranteed", "with free inspection", "no-risk guarantee", or similar words or phrases shall be deemed to meet the requirements of the review and return for refund policy.

(2) Subdivision (1)(a) of this section does not apply to a sale in which the seller at a minimum has a policy of giving the consumer the right to review goods or services for a period of at least seven days after the date of delivery, accepting returns or canceling services, and providing a refund for the return of its unused and undamaged merchandise or canceled services.

Sec. 5. It shall be unlawful for a seller to procure the services of any third-party delivery, courier, or other pickup service to obtain a consumer's payment for goods, unless the goods are delivered and can be inspected.

Sec. 6. It shall be unlawful for a seller to request or receive payment or other consideration, in advance, from a consumer to recover or otherwise aid in the return of money or any other item lost by the consumer in a prior telemarketing transaction. This section shall not apply to services provided to a consumer by an attorney licensed to practice law.

Sec. 7. In the case of prize promotions, it shall be unlawful for a seller to fail to provide the following information:

(1) The odds of winning or receiving the prize and, if the odds are not calculable in advance, the factors used in calculating the odds;

(2) That no purchase and no payment is necessary to win;

(3) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(4) The no-purchase or no-payment method of participating in the prize promotion, with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(5) The true name and address of the solicitor, sponsor, or seller offering a prize when the consumer is told he or she has won or will receive a prize; and

(6) The verifiable retail value of each prize the consumer is told

he or she has won or will receive.

Sec. 8. A solicitor, sponsor, or seller may not do any of the following:

- (1) Misrepresent the source of any written prize notice;
- (2) Represent directly or by implication that the number of individuals eligible for the prize is limited or that an individual has won or will receive a particular prize unless that representation is true; or
- (3) Misrepresent the value of a prize.

Sec. 9. Sellers must maintain records for twenty-four months in compliance with 16 C.F.R. 310.5.

Sec. 10. In any civil proceeding alleging a violation of the Telemarketing and Prize Promotions Act, the burden of proving an exemption from the act or an exemption from a definition in the act is upon the person claiming it. In any criminal proceeding alleging a violation of the act, the burden of producing evidence pertaining to a definition or an exemption is upon the person claiming it.

Sec. 11. Nothing in the Telemarketing and Prize Promotions Act shall be construed to limit the remedies available to consumers, the Attorney General, or any county attorney under the Uniform Deceptive Trade Practices Act or any other state or federal law.

Sec. 12. Any consumer that suffers a loss or harm as a result of a violation of the Telemarketing and Prize Promotions Act may recover actual damages, attorney's fees, court costs, and any other remedies provided by law. The state, on behalf of its residents who have suffered a loss or harm as a result of a violation of the act, may seek actual damages or other remedies provided by law.

Sec. 13. A violation of the Telemarketing and Prize Promotions Act is a Class I misdemeanor.

Sec. 14. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.