

**CONSUMER PROTECTION AMENDMENTS**

2004 GENERAL SESSION

STATE OF UTAH

**Sponsor: Sheryl L. Allen**

Patricia W. Jones

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**LONG TITLE**

**General Description:**

This bill modifies provisions of the Commerce and Trade Code dealing with the duties of the Division of Consumer Protection.

**Highlighted Provisions:**

This bill:

- ▶ modifies certain definitions;
  - ▶ deletes provisions that currently give the Division of Consumer Protection authority to regulate the misuse of personal identifying information;
  - ▶ modifies provisions related to a deceptive act or practice by a supplier;
  - ▶ modifies certain administrative fines imposed for violations of the Utah Consumer Sales Practices Act;
  - ▶ modifies the definition of a credit services organization for purposes of the Credit Services Organizations Act;
  - ▶ modifies the Charitable Solicitations Act to:
    - change certain requirements for an application for registration to enable electronic filing; and
    - exempt certain corporations from the act;
  - ▶ modifies the definitions of a telephone solicitation and a telephone solicitor for purposes of the Telephone Fraud Prevention Act to be consistent with other statutes;
- and
- ▶ makes technical corrections.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

This bill provides an immediate effective date.

**Utah Code Sections Affected:**

AMENDS:

**13-11-3**, as last amended by Chapter 57, Laws of Utah 2000

**13-11-4**, as last amended by Chapter 196, Laws of Utah 2001

**13-11-17**, as last amended by Chapters 198 and 237, Laws of Utah 1995

**13-21-2**, as last amended by Chapter 83, Laws of Utah 1995

**13-22-6**, as last amended by Chapter 187, Laws of Utah 1996

**13-22-8**, as last amended by Chapter 210, Laws of Utah 2001

**13-26-2**, as last amended by Chapter 92, Laws of Utah 1997

REPEALS:

**13-11-4.5**, as enacted by Chapter 57, Laws of Utah 2000

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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **13-11-3** is amended to read:

**13-11-3. Definitions.**

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including a telephone request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which

any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(2) (a) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance)~~[, including the use or misuse of personal identifying information of any person in relation to a consumer transaction]~~ to, or apparently to, a person for:

- (i) primarily personal, family, or household purposes~~[-]; or [for]~~
- (ii) purposes that relate to a business opportunity that requires ~~[both his]~~:

(A) expenditure of money or property ~~[and his]~~ by the person described in Subsection (2)(a); and

(B) the person described in Subsection (2)(a) to perform personal services on a continuing basis and in which [he] the person described in Subsection (2)(a) has not been previously engaged~~[-, or a solicitation or offer by a supplier].~~

(b) "Consumer transaction" includes:

(i) any of the following with respect [to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any] to a transfer or disposition described in Subsection

(2)(a):

(A) an offer;

(B) a solicitation;

(C) an agreement; or

(D) performance of an agreement [with respect to any of these transfers or dispositions, and any]; or

(ii) a charitable solicitation [as defined in this section].

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

Section 2. Section **13-11-4** is amended to read:

**13-11-4. Deceptive act or practice by supplier.**

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's personal contact, whether through mail, electronic mail, facsimile transmission, telephone, or any other form of direct solicitation and if the sale price exceeds \$25, unless the supplier's cancellation policy is communicated to the buyer and the policy offers greater rights to the buyer than this Subsection (2)(m), which notice shall be a conspicuous statement written in dark bold at least 12 point type, on the first page of the purchase documentation, and shall read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or

time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER.";

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false;

(p) if a consumer indicates his intention of making a claim for a motor vehicle repair against his motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told he was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement;

(q) includes in any contract, receipt, or other written documentation of a consumer

transaction, or any addendum to any contract, receipt, or other written documentation of a consumer transaction, any confession of judgment or any waiver of any of the rights to which a consumer is entitled under this chapter; ~~or~~

(r) charges a consumer for a consumer transaction that has not previously been agreed to by the consumer~~[-]; or~~

(s) solicits or enters into a consumer transaction with a person who lacks the mental ability to comprehend the nature and consequences of:

(i) the consumer transaction; or

(ii) the person's ability to benefit from the consumer transaction.

