

CONSUMER PROTECTION AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: Sheryl L. Allen

LONG TITLE

General Description:

This bill modifies provisions of the Commerce and Trade Code administered by the Division of Consumer Protection.

Highlighted Provisions:

This bill:

- ▶ allows the Consumer Protection Education and Training Fund to earn interest;
- ▶ increases the amount that may remain in the Consumer Protection Education and Training Fund at the end of the fiscal year;
- ▶ requires a supplier to honor a warranty;
- ▶ requires that an organization be exempt or register before making a charitable solicitation that originates in Utah, is received in Utah, or is made through business operations in Utah;
- ▶ modifies the definition of a health spa for purposes of the Health Spa Services Protection Act;
- ▶ provides for payment of a fee by a health spa for failing to properly file a registration application or renewal;
- ▶ clarifies that a health spa shall calculate its surety requirement based on all the spa's unexpired contracts;
- ▶ modifies the maximum distance from the original location to which a health spa may relocate in order to be exempt from certain requirements;
- ▶ allows the Division of Consumer Protection to pursue administrative orders and



- 28 fines for violations of the Health Spa Services Protection Act;
- 29 ▶ increases the maximum administrative fine in the Telephone and Facsimile
- 30 Solicitation Act to \$2,500;
- 31 ▶ removes a criminal penalty from the Telephone and Facsimile Solicitation Act;
- 32 ▶ prohibits a telephone solicitation to a person who has requested not to receive calls
- 33 from that telephone solicitor;
- 34 ▶ modifies exemptions within the Telephone and Facsimile Solicitation Act;
- 35 ▶ modifies definitions within the Telephone Fraud Prevention Act;
- 36 ▶ requires a telephone soliciting business to register if the business makes telephone
- 37 solicitations that originate in Utah, or are received in Utah, or if the business
- 38 conducts business operations in Utah;
- 39 ▶ modifies penalties under the Telephone Fraud Prevention Act;
- 40 ▶ requires a telephone solicitor to orally advise a buyer of the buyer’s rescision rights;
- 41 and
- 42 ▶ makes technical changes.

43 **Monies Appropriated in this Bill:**

44 None

45 **Other Special Clauses:**

46 This bill provides an immediate effective date.

47 **Utah Code Sections Affected:**

48 AMENDS:

- 49 **13-2-8**, as last amended by Chapter 256, Laws of Utah 2002
- 50 **13-11-4**, as last amended by Chapter 55, Laws of Utah 2004
- 51 **13-22-5**, as last amended by Chapter 210, Laws of Utah 2001
- 52 **13-23-2**, as last amended by Chapter 89, Laws of Utah 1995
- 53 **13-23-3**, as last amended by Chapter 89, Laws of Utah 1995
- 54 **13-23-5**, as last amended by Chapter 196, Laws of Utah 2001
- 55 **13-23-6**, as last amended by Chapter 89, Laws of Utah 1995
- 56 **13-23-7**, as last amended by Chapter 89, Laws of Utah 1995
- 57 **13-25a-105**, as enacted by Chapter 26, Laws of Utah 1996
- 58 **13-25a-106**, as last amended by Chapter 263, Laws of Utah 2003

- 59 **13-25a-111**, as last amended by Chapter 263, Laws of Utah 2004
- 60 **13-26-2**, as last amended by Chapter 55, Laws of Utah 2004
- 61 **13-26-3**, as last amended by Chapter 122, Laws of Utah 2002
- 62 **13-26-8**, as last amended by Chapter 26, Laws of Utah 1995
- 63 **13-26-11**, as last amended by Chapter 77, Laws of Utah 1998

64 ENACTS:

65 **13-25a-107.2**, Utah Code Annotated 1953



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

68 Section 1. Section **13-2-8** is amended to read:

69 **13-2-8. Consumer Protection Education and Training Fund.**

70 (1) There is created a restricted special revenue fund known as the "Consumer
71 Protection Education and Training Fund."

