

STATE OF OKLAHOMA

2nd Session of the 44th Legislature (1994)

COMMITTEE SUBSTITUTE

FOR

HOUSE BILL NO. 2210

By: Bastin and Boyd (Laura)

COMMITTEE SUBSTITUTE

An Act relating to contracts; amending 15 O.S. 1991, Sections 752, as amended by Section 1, Chapter 317, O.S.L. 1992, 753, as last amended by Section 2, Chapter 10, O.S.L. 1993 (15 O.S. Supp. 1993, Sections 752 and 753), which relate to the Oklahoma Consumer Protection Act; adding certain definitions; adding certain acts to those which are prohibited; stating legislative findings and declarations concerning telemarketing; defining terms; specifying certain exemptions from the term "commercial telephone seller" or "seller"; requiring registration of commercial telephone sellers; providing procedures related thereto; placing certain requirements on registrants and applicants for registration; requiring the providing of certain information; specifying certain nonapplicability to certain transactions; requiring certain disclosure; specifying certain unlawful acts; providing exceptions; stating that unlawful acts pursuant to this act may be in addition to other unlawful acts; providing that violations are violations of the Oklahoma Consumer Protection Act; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 15 O.S. 1991, Section 752, as amended by Section 1, Chapter 317, O.S.L. 1992 (15 O.S. Supp. 1993, Section 752), is amended to read as follows:

Section 752. As used in the Oklahoma Consumer Protection Act:

1. "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity~~;~~;

2. "Consumer transaction" means the advertising, offering for sale, sale, or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other

article, commodity, or thing of value wherever located, for purposes that are personal, household, or business oriented-i

3. "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever located-i

4. "Examination" when used in reference to documentary material includes the inspection, study, or copying of any such material, and the taking of testimony under oath, or acknowledgment in respect to any such documentary material or copy thereof-i

5. "Merchandise" includes any object, ware, good, commodity, intangible, real estate, or service-i

6. "Closing out sale" means any offer to sell, or actual sale, to the public of goods, wares, or merchandise on the implied or direct representation that the sale is in anticipation of the termination of a business at its present location, or that the sale is being held other than in the ordinary course of business. It also shall mean but shall not be limited to any sale held or advertised as a "closing out sale", "going out of business sale", "discontinuance of business sale", "quitting business sale", "sell out", "liquidation", "loss of lease sale", "must vacate sale", "forced out of business sale", "fire sale", "smoke and water damage sale", "adjustment sale", "creditor's sale", "bankrupt sale", "insolvent sale", "mortgage sale", or other like or similar title-i

7. "Advertisement" means any advertisement or announcement published in the news media including but not limited to the radio, television, newspapers, handbills, and mailers-i

8. "License" means the written authorization issued by the court clerk of the district court in any county in this state to any person to conduct a closing out sale-i

9. "Clerk" means the court clerk of the district court of any county of this state in which a person applying for a license intends to conduct a closing out sale-i

10. "Automatic dial announcing device" means automatic equipment that:

- a. stores telephone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called,
- b. conveys a prerecorded or synthesized voice message to the number called, and
- c. is used for the purpose of offering any goods or services for sale or conveying information regarding such goods or services;

11. "Deceptive trade practice" means a misrepresentation, omission, or other practice that has deceived or misled a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral; and

12. "Unfair trade practice" is any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

SECTION 2. AMENDATORY 15 O.S. 1991, Section 753, as last amended by Section 2, Chapter 10, O.S.L. 1993 (15 O.S. Supp. 1993, Section 753), is amended to read as follows:

Section 753. A person engages in a practice which is declared to be unlawful under the Oklahoma Consumer Protection Act, Section 751 et seq. of this title, when, in the course of his business, he:

1. Represents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular make or brand, when it is of another;

2. Makes a false or misleading representation, knowingly or with reason to know, as to the source, sponsorship, approval, or certification of the subject of a consumer transaction;

3. Makes a false or misleading representation, knowingly or with reason to know, as to affiliation, connection, association with, or certification by another;