Section 3. Section **13-11-17** is amended to read:

**13-11-17. Actions by enforcing authority.**

(1) The enforcing authority may bring an action:

(a) to obtain a declaratory judgment that an act or practice violates this chapter;

(b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter; and

(c) to recover, for each violation, actual damages, or obtain relief under Subsection (2)(b), on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(2) (a) The enforcing authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this chapter in a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by final judgment of courts of general jurisdiction and appellate courts of this state that was either reported officially or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(b) (i) On motion of the enforcing authority and without bond in an action under this

Subsection (2), the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, but only if it appears that the defendant is threatening or is about to remove, conceal, or dispose of the defendant's property to the damage of persons for whom relief is requested. An appropriate order may include an order:

- (A) to reimburse consumers found to have been damaged;
  - (B) to carry out a transaction in accordance with consumers' reasonable expectations;
  - (C) to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or
  - (D) to grant other appropriate relief.
- (ii) The court may assess the expenses of a master or receiver against a supplier.
- (c) If an act or practice that violates this chapter unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.
- (d) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this Subsection (2) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.
- (e) An action may not be brought by the enforcing authority under this Subsection (2) more than two years after the occurrence of a violation of this chapter.
- (3) (a) The enforcing authority may terminate an investigation or an action other than a class action upon acceptance of the supplier's written assurance of voluntary compliance with this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action.
- (b) An assurance is not evidence of a prior violation of this chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation.
- (4) (a) In addition to other penalties and remedies set out under this chapter, and in

addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to [~~\$1,000~~] \$2,500 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8.

Section 4. Section **13-21-2** is amended to read:

**13-21-2. Definitions -- Exemptions.**

As used in this chapter:

(1) "Buyer" means an individual who is solicited to purchase or who purchases the services of a credit services organization.

(2) "Credit reporting agency" means a person that, for a monetary fee, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third persons.

(3) (a) "Credit services organization" means a person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that the person can or will sell, provide, or perform, in return for the payment of money or other valuable consideration any of the following services:

(i) improving a buyer's credit record, history, or rating;

(ii) obtaining an extension of credit for a buyer; [~~or~~]

(iii) providing advice, assistance, instruction, or instructional materials to a buyer with regard to either Subsection (3)(a)(i) or (ii)[-];

(iv) debt reduction or debt management plans;

(v) represent itself or its employee as a debt professional or credit counselor; or

(vi) negotiate with a buyer's creditor.

(b) "Credit services organization" does not include:

(i) a person authorized to make loans or extensions of credit under the laws of this state or the United States who is subject to regulation and supervision by this state or the United States

and who derives at least 35% of the person's income from making loans and extensions of credit;

(ii) a depository institution;

(A) as defined in Section 7-1-103; or

(B) that is regulated or supervised by the Federal Deposit Insurance Corporation and the National Credit Union Association;

(iii) a person licensed as a real estate broker by this state if the person is acting within the course and scope of that license;

(iv) a person licensed to practice law in this state if the person renders services within the course and scope of the person's practice as an attorney;

(v) a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission if the broker-dealer is acting within the course and scope of that regulation; or

(vi) a credit reporting agency.

(4) "Extension of credit" means the right to defer payment of debt or to incur debt and defer its payment, offered or granted primarily for personal, family, or household purposes.