72 (2) (a) Unless otherwise provided by a chapter listed in Section 13-2-1, all money not
73 distributed as consumer restitution that is received by the division from administrative fines
74 and settlements, from criminal restitution, or from civil damages, forfeitures, penalties, and
75 settlements when the division receives the monies on its own behalf and not in a representative
76 capacity, shall be deposited into the fund.

77 (b) Any portion of the fund may be maintained in an interest-bearing account.

78 (c) All interest earned on fund monies shall be deposited into the fund.

79 (3) Notwithstanding Title 63, Chapter 38, Budgetary Procedures Act, the division may
80 use the fund with the approval of the executive director of the Department of Commerce in a
81 manner consistent with the duties of the division under this chapter for:

- 82 (a) consumer protection education for members of the public;
- 83 (b) equipment for and training of division personnel;
- 84 (c) publication of consumer protection brochures, laws, policy statements, or other
85 material relevant to the division's enforcement efforts; and
- 86 (d) investigation and litigation undertaken by the division.

87 (4) If the balance in the fund exceeds [~~\$75,000~~] \$100,000 at the close of any fiscal
88 year, the excess shall be transferred to the General Fund.

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

90 **13-11-4. Deceptive act or practice by supplier.**

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

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

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

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

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

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

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

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

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

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

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

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

114 (ii) fails to honor a warranty or a particular warranty term;

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

120 (l) after receipt of payment for goods or services, fails to ship the goods or furnish the

121 services within the time advertised or otherwise represented or, if no specific time is advertised
122 or represented, fails to ship the goods or furnish the services within 30 days, unless within the
123 applicable time period the supplier provides the buyer with the option to ~~[either]~~:

124 (i) cancel the sales agreement and receive a refund of all previous payments to the
125 supplier if the refund is mailed or delivered to the buyer within ten business days after the day
126 on which the seller receives written notification from the buyer of the buyer's intent to cancel
127 the sales agreement and receive the refund; or ~~[to]~~

128 (ii) extend the shipping date to a specific date proposed by the supplier~~[-but any refund~~
129 ~~shall be mailed or delivered to the buyer within ten business days after the seller receives~~
130 ~~written notification from the buyer of the buyer's right to cancel the sales agreement and~~
131 ~~receive the refund];~~

132 (m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the
133 requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale
134 within three business days of the time of purchase if:

135 (i) the sale is made other than at the supplier's established place of business pursuant to
136 the supplier's personal contact, whether through mail, electronic mail, facsimile transmission,
137 telephone, or any other form of direct solicitation; and ~~[if]~~

138 (ii) the sale price exceeds \$25~~[-unless the supplier's cancellation policy is~~
139 ~~communicated to the buyer and the policy offers greater rights to the buyer than this Subsection~~
140 ~~(2)(m), which notice shall be a conspicuous statement written in dark bold at least 12 point~~
141 ~~type, on the first page of the purchase documentation, and shall read as follows: "YOU, THE~~
142 ~~BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF~~
143 ~~THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but~~
144 ~~not less than three business days) AFTER THE DATE OF THE TRANSACTION OR~~
145 ~~RECEIPT OF THE PRODUCT, WHICHEVER IS LATER."];~~

146 (n) promotes, offers, or grants participation in a pyramid scheme as defined under Title
147 76, Chapter 6a, Pyramid Scheme Act;

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

151 (p) if a consumer indicates ~~[his]~~ the consumer's intention of making a claim for a motor

152 vehicle repair against [~~his~~] the consumer's motor vehicle insurance policy:

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

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

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

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

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

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

170 (q) includes in any contract, receipt, or other written documentation of a consumer
171 transaction, or any addendum to any contract, receipt, or other written documentation of a
172 consumer transaction, any confession of judgment or any waiver of any of the rights to which a
173 consumer is entitled under this chapter;

174 (r) charges a consumer for a consumer transaction that has not previously been agreed
175 to by the consumer; or

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

178 (i) the consumer transaction; or

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

180 (3) (a) The notice required by Subsection (2)(m) shall:

181 (i) be a conspicuous statement written in dark bold with at least 12 point type on the
182 first page of the purchase documentation; and

183 (ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT
184 ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period
185 reflecting the supplier's cancellation policy but not less than three business days) AFTER THE
186 DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS
187 LATER".