4. Makes a false or misleading representation or designation, knowingly or with reason to know, of the geographic origin of the subject of a consumer transaction;

5. Makes a false representation, knowingly or with reason to know, as to the characteristics, ingredients, uses, benefits, alterations, or quantities of the subject of a consumer transaction or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith;

6. Represents, knowingly or with reason to know, that the subject of a consumer transaction is original or new if he knows that it is reconditioned, reclaimed, used, or secondhand;

7. Represents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular standard, style or model, if it is of another;

8. Advertises, knowingly or with reason to know, the subject of a consumer transaction with intent not to sell it as advertised;

9. Advertises, knowingly or with reason to know, the subject of a consumer transaction with intent not to supply reasonably expected public demand, unless the advertisement discloses a limitation of quantity;

10. Advertises under the guise of obtaining sales personnel when in fact the purpose is to sell the subject of a consumer transaction to the sales personnel applicants;

11. Makes false or misleading statements of fact, knowingly or with reason to know, concerning the price of the subject of a consumer transaction or the reason for, existence of, or amounts of price reduction;

12. Employs "bait and switch" advertising, which consists of an offer to sell the subject of a consumer transaction which the seller does not intend to sell, which advertising is accompanied by one or more of the following practices:

a. refusal to show the subject of a consumer transaction advertised~~+~~l

b. disparagement of the advertised subject of a consumer transaction or the terms of sale~~+~~l

- c. requiring undisclosed tie-in sales or other undisclosed conditions to be met prior to selling the advertised subject of a consumer transaction~~†~~
- d. refusal to take orders for the subject of a consumer transaction advertised for delivery within a reasonable time~~†~~
- e. showing or demonstrating defective subject of a consumer transaction which the seller knows is unusable or impracticable for the purpose set forth in the advertisement~~†~~
- f. accepting a deposit for the subject of a consumer transaction and subsequently charging the buyer for a higher priced item~~†~~ or
- g. willful failure to make deliveries of the subject of a consumer transaction within a reasonable time or to make a refund therefor upon the request of the purchaser;

13. Conducts a closing out sale without having first obtained a license as required in this act, Section 751 et seq. of this title;

14. Resumes the business for which the closing out sale was conducted within one (1) year from the expiration date of the closing out sale license;

15. Falsely states, knowingly or with reason to know, that services, replacements or repairs are needed;

16. Violates any provision of the Oklahoma Health Spa Act, Section 2000 et seq. of Title 59 of the Oklahoma Statutes;

17. Violates any provision of the Home Repair Fraud Act, Section 765.1 et seq. of this title;

18. Violates any provision of the Consumer Disclosure of Prizes and Gifts Act, Section 996.1 et seq. of Title 21 of the Oklahoma Statutes; ~~or~~

19. Violates any provision of Section 755.1 of this title or Section 1847a of Title 21 of the Oklahoma Statutes; or

20. Commits an unfair or deceptive trade practice as defined in Section 752 of this title.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 775A.1 of Title 15, unless there is created a duplication in numbering, reads as follows:

The Legislature hereby finds, determines and declares that the use of telephones for commercial solicitation is rapidly increasing; that this form of communication offers unique benefits, but entails special risks and poses the potential for abuse; that the Legislature finds that the widespread practice of fraudulent and deceptive commercial telephone solicitation has caused substantial financial losses to thousands of consumers and, particularly, elderly, homebound and otherwise vulnerable consumers, and is a matter vitally affecting the public interest; and, therefore, that the general welfare of the public and the protection of the integrity of the telemarketing industry requires statutory regulation of the commercial use of telephones.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 775A.2 of Title 15, unless there is created a duplication in numbering, reads as follows:

As used in this act, unless the context otherwise requires:

1. "Commercial telephone seller" or "seller" means a person who, in the course of such person's business, vocation or occupation, on the person's own behalf or on behalf of another person, causes or attempts to cause a commercial telephone solicitation to be made; except that "commercial telephone seller" or "seller" does not include the following:

- a. a person offering or selling a security as defined in Section 2 of Title 71 of the Oklahoma Statutes if:
  - (1) the security is either registered with the Oklahoma Securities Commission under Section 301 through 307 of Title 71 of the Oklahoma Statutes, or exempt from registration under Section 401 of Title 71 of the Oklahoma Statutes, and
  - (2) the person is registered by the securities commission as a broker-dealer as defined in

Section 2 of Title 71 of the Oklahoma Statutes, an agent as defined in Section 2 of Title 71 of the Oklahoma Statutes, or an investment adviser representative as defined in Section 2 of Title 71 of the Oklahoma Statutes, unless expressly excluded from such definitions, or such person is exempted from registration under Section 201 of Title 71 of the Oklahoma Statutes,

- b. a person soliciting the sale of any book, record, audio tape, compact disc or video if the person allows the purchaser to review the merchandise without obligation for at least seven (7) days and provides a full refund for the return of undamaged merchandise within thirty (30) days or if the person solicits such sale on behalf of a membership club operating in conformity with 16 Code of Federal Regulations 425,
- c. a person making telephone calls to a residential customer for the sole purpose of polling or soliciting the expression of ideas, opinions or votes, or a person soliciting solely for a political or religious cause or purpose,
- d. a paid solicitor or charitable organization which is required to and which has complied with the notice and reporting requirements of Section 553 of Title 18 of the Oklahoma Statutes or a person who is excluded from such notice and reporting requirements by Section 554 of Title 18 of the Oklahoma Statutes,
- e. a supervised financial organization, as defined in Section 1-301 of Title 14A of the Oklahoma Statutes, and its employees, when acting within the scope of their employment,
- f. a supervised lender, as defined in subsection (2) of Section 3-501 of Title 14A of the Oklahoma Statutes, and its employees, when acting within the scope of their employment,

- g. a person or an affiliate of a person who is regulated by the Insurance Commission pursuant to Title 36 of the Oklahoma Statutes,
- h. a person soliciting without the intent to complete and who does not in fact complete the sales transaction during the telephone solicitation or another telephone solicitation and who only completes the sales transaction at a later face-to-face meeting between the solicitor and the prospective purchaser, excluding a face-to-face meeting, the sole purpose of which is to collect the payment or deliver any item purchased, or a person soliciting a purchaser with whom the person has had a previous face-to-face meeting in the course of such person's business,
- i. any governmental entity or employee thereof, acting in the employee's official capacity,
- j. a person soliciting telephone service, or licensed or franchised cable television service, which is billed and paid on a daily, weekly, or monthly basis and which can be canceled at any time without further obligation to the purchaser,
- k. a person or an affiliate of a person whose business is regulated by the Oklahoma Real Estate Commission,
- l. a person whose conduct is within the exclusive jurisdiction of the federal Commodity Futures Trading Commission as granted under the federal "Commodity Exchange Act", as amended,
- m. a seller of food for immediate consumption when the sale to one purchaser does not exceed Three Hundred Dollars (\$300.00),
- n. a person who initially contacts the purchaser with a retail sales catalog requesting a telephone call response, when the person allows the purchaser to review the merchandise without obligation for at least seven (7) days and provides a full refund for

- the return of undamaged merchandise within thirty (30) days after receipt of the returned merchandise,
- o. an issuer or a subsidiary of an issuer that has a class of securities which is subject to Section 12 of the federal "Securities Exchange Act of 1934", 15 U.S.C. 781, and which is either registered or exempt from registration under paragraph (A), (B), (C), (E), (F), (G) or (H) of subsection (g) (2) of that section,
  - p. a person who has been operating for at least three (3) years a retail business establishment in Oklahoma under the same name as that used in connection with the solicitation of sales by telephone if, on a continuing basis, the majority of the seller's business involves the purchaser receiving the seller's goods and services at the seller's business location,
  - q. a person who has conducted business for at least three (3) years under the same name and in the same state and offers potential purchasers satisfaction guaranteed by the sending of the product or providing the service and the purchaser has an unqualified right to review and return or cancel for at least thirty (30) days,
  - r. any telephone marketing service company which provides telemarketing sales services under written contract to sellers and has been operating continuously for at least five (5) years under the same business name and seventy-five percent (75%) or more of its services are performed on behalf of sellers exempt from this section. This exemption shall not apply to that portion of a telephone marketing service company's services performed on behalf of nonexempt sellers, and
  - s. a person soliciting business solely from business purchasers who have previously purchased identical