Section 5. Section **13-22-6** is amended to read:

**13-22-6. Application for registration.**

(1) An applicant for registration or renewal of registration as a charitable organization shall:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit ~~[a written]~~ an application~~[, verified under oath,]~~ on a form approved by the division which shall include:

(i) the organization's name, address, telephone number, facsimile number, if any, and the names and addresses of any organizations or persons controlled by, controlling, or affiliated with the applicant;

(ii) the specific legal nature of the organization, that is, whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(iii) the names and residence addresses of the officers and directors of the organization;

- (iv) the name and address of the registered agent for service of process and a consent to service of process;
- (v) the purpose of the solicitation and use of the contributions to be solicited;
- (vi) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;
- (vii) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;
- (viii) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available for application to the charitable purposes declared in the application, including a satisfactory statement of the factual basis for the projected percentage;
- (ix) a statement of total contributions collected or received by the organization within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;
- (x) a copy of any written agreements with any professional fund raiser involved with the solicitation;
- (xi) disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the organization;
- (xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds for the solicitation or fundraising;
- (xiii) a statement of whether or not the charity, or its parent foundation, will be using the services of a professional fund raiser or of a professional fund raising counsel or consultant;
- (xiv) if either the charity or its parent foundation will be using the services of a professional fund raiser or a professional fund raising counsel or consultant:
  - (A) a copy of all agreements related to the services; and
  - (B) an acknowledgment that fund raising in the state will not commence until both the charitable organization, its parent foundation, if any, and the professional fund raiser or professional fund raising counsel or consultant are registered and in compliance with this chapter;

and

(xv) any additional information the division may require by rule.

(2) If any information contained in the application for registration becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the registration fee, an organization failing to file a registration application or renewal by the due date or filing an incomplete registration application or renewal shall pay an additional fee of \$25 for each month or part of a month after the date on which the registration application or renewal were due to be filed.

Section 6. Section **13-22-8** is amended to read:

**13-22-8. Exemptions.**

(1) Section 13-22-5 does not apply to:

(a) a solicitation that an organization conducts among its own established and bona fide membership exclusively through the voluntarily donated efforts of other members or officers of the organization;

(b) a bona fide religious, ecclesiastical, or denominational organization if:

(i) the solicitation is made for a church, missionary, religious, or humanitarian purpose;

and

(ii) the organization is either:

(A) a lawfully organized corporation, institution, society, church, or established physical place of worship, at which nonprofit religious services and activities are regularly conducted and carried on;

(B) a bona fide religious group:

(I) that does not maintain specific places of worship;

(II) that is not subject to federal income tax; and

(III) not required to file an IRS Form 990 under any circumstance; or

(C) a separate group or corporation that is an integral part of an institution that is an

income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) and is not primarily supported by funds solicited outside its own membership or congregation;

(c) a solicitation by a broadcast media owned or operated by an educational institution or governmental entity, or any entity organized solely for the support of that broadcast media;

(d) except as provided in Subsection 13-22-21(1), a solicitation for the relief of any person sustaining a life-threatening illness or injury specified by name at the time of solicitation if the entire amount collected without any deduction is turned over to the named person;

(e) a political party authorized to transact its affairs within this state and any candidate and campaign worker of the party if the content and manner of any solicitation make clear that the solicitation is for the benefit of the political party or candidate;

(f) a political action committee or group soliciting funds relating to issues or candidates on the ballot if the committee or group is required to file financial information with a federal or state election commission;

(g) any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school;

(h) a public or higher education foundation established under Title 53A or 53B;

(i) a television station, radio station, or newspaper of general circulation that donates air time or print space for no consideration as part of a cooperative solicitation effort on behalf of a charitable organization, whether or not that organization is required to register under this chapter;

(j) a volunteer fire department, rescue squad, or local civil defense organization whose financial oversight is under the control of a local governmental entity; ~~and~~

(k) any governmental unit of any state or the United States~~[-]; and~~

(l) any corporation:

(i) established by an act of the United States Congress; and

(ii) that is required by federal law to submit an annual report:

(A) on the activities of the corporation, including an itemized report of all receipts and expenditures of the corporation; and

(B) to the United States Secretary of Defense to be:

(I) audited; and

(II) submitted to the United States Congress.

(2) Any organization claiming an exemption under this section bears the burden of proving its eligibility for, or the applicability of, the exemption claimed.