188 (b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's
189 cancellation policy:

190 (i) is communicated to the buyer; and

191 (ii) offers greater rights to the buyer than Subsection (2)(m).

192 Section 3. Section **13-22-5** is amended to read:

193 **13-22-5. Registration required.**

194 (1) (a) It is unlawful for any organization [~~that is not~~] to engage in an activity described
195 in Subsection (1)(b) unless the organization is:

196 (i) exempt under Section 13-22-8 [~~to knowingly solicit, request, promote, advertise, or~~
197 sponsor the solicitation in this state of any contribution for a charitable purpose, unless the
198 organization is]; or

199 (ii) registered with the division in accordance with this chapter.

200 (b) Unless an organization meets the requirements of Subsection (1)(a), the
201 organization may not knowingly solicit, request, promote, advertise, or sponsor a charitable
202 solicitation if the charitable solicitation:

203 (i) originates in Utah;

204 (ii) is received in Utah; or

205 (iii) is caused to be made through business operations in Utah.

206 (2) Subsection (1) does not prohibit an organization from receiving an unsolicited
207 contribution.

208 (3) It is unlawful for any professional fund raiser to knowingly solicit, request,
209 promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable
210 organization, whether or not the charitable organization is exempt under Section 13-22-8,
211 unless the professional fund raiser and any nonexempt charitable organization that is benefitted
212 are registered with the division.

213 (4) It is unlawful for any professional fund raising counsel or consultant to knowingly

214 plan, manage, advise, counsel, consult, or prepare material for, or with respect to, the
215 solicitation in this state of a contribution for a charitable organization, whether or not the
216 charitable organization is exempt under Section 13-22-8, unless the professional fund raising
217 counsel or consultant and any nonexempt charitable organization that is benefitted are
218 registered with the division.

219 Section 4. Section 13-23-2 is amended to read:

220 **13-23-2. Definitions.**

221 As used in this chapter:

222 (1) "Consumer" means a purchaser of health spa services for valuable consideration.

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

224 (3) (a) "Health spa" means any person, partnership, joint venture, corporation,
225 association, or other entity that, for a charge or fee, provides as one of its primary purposes
226 services or facilities that are purported to assist patrons to improve their physical condition or
227 appearance through [~~change in weight, weight control, treatment, dieting,~~];

228 (i) aerobic conditioning;

229 (ii) strength training;

230 (iii) fitness training;

231 (iv) yoga training;

232 (v) pilates training; or

233 (vi) other exercise. [~~H~~]

234 (b) "Health spa" includes any establishment designated [~~as a "reducing salon,"~~];

235 (i) as a "health spa";

236 (ii) as a "spa";

237 (iii) as an "exercise gym";

238 (iv) as a "health studio";

239 (v) as a "health club";

240 (vi) as a "personal training facility";

241 (vii) as a "yoga facility";

242 (viii) as a "pilates facility"; or [~~by~~]

243 (ix) with any other similar terms.

244 [~~(b)~~] (c) "Health spa" does not include:

245 (i) any facility operated by a licensed physician at which the physician engages in the
246 practice of medicine;

247 (ii) any facility operated by a health care provider, hospital, intermediate care facility,
248 or skilled nursing care facility;

249 (iii) any public or private school, college, or university;

250 (iv) any facility owned or operated by the state or its political subdivisions; or

251 (v) any facility owned or operated by the United States or its political subdivisions.

252 (4) "Health spa services" means any service provided by a health spa, including athletic
253 facilities, equipment, and instruction.

254 Section 5. Section **13-23-3** is amended to read:

255 **13-23-3. Contracts for health spa services.**

256 (1) Any contract for the sale of health spa services shall be in writing. The written
257 contract shall constitute the entire agreement between the consumer and the health spa.