or similar goods or services from the business enterprise on whose behalf the person is calling;

2. "Commercial telephone solicitation" means:

a. unsolicited telephone calls to a person initiated by a commercial telephone seller or salesperson, or an automated dialing machine with or without a recorded message device, for the purpose of inducing the person to purchase or invest in goods, services or property or offering an extension of credit,

b. any other communication by a commercial telephone seller in which:

(1) a gift, award, prize or contest is offered and a telephone call response from the intended purchaser is invited,

(2) a loan, credit card or other extension of credit is offered to a purchaser who has not previously purchased from the person initiating the communication, and a telephone call response from the intended purchaser is invited, or

(3) a sale is to be completed or an agreement to purchase is to be entered into during the course of the telephone call response, or

c. any other communication by a commercial telephone seller which includes representations about the price, quality or availability of goods, services or property and which invites a response by telephone, including pay-per-call service calls, or which is followed by a telephone call to the intended purchaser by a salesperson;

3. "Pay-per-call" means the use of a telephone number with a 900 prefix or any other prefix under which liability for the service or product provided attaches to the telephone bill of the individual calling such number;

4. "Principal" means an owner, an officer of a corporation, a general partner of a partnership, the sole proprietor of a sole

proprietorship, a trustee of a trust or any other individual with similar supervisory functions with respect to any person;

5. "Purchaser" means a person who receives or responds to a commercial telephone solicitation;

6. "Salesperson" means any person employed or authorized by a commercial telephone seller to cause or attempt to cause a commercial telephone solicitation to be made; and

7. "Telephone sales transaction" means any payment of money by a purchaser in exchange for the promise of goods, services, property or an extension of credit by a commercial telephone seller and includes all communications which precede such payment of money.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 775A.3 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. No commercial telephone seller shall conduct business in this state without having registered with the Attorney General at least ten (10) days prior to the conduct of such business. Individual employees of the commercial telephone seller are not required to register. A commercial telephone seller conducts business in this state if the telephone solicitations of prospective purchasers are made from locations in this state or solicitation is made of prospective purchasers located in this state.

B. A registration shall be effective for one (1) year after the date of filing with the Attorney General. Each application for registration or renewal thereof shall be accompanied by a filing fee, determined and collected by the Attorney General, but such filing fee shall not exceed Two Hundred Fifty Dollars (\$250.00) for an application for registration or One Hundred Dollars (\$100.00) for an application for renewal.

C. Whenever, prior to expiration of a commercial telephone seller's annual registration, there is a material change in the information required by subsection E of this section, the seller shall, within ten (10) days, file an addendum updating the information with the Attorney General.

D. Each application for registration shall be in writing and shall contain such information regarding the conduct of the commercial telephone seller's business and the personnel conducting the business as is required by law. The application shall be submitted on a form provided by the Attorney General and shall be verified by a declaration signed by each principal of the commercial telephone seller under penalty of perjury. The declaration shall specify the date and location of signing. The information submitted pursuant to this section shall be available for public inspection.