(3) Each organization exempt from registration pursuant to this section that makes a material change in its legal status, officers, address, or similar changes shall file a report informing the division of its current legal status, business address, business phone, officers, and primary contact person within 30 days of the change.

(4) The division may by rule:

(a) require organizations exempt from registration pursuant to this section to file a notice of claim of exemption;

(b) prescribe the contents of the notice of claim; and

(c) require a filing fee for the notice, as determined under Section 63-38-3.2.

Section 7. Section **13-26-2** is amended to read:

**13-26-2. Definitions.**

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

(1) "Continuity plan" means a shipment, with the prior express consent of the buyer, at regular intervals of similar special-interest products. A continuity plan is distinguished from a subscription arrangement by no binding commitment period or purchase amount.

(2) "Division" means the Division of Consumer Protection.

(3) "Fictitious personal name" means a name other than an individual's true name. An "individual's true name" is the name taken at birth unless changed by operation of law or by civil action.

(4) "Material statement" or "material fact" means information that a person of ordinary intelligence or prudence would consider important in deciding whether or not to accept an offer extended through a telephone solicitation.

(5) "Premium" means a gift, bonus, prize, award, certificate, or other document by which

a prospective purchaser is given a right, chance, or privilege to purchase or receive goods or services with a stated or represented value of \$25 or more as an inducement to a prospective purchaser to purchase other goods or services.

(6) "Subscription arrangements," "standing order arrangements," "supplements," and "series arrangements" mean products or services provided, with the prior express request or consent of the buyer, for a specified period of time at a price dependent on the duration of service and to complement an initial purchase.

(7) (a) "Telephone solicitation," "sale," "selling," or "solicitation of sale" means:

(i) a sale or solicitation of goods or services in which:

~~[(i)-(A)]~~ (A) (I) the seller solicits the sale over the telephone;

~~[(B)]~~ (II) the purchaser's agreement to purchase is made over the telephone; and

~~[(C)]~~ (III) the purchaser, over the telephone, pays for or agrees to commit to payment for goods or services prior to or upon receipt by the purchaser of the goods or services;

~~[(ii)]~~ (B) the solicitor, not exempt under Section 13-26-4, induces a prospective purchaser over the telephone, to make and keep an appointment that directly results in the purchase of goods or services by the purchaser that would not have occurred without the telephone solicitation and inducement by the solicitor;

~~[(iii)]~~ (C) the seller offers or promises a premium to a prospective purchaser if:

~~[(A)]~~ (I) the seller induces the prospective purchaser to initiate a telephone contact with the telephone soliciting business; and

~~[(B)]~~ (II) the resulting solicitation meets the requirements of Subsection (7)(a); or

~~[(iv)]~~ (D) the solicitor solicits a charitable donation involving the exchange of any premium, prize, gift, ticket, subscription, or other benefit in connection with any appeal made for a charitable purpose by an organization that is not otherwise exempt under Subsection 13-26-4(2)(b)(iv)~~[-];~~ or

(ii) a telephone solicitation as defined in Section 13-25a-102.

(b) A solicitation of sale or telephone solicitation is considered complete when made, whether or not the person receiving the solicitation agrees to the sale or to make a charitable

donation.

(8) "Telephone soliciting business" means a sole proprietorship, partnership, limited liability company, corporation, or other association of individuals engaged in a common effort to solicit sales regulated under this chapter.

(9) "Telephone solicitor" or "solicitor" means a person, partnership, limited liability company, corporation, or other entity that:

(a) makes, places, or receives telephone calls for the purpose of selling or solicitation of sales as defined in Subsection (7) over the telephone, whether the calls originate in Utah or are received in Utah[-]; or

(b) is defined as a telephone solicitor in Section 13-25a-102.

**Section 8. Repealer.**

This bill repeals:

**Section 13-11-4.5, Deceptive act or practice by person other than a supplier.**

**Section 9. Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.