258 (2) The health spa shall provide the consumer with a fully completed copy of the
259 contract required by Subsection (1) at the time of its execution. The copy shall show:

260 (a) the date of the transaction;

261 (b) the name and address of the health spa; and

262 (c) the name, address, and telephone number of the consumer.

263 (3) (a) A contract may not have a term in excess of 36 months, but the contract may
264 provide that the consumer may exercise an option to renew the term after its expiration.

265 (b) Except for a lifetime membership sold prior to May 1, 1995, a health spa may not
266 offer a lifetime membership.

267 (4) The contract or an attachment to it shall clearly state any rules of the health spa that
268 apply to:

269 (a) the consumer's use of its facilities and services; and

270 (b) cancellation and refund policies of the health spa.

271 (5) The contract shall specify which equipment or facility of the health spa;

272 (a) is omitted from the contract's coverage; or ~~[which]~~

273 (b) may be changed at the health spa's discretion.

274 (6) The contract shall clearly state that the consumer has a three-day ~~[recision right~~

275 ~~provided in Section 13-23-4.]~~ period after the day on which the contract is executed to rescind

276 the contract.

277 Section 6. Section **13-23-5** is amended to read:

278 **13-23-5. Registration -- Bond, letter of credit, or certificate of deposit required --**

279 **Penalties.**

280 (1) (a) (i) It is unlawful for any health spa facility to operate in this state unless the
281 facility is registered with the division.

282 (ii) Registration is effective for one year. If the health spa facility renews its
283 registration, the registration shall be renewed at least 30 days prior to its expiration.

284 (iii) The division shall provide by rule for the form, content, application process, and
285 renewal process of the registration.

286 (b) Each health spa registering in this state shall designate a registered agent for
287 receiving service of process. The registered agent shall be reasonably available from 8 a.m.
288 until 5 p.m. during normal working days.

289 (c) The division shall charge and collect a fee for registration under guidelines
290 provided in Section 63-38-3.2.

291 (d) If an applicant fails to file a registration application or renewal by the due date, or
292 files an incomplete registration application or renewal, the applicant shall pay a fee of \$25 for
293 each month or part of a month after the date on which the registration application or renewal
294 were due to be filed, in addition to the registration fee described in Subsection (1)(c).

295 (2) (a) Each health spa shall obtain and maintain:

296 (i) a performance bond issued by a surety authorized to transact surety business in this
297 state;

298 (ii) an irrevocable letter of credit issued by a financial institution authorized to do
299 business in this state; or

300 (iii) a certificate of deposit.

301 (b) The bond, letter of credit, or certificate of deposit shall be payable to the division
302 for the benefit of any consumer who incurs damages as the result of:

303 (i) the health spa's violation of this chapter; or

304 (ii) ~~[as the result of]~~ the health spa's going out of business or relocating and failing to
305 offer an alternate location within ~~Ĥ~~→ [ten] five ← ~~Ĥ~~ miles.

306 (c) (i) The division may recover from the bond, letter of credit, or certificate of deposit

307 the costs of collecting and distributing funds under this section, up to 10% of the face value of
 308 the bond, letter of credit, or certificate of deposit but only if the consumers have fully recovered
 309 their damages first.

310 (ii) The total liability of the issuer of the bond, letter of credit, or certificate of deposit
 311 may not exceed the amount of the bond, letter of credit, or certificate of deposit.

312 (iii) The health spa shall maintain a bond, letter of credit, or certificate of deposit in
 313 force for one year after it notifies the division in writing that it has ceased all activities
 314 regulated by this chapter.

315 (d) A health spa providing services at more than one location shall comply with the
 316 requirements of Subsection (2)(a) for each separate location.

317 (e) The division may impose a fine against a health spa that fails to comply with the
 318 requirements of Subsection (2)(a) of up to \$100 per day that the health spa remains out of
 319 compliance. All penalties received shall be deposited into the Consumer Protection Education
 320 and Training Fund created in Section 13-2-8.