E. Each application for registration or renewal pursuant to this section shall contain the following information:

1. The name or names of the commercial telephone seller, including all names under which the commercial telephone seller is doing or intends to do business, if different from the name of the seller, and the name of any parent or affiliated organization;

2. The seller's business form and the date and place of organization;

3. The complete street addresses of all locations from which the commercial telephone seller is or will be conducting business, including a designation of the seller's principal business location;

4. A listing of all telephone numbers, including pay-per-call numbers, to be used by the commercial telephone seller;

5. The name, residential address, and position held by each principal of the commercial telephone seller and the names, residential addresses and positions of those persons who have management responsibilities in connection with the commercial telephone seller's business activities;

6. A description of the goods, services, property or extension of credit the commercial telephone seller is offering for sale and a copy of all sales scripts the commercial telephone seller requires salespersons to use when soliciting prospective purchasers, or, if no sales script is required to be used, a description of the sales presentation;

7. All rules, regulations, terms, restrictions and conditions to receiving any prize, bonus, award, gift or premium, if applicable, including a description of each prize, bonus, award, gift or premium, and the actual or approximate odds of a purchaser's receiving such prize, bonus, award, gift or premium;

8. A copy or representative sample of all written materials the seller sends to any purchaser; and

9. Such additional information regarding the conduct of the commercial telephone seller's business and the personnel conducting the business as may reasonably be required by the Attorney General.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 775A.4 of Title 15, unless there is created a duplication in numbering, reads as follows:

A. A commercial telephone seller engages in an unlawful telemarketing practice when, in the course of any commercial telephone solicitation, the seller:

1. Conducts business as a commercial telephone seller without having registered with the Attorney General, as required by Section 5 of this act;

2. Fails to allow the purchaser in any telephone sales transaction to cancel any purchase or agreement to purchase goods, services or property at any time before the expiration of three (3) business days after the purchaser's receipt of such goods, services or property by delivering or mailing to the commercial telephone seller written notice of cancellation. Notice of cancellation, if sent by mail, is deemed to be given as of the date the mailed notice was postmarked;

3. Fails to refund all payments made by any purchaser in any telephone sales transaction within thirty (30) days after the commercial telephone seller receives notice of cancellation from the purchaser, except that:

- a. if the purchaser has received goods or property from the commercial telephone seller, other than an item represented as free, the commercial telephone seller shall refund all payments made by the purchaser

within thirty (30) days after the commercial telephone seller's receipt of the returned goods or property, and

- b. if the purchaser has received services during the course of a pay-per-call service call, which services cannot, by their nature, be returned, the commercial telephone seller is not required to refund payments to the purchaser;

4. Fails to disclose to the purchaser during a telephone solicitation that the purchaser has the cancellation rights set forth in paragraph 2 of this subsection;

5. Misrepresents to any person that the person has won a contest, sweepstakes or drawing, or that the person will receive free goods, services or property;

6. Represents that the seller's goods, services or property are "free" if the commercial telephone seller charges or collects a fee from the purchaser in exchange for providing or delivering such goods, services or property;

7. Makes any reference to the commercial telephone seller's compliance with this act to any purchaser without also disclosing that compliance with this act does not constitute approval by any governmental agency of the seller's marketing, advertisements, promotions, goods or services; or

8. Engages in any deceptive trade practice defined in Section 752 of this title.

B. Paragraphs 2 and 4 of subsection A of this section do not apply to a transaction in which the consumer obtains a full refund for the return of undamaged or unused goods or a cancellation of services by giving notice to the seller within seven (7) days after receipt by the consumer and the seller processes the refund or cancellation within thirty (30) days after receipt of the returned merchandise or the consumer's request for refund for services not performed or a pro rata refund for any services not yet performed for the consumer. The availability and terms of the return and refund privilege shall be disclosed to the consumer orally by telephone and in writing with any advertising or

promotional material or with the delivery of the product or service. If a seller offers consumers an unconditional guarantee, a clear disclosure of such guarantee by using the words "satisfaction guaranteed", "free inspection" or "no-risk guarantee" satisfy the disclosure requirements of this subsection.

C. The unlawful telemarketing practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other civil and criminal statutes of this state.

D. Any violations of Sections 3 through 6 of this act are violations of the Oklahoma Consumer Protection Act.

SECTION 7. This act shall become effective September 1, 1994.

44-2-8979

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