321 (3) (a) The minimum principal amount of the bond, letter of credit, or certificate of
 322 credit required under Subsection (2) shall be based on the number of unexpired contracts for
 323 health spa services to which the health spa is a party, in accordance with the following
 324 schedule:

| 325 Principal Amount of | Number of Contracts |
|-------------------------------|---------------------|
| 326 Bond, Letter of Credit, | |
| 327 or Certificate of Deposit | |
| 328 \$15,000 | 500 or fewer |
| 329 35,000 | 501 to 1,500 |
| 330 50,000 | 1,500 to 3,000 |
| 331 75,000 | 3,001 or more |

332 (b) A health spa that is not exempt under Section 13-23-6 shall comply with
 333 Subsection (3)(a) with respect to all of the health spa's unexpired contracts for health spa
 334 services, regardless of whether a portion of those contracts satisfy the criteria in Section
 335 13-23-6.

336 (4) Each health spa shall obtain the bond, letter of credit, or certificate of deposit and
 337 furnish a certified copy of the bond, letter of credit, or certificate of deposit to the division prior

338 to selling, offering or attempting to sell, soliciting the sale of, or becoming a party to any
339 contract to provide health spa services. A health spa is considered to be in compliance with
340 this section only if the proof provided to the division shows that the bond, letter of credit, or
341 certificate of credit is current.

342 (5) Each health spa shall:

343 (a) maintain accurate records of the bond, letter of credit, or certificate of credit and of
344 any payments made, due, or to become due to the issuer; and ~~shall~~

345 (b) open the records to inspection by the division at any time during normal business
346 hours.

347 (6) If a health spa changes ownership, ceases operation, discontinues facilities, or
348 relocates and fails to offer an alternate location within ~~ten~~ five miles within 30 days after its
349 closing, the health spa is subject to the requirements of this section as if it were a new health
350 spa coming into being at the time the health spa changed ownership. The former owner may
351 not release, cancel, or terminate the owner's liability under any bond, letter of credit, or
352 certificate of deposit previously filed with the division, unless:

353 (a) the new owner has filed a new bond, letter of credit, or certificate of deposit for the
354 benefit of consumers covered under the previous owner's bond, letter of credit, or certificate of
355 deposit; or

356 (b) the former owner has refunded all unearned payments to consumers.

357 (7) If a health spa ceases operation or relocates and fails to offer an alternative location
358 within ~~ten~~ five miles, the health spa shall provide the division with 45 days prior notice.

359 Section 7. Section **13-23-6** is amended to read:

360 **13-23-6. Exemptions from bond, letter of credit, or certificate of deposit**
361 **requirement.**

362 A health spa ~~which~~ that offers no paid-in-full membership, but only memberships
363 paid for by installment contracts is exempt from the application of Section 13-23-5 if:

364 (1) each contract contains the following clause: "If this health spa ceases operation and
365 fails to offer an alternate location within ~~ten~~ five miles, no further payments under this
366 contract shall be due to anyone, including any purchaser of any note associated with or
367 contained in this contract.";

368 (2) all payments due under each contract, including down payments, enrollment fees,

369 membership fees, or any other payments to the health spa, are in equal monthly installments
 370 spread over the entire term of the contract; and

371 (3) the term of each contract is clearly stated and is not capable of being extended.

372 Section 8. Section **13-23-7** is amended to read:

373 **13-23-7. Enforcement -- Costs and attorney's fees -- Penalties.**

374 (1) The division may, on behalf of any consumer or on its own behalf, file an action for
 375 injunctive relief, damages, or both to enforce this chapter. In addition to any relief granted, the
 376 division is entitled to an award for reasonable attorney's fees, court costs, and reasonable
 377 investigative expenses.

378 (2) (a) A person who willfully violates any provision of this chapter, either by failing to
 379 comply with any requirement or by doing any act prohibited in this chapter, is guilty of a class
 380 B misdemeanor. Each day the violation is committed or permitted to continue constitutes a
 381 separate punishable offense.

382 (b) In the case of a second offense, the person is guilty of a class A misdemeanor.

383 (c) In the case of three or more offenses, the person is guilty of a third degree felony.

384 (3) (a) In addition to any other penalty available under this chapter, a person who
 385 violates this chapter is subject to:

386 (i) a cease and desist order; and

387 (ii) an administrative fine of up to \$2,500 for each separate violation that is not a

388 violation described in Subsection 13-23-5(2)(e) ~~H~~→ up to \$10,000 for any series of violations arising

388a out of the same operative facts ←~~H~~.

389 (b) All administrative fines collected under this chapter shall be deposited in the

390 Consumer Protection Education and Training Fund created in Section 13-2-8.

391 Section 9. Section **13-25a-105** is amended to read:

392 **13-25a-105. Penalties -- Administrative and criminal.**

393 (1) Any person who violates this chapter is subject to:

394 (a) a cease and desist order; and

395 (b) an administrative fine of not less than \$100 or more than [~~\$1,000~~] \$2,500 for each
 396 separate violation.

397 (2) All administrative fines collected under this chapter shall be deposited in the

398 Consumer Protection Education and Training Fund created in Section 13-2-8.

399 ~~S~~→ [F] (3) **Any person who intentionally violates this chapter is guilty of a class** ←~~S~~

400 **§→ A misdemeanor and may be fined up to \$2,500. A person intentionally violates this**
 400a **chapter if**
 401 **the violation occurs after the division, attorney general, or a district or county attorney notifies**
 402 **the person by certified mail that he is in violation of this chapter. [H] ←§**

403 Section 10. Section **13-25a-106** is amended to read:

404 **13-25a-106. Enforcement.**

405 (1) The division shall investigate and assess administrative fines for violations of this
 406 chapter.

407 (2) (a) Upon referral from the division, the attorney general or any district or county
 408 attorney may:

409 (i) bring an action for temporary or permanent injunctive or other relief in any court of
 410 competent jurisdiction for any violation of this chapter[. ~~The court may,~~];

411 (ii) upon entry of final judgment, award restitution when appropriate to any person
 412 suffering loss because of a violation of this part if proof of loss is submitted to the satisfaction
 413 of the court; or

414 [~~(ii)~~] (iii) bring an action in any court of competent jurisdiction for the collection of
 415 penalties authorized under Subsection 13-25a-105(1)[~~; or~~].

416 [~~(iii) bring an action under Subsection 13-25a-105(3).~~]

417 (b) In an action under Subsection (2)(a), the attorney general or any district or county
 418 attorney may recover costs, including investigative costs and attorney fees, from any violator of
 419 this chapter.

420 Section 11. Section **13-25a-107.2** is enacted to read:

421 **13-25a-107.2. Requests to a specific telephone solicitor.**

422 **§→ (1) ←§ A telephone solicitor may not make or cause to be made a telephone solicitation**
 422a **to a**
 423 **person who has informed the telephone solicitor, either in writing or orally, that the person**
 424 **does not wish to receive a telephone call from the telephone solicitor.**

424a **§→ (2) A telephone solicitor is not liable for a violation of this section if the telephone**
 424b **solicitor complies with 16 C.F.R. Part 310.4(b)(3) and (4). ←§**

425 Section 12. Section **13-25a-111** is amended to read:

426 **13-25a-111. Exemptions.**

427 Notwithstanding any other provision of this chapter, [~~the provisions of~~] Sections
 428 13-25a-103 and 13-25a-108 do not apply to:

429 (1) a telephone call made [~~by or on behalf of a charitable organization~~] for a charitable
 430 purpose as defined in Section 13-22-2; [~~or~~]

431 (2) a charitable solicitation as defined in Section 13-22-2; or

432 [~~(2)~~] (3) a person ~~[that]~~ who holds a license or registration:

433 (a) under Title 31A, Insurance Code;

434 (b) issued by the Division of Real Estate established in Section 61-2-5; or

435 (c) issued by the National Association of Securities Dealers.

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

437 **13-26-2. Definitions.**

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

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

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

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

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

449 (5) "Premium" means a gift, bonus, prize, award, certificate, or other document by
450 which a prospective purchaser is given a right, chance, or privilege to purchase or receive
451 goods or services with a stated or represented value of \$25 or more as an inducement to a
452 prospective purchaser to purchase other goods or services.

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

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

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

459 (A) (I) the seller solicits the sale over the telephone;

460 (II) the purchaser's agreement to purchase is made over the telephone; and

461 (III) the purchaser, over the telephone, pays for or agrees to commit to payment for

462 goods or services prior to or upon receipt by the purchaser of the goods or services;

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

467 (C) the seller offers or promises a premium to a prospective purchaser if:

468 (I) the seller induces the prospective purchaser to initiate a telephone contact with the
469 telephone soliciting business; and

470 (II) the resulting solicitation meets the requirements of Subsection (7)(a); or

471 (D) the solicitor solicits a charitable donation involving the exchange of any premium,
472 prize, gift, ticket, subscription, or other benefit in connection with any appeal made for a
473 charitable purpose by an organization that is not otherwise exempt under Subsection
474 13-26-4(2)(b)(iv); or

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

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

479 (8) "Telephone soliciting business" means a sole proprietorship, partnership, limited
480 liability company, corporation, or other association of individuals engaged in a common effort
481 to ~~[solicit sales regulated under this chapter]~~ conduct telephone solicitations.

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

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

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

488 (a) makes a telephone solicitation; or

489 (b) causes a telephone solicitation to be made.

490 Section 14. Section **13-26-3** is amended to read:

491 **13-26-3. Registration and bond required.**

492 (1) (a) ~~Ĥ→~~ **[Each] Unless exempt under Section 13-26-4, each** ~~←Ĥ~~ telephone soliciting
492a business ~~[engaging in telephone solicitation or sales in~~

493 ~~this state]~~ shall register annually with the [~~Division of Consumer Protection prior to doing or~~
494 ~~continuing to do business in this state]~~ division before engaging in telephone solicitations if:

495 (i) the telephone soliciting business engages in telephone solicitations that:

496 (A) originate in Utah; or

497 (B) are received in Utah; or

498 (ii) the telephone soliciting business conducts any business operations in Utah.

499 (b) The registration form shall designate an agent residing in this state who is
500 authorized by the telephone soliciting business to receive service of process in any action
501 brought by this state or a resident of this state.

502 (c) If a telephone soliciting business fails to designate an agent to receive service or
503 fails to appoint a successor to the agent[;]:

504 (i) the business' application for an initial or renewal registration shall be denied[;]; and

505 (ii) any current registration shall be suspended until an agent is designated.

506 (2) The division may impose an annual registration fee set pursuant to Section
507 63-38-3.2.

508 (3) (a) Each telephone soliciting business engaging in telephone solicitation or sales in
509 this state shall obtain and maintain the following security:

510 (i) a performance bond issued by a surety authorized to transact surety business in this
511 state;

512 (ii) an irrevocable letter of credit issued by a financial institution authorized to do
513 business in this state; or

514 (iii) a certificate of deposit held in this state in a depository institution regulated by the
515 Department of Financial Institutions.

516 (b) The bond, letter of credit, or certificate of deposit shall be payable to the division
517 for the benefit of any consumer who incurs damages as the result of any telephone solicitation
518 or sales violation of this chapter.

519 (c) The division may recover from the bond, letter of credit, or certificate of deposit
520 investigative costs, attorneys' fees, and other costs of collecting and distributing funds under
521 this section and the costs of promoting consumer education, but only if the consumer has first
522 recovered full damages.

523 (d) A telephone soliciting business shall keep a bond, certificate of deposit, or letter of

524 credit in force for one year after it notifies the division in writing that it has ceased all activities
525 regulated by this chapter.

526 (e) The amount to be posted in the form of a bond, irrevocable letter of credit, or
527 certificate of deposit shall be:

528 (i) \$25,000 if:

529 (A) neither the telephone soliciting business nor any affiliated person has violated this
530 chapter within three years preceding the date of the application; and

531 (B) the telephone soliciting business has fewer than ten employees;

532 (ii) \$50,000 if:

533 (A) neither the telephone soliciting business nor any affiliated person has violated this
534 chapter within three years preceding the date of the application; and

535 (B) the telephone soliciting business has ten or more employees; or

536 (iii) \$75,000 if the telephone soliciting business or any affiliated person has violated
537 this chapter within three years preceding the date of the application.

538 (f) For purposes of Subsection (3)(e) an "affiliated person" means a contractor,
539 director, employee, officer, owner, or partner of the telephone soliciting business.

540 (4) The division may establish by rule the registration requirements for telephone
541 soliciting businesses under the terms of Title 63, Chapter 46a, Utah Administrative
542 Rulemaking Act. An administrative proceeding conducted by the division under this chapter
543 shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act.

544 (5) The division director may revoke a registration under this section for any violation
545 of this chapter.

546 Section 15. Section **13-26-8** is amended to read:

547 **13-26-8. Penalties.**

548 (1) (a) Any telephone soliciting business or any person associated with a telephone
549 soliciting business, including [~~but not limited to~~] solicitors, salespersons, agents,
550 representatives of a solicitor, or independent contractor, who violates this chapter as a first
551 offense is guilty of a class B misdemeanor.

552 (b) In the case of a second offense, the person is guilty of a class A misdemeanor.

553 (c) In the case of three or more offenses, the person is guilty of a third degree felony.

554 (d) In addition to other penalties under this [~~subsection~~] Subsection (1), the division

555 director may issue a cease and desist order and impose an administrative fine of up to [~~\$1,000~~
 556 \$2,500 for each violation of this chapter. All money received through administrative fines
 557 imposed under this section shall be deposited in the Consumer Protection Education and
 558 Training Fund created by Section 13-2-8.

559 (2) Any telephone soliciting business or any person associated with a telephone
 560 soliciting business, including [~~but not limited to~~] solicitors, salespersons, agents,
 561 representatives of a solicitor, or independent contractors, who violates any provision of this
 562 chapter shall be subject to a civil penalty in a court of competent jurisdiction not exceeding
 563 [~~\$2,000~~] \$2,500 for each unlawful transaction.

564 Section 16. Section **13-26-11** is amended to read:

565 **13-26-11. Prohibited practices.**

566 (1) It is unlawful for any solicitor:

567 (a) to solicit prospective purchasers on behalf of a telephone soliciting business that is
 568 not registered with the division or exempt from registration under this chapter;

569 (b) to use a fictitious personal name in connection with a telephone solicitation;

570 (c) to make or cause to be made any untrue material statement, or fail to disclose a
 571 material fact necessary to make any statement made not misleading, whether in connection
 572 with a telephone solicitation or a filing with the division;

573 (d) to make or authorize the making of any misrepresentation about its compliance
 574 with this chapter to any prospective or actual purchaser; [~~or~~]

575 (e) to fail to refund within 30 days any amount due a purchaser who exercises the right
 576 to cancel under Section 13-26-5[~~;~~]; or

577 (f) to fail to orally advise a purchaser of the purchaser's right to cancel under Section
 578 13-26-5 ~~Ĥ~~ → **unless the solicitor is exempt under Section 13-26-4** ← ~~Ĥ~~ .

579 (2) It is unlawful for any telephone soliciting business:

580 (a) to cause or permit any solicitor to violate any provision of this chapter; or

581 (b) to use inmates in telephone soliciting operations where inmates have access to
 582 personal data about an individual sufficient to physically locate or contact that individual, such
 583 as names, addresses, telephone numbers, Social Security numbers, credit card information, or
 584 physical descriptions.

585 Section 17. **Effective date.**

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

Legislative Review Note
as of 12-20-04 2:48 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number HB0186

Consumer Protection Amendments

15-Jan-05

5:24 PM

State Impact

No fiscal impact.

